Neutral Citation Number: [2025] EWHC 3060 (Admin)

Case Nos: AC-2025-LON-001058 &
AC-2025-LON-001148

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 November 2025

Before :

MRS JUSTICE LANG DBE

- -

Between :

AC-2025-LON-001058

THE KING — **Claimant**

on the application of

WILDFISH

- and -

BUCKINGHAMSHIRE COUNCIL — **Defendant**

(1) DAVID WILSON HOMES (SOUTH MIDLANDS) LIMITED
(2) ANGLIAN WATER SERVICES LIMITED — **Interested Parties**

AC-2025-LON-001148

THE KING — **Claimant**

on the application of

JANE WOOD

- and -

BUCKINGHAMSHIRE COUNCIL — **Defendant**

BDW TRADING LIMITED TRADING AS DAVID WILSON HOMES (SOUTH MIDLANDS) LIMITED — **Interested Party**

- -
- -

Jonathan Welch (instructed by **Wildfish in AC-2025-LON-001058 and Fortune Green Legal Practice in AC-2025-LON-001148**) for the **Claimants**

Charles Streeten and Stephanie Bruce-Smith (instructed by **Buckinghamshire Legal Services**) for the **Defendant**
Hashi Mohamed and Edward-Arash Abedian (instructed by **Dentons UK and Middle East LLP**) for the **First Interested Party in AC-2025-LON-001058** and the **Interested Party in AC-2025-LON-001148**
The Second Interested Party in AC-2025-LON-001058 did not appear and was not represented

Hearing dates: 14 – 16 October 2025

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Approved Judgment

This judgment was handed down remotely at 11am on 20 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. In both these claims, the Claimants - "Wildfish" and "Wood" - seek judicial review of the decision, dated 4 March 2025, by the Defendant ("the Council") to approve an application for the grant of reserved matters approval ("RMA") and discharge of conditions 8 and 22 in respect of an outline planning permission ("OPP"), granted on 24 March 2022, with a further varied permission granted on 10 December 2024, for a residential development near Maids Moreton, Buckinghamshire ("the Site").

2. Wildfish is an environmental charity that campaigns to protect rivers and streams in the United Kingdom from pollution and over-abstraction. Ms Wood is a local resident who has objected to the development, both in her personal capacity, and as an active member of the Maids Moreton and Foscote Action Group. Their claims have been linked for case management and hearing because they challenge the same decision.

3. The First Interested Party ("IP1") is the applicant for planning permission. The Second Interested Party ("Anglian") is the water authority for the area in which the development is situated. Anglian has played no part in these proceedings.

4. The grounds of challenge in the Wildfish claim may be summarised as follows:

    i) **Ground 1**: error of law in approving a substantial alteration to the application for RMA after expiry of the time limit, and failure to consult on the application.

    ii) **Ground 2**: error of law in approving reserved matters "as varied by" the permission granted under section 73 Town and Country Planning Act 1990 ("TCPA 1990") on 10 December 2024 ("the section 73 permission").

    iii) **Ground 3**: the planning officer's report ("OR") was significantly misleading; irrational; insufficiently investigated; failed to refer to material considerations; and it was inadequately reasoned. The Ofwat email dated 27 January 2025 was not listed as a background paper, as required by section 100D Local Government Act 1972 ("LGA 1972").

    iv) **Ground 4**: error of law in deciding not to re-consider the screening decision under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("EIA Regulations 2011").

5. The grounds of challenge in the Wood claim may be summarised as follows:

    i) **Ground 1**: the decision to discharge condition 22 was *ultra vires* and irrational because the Defra 2.0 BNG metric and guidance was not used when calculating biodiversity net gain.

    ii) **Ground 2**: the OR misled Committee Members on the calculations for measuring biodiversity net gain, did not investigate sufficiently, did not refer to material considerations and gave inadequate reasons. Alternative calculations, presented on behalf of objectors by Professor Shreeve, were not listed as background papers, in breach of LGA 1972.

    iii) **Ground 3**: error of law in accepting the October 2024 resubmission of reserved matters out of time.

6. On 23 May 2025, I granted permission, on the papers, to apply for judicial review in both claims.

Planning history: Wildfish

EIA screening

7. On 24 November 2015, Aylesbury Vale District Council issued a negative screening opinion in respect of the proposed development under the EIA Regulations 2011.

The OPP

8. IP1 applied for OPP on 20 January 2016. The Council granted outline planning permission, on 24 March 2022, for up to 170 dwellings and associated infrastructure, at land off Walnut Drive and Foscote Road, Maids Moreton, Buckinghamshire MK18 1QQ (application ref 16/00151/AOP).

9. Condition 1 provided:

> "Details of the appearance, landscaping, layout and scale, (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the Local Planning Authority before any development begins and the development should be carried out as approved.
>
> Reason: The application is for outline planning permission."

10. Condition 2 required application for approval of reserved matters to be made to the Council the local planning authority "no later than eighteen months from the date of this permission". That time limit expired on 24 September 2023.

11. Condition 13 provided:

> "The details to be submitted for approval in writing by the Local Planning Authority in accordance with Condition (1) above shall include a foul water drainage scheme for the site. The scheme shall include a waste water treatment capacity assessment to identify the need for any infrastructure upgrades and a programme for carrying out the works to inform site delivery.
>
> No part of the development shall be occupied until confirmation has been provided to the local planning authority that the scheme and programming of any wastewater upgrades required to accommodate the additional flows from the development have been agreed with Anglian Water; and all wastewater upgrades required to accommodate the additional flows have been completed. The development shall be carried out in accordance with the approved details.

> Reason: Network reinforcement works are likely to be required to accommodate the proposed development. Any reinforcement works identified will be necessary in order to avoid sewage flooding and/or potential pollution incidents in accordance with policy I5 and D-MMO006 of the Vale of Aylesbury Local Plan and the National Planning Policy Framework."

12. Condition 22 provided:

> "Prior to commencement of development updated Biodiversity Net Gain Calculations must be submitted and be approved in writing by the local planning authority, alongside the Ecological Mitigation, Compensation and Enhancement Plan and the Landscape and Ecology Management Plan. The calculations must be undertaken using the Defra 2 metric and guidance and result in a net gain in both habitat and hedgerow units of at least 10% having regard to net gain being delivered across the overall development site.
>
> Reason: To comply with the requirements of Policies D-MMO006 and NE1 of the Vale of Aylesbury Local Plan and the NPPF."

Previous judicial review claim

13. A member of the Maids Moreton and Foscote Action Group applied unsuccessfully for judicial review of the grant of OPP on multiple grounds, including an alleged failure to review the EIA screening decision. The claim was dismissed on 16 November 2022 by Cranston J. in *R (Hardcastle)* v *Buckinghamshire Council* [2022] EWHC 2905 (Admin).

RMA applications

14. IP1 made its RMA application on 25 May 2023 (23/01636/ADP) for 163 dwellings, in the following terms:

> "Reserved matters being sought for appearance, landscaping, layout and scale for 163 dwellings on land off Walnut Drive and Foscote Road and discharge of condition 22 (biodiversity net gain) and condition 8 (CMP) of outline approval 16/00151/AOP)."

15. A second duplicate application was submitted on 18 September 2023. The second application has not been determined. There was no application for discharge of condition 13.

16. On 16 October 2023 a new set of plans and documents were submitted by IP1 together with a new site notice, appearing to correct errors in the initial RMA application documents. The number of dwellings remained 163.

17. On 29 March 2024 a new application form was submitted with a further new set of plans and documents, though this time no new site notice was posted. The number of dwellings remained 163.

18. On 17 October 2024, IP1 submitted a further new set of documents, described as an "amended planning application pack". A new site notice was provided. It reduced the number of dwellings from 163 to 153 and made various other changes which are considered under Ground 3 of the Wood claim.

Communications on drainage in 2023 & 2024

19. In an updating email, on 12 June 2023, IP1 informed the Council that the required drainage capacity statement was not yet available as it required input from Anglian. This was usually done "at S104 stage"[1].

20. On 13 September 2023, IP1's drainage consultant informed IP1 by email that Anglian had confirmed a suitable connection point to the main sewer and stated:

> "Anglian Water has assessed the impact of a pumped conveyance from the planning development to the public foul sewerage network and we can confirm that this connection is acceptable as the foul sewerage system, at present, has available capacity for your site…..
>
> A full programme of works will be issued upon S104 consultation with Anglian Water ….."

21. On 3 July 2024, an email was sent by Anglian to the Council which stated:

> "Our response stating the drainage strategy is acceptable to us relates to the local foul network, it does not relate to the receiving water recycling centre (WRC), which is Buckingham WRC.
>
> Buckingham WRC does not currently have dry weather flow headroom to accommodate the additional flows from this development site. However, as the site has outline permission Anglian Water is obligated to accommodate the additional flows. This process is managed by us, and the funding comes from customer bills. It is not a process the developer can engage in or have any influence.
>
> We have identified Buckingham WRC as requiring investment in our Drainage and Wastewater Management Plan and our draft Business Plan. However, our Business Plan is subject to Ofwat approval, and our planned investment will have to change if Ofwat does not agree with what we have proposed.

[1] "S104" is a reference to section 104 of the Water Industry Act 1991, which makes provision for a legally binding agreement between a developer and a water company, under which the developer constructs new sewers and drains on site to a specific standard, allowing the water company to adopt and maintain them on completion

> Final determination is in December. Our Business Plan covers the period 2025-2030 and we cannot guarantee that the proposed investment strategy does not change due to risks and prioritisation.
>
> In summary we have no committed investment at Buckingham WRC and it does not currently have headroom to accommodate the additional flows."

Section 73 permission

22. On 20 September 2024, IP1 applied to the Council for a further varied permission under section 73 TCPA 1990. The proposed variation was the removal of paragraph 1 of condition 13, which imposed a pre-commencement condition. The pre-occupation condition in paragraph 2 of condition 13 was to be retained.

23. IP1's covering letter summarised Anglian's email of 3 July 2024 and stated:

> "Whilst we have identified from Anglian Water that there is a water capacity issue in the area and upgrades will be required at the Buckingham Water Recycling Centre, no detailed programme for such upgrades have been provided. Anglian Water have, however, confirmed that upgrades to the Buckingham Water Recycling Centre is planned which is subject to OfWat approving their business plan. Anglian Water have also confirmed that they are obliged to accommodate the additoinal flows from this development and funding will come from customer bills (presumably if OfWat funding is not available).
>
> It should also be noted that a Supreme Court Judgement 'Barratt Homes Limited v Welsh Water' concluded that developers have the right to connect to the public sewer regardless of capacity concerns as noted at paragraph 56 of the judgement which states:
>
> *...The facts of this case do not illustrate that section 106 gives rise to a problem with the point of connection. It illustrates the more fundamental problem that can arise as a result of the fact .... that no objection can be taken by a sewerage undertaker to connection with a public sewer on the ground of lack of capacity of the sewer.*
>
> At Outline stage, representations were made by Anglian Water and reported to the Strategic Sites Committee on Thursday 19 November 2020. Paragraph A3.16 of the Committee report states:
>
> *Wastewater Treatment – The foul drainage from this development is in the catchment of Buckingham Water Recycling Centre which currently does not have capacity to treat the flows the development site. Anglian Water are obligated to accept the*

> *foul flows from the development with the benefit of planning consent and would therefore take the necessary steps to ensure that there is sufficient treatment capacity should the Planning Authority grant planning permission.*
>
> This echo's *[sic]* verbal conversation we have had with Anglian Water who have said the Buckingham Water Recycling Centre will be upgraded if required as a result of detailed reserved matters consent being granted.
>
> This application therefore seeks to re-word condition 13 …. To read the following which allows the current reserved matters application to be issued and Anglian Water to provide a programme for the upgrade of Buckingham Water Recycling Centre:
>
> *No part of the development shall be occupied until confirmation has been provided to the local planning authority that the scheme and programming of any wastewater upgrades required to accommodate the additional flows from the development have been agreed with Anglian Water; and all wastewater upgrades required to accommodate the additional flows have been completed. The development shall be carried out in accordance with the approved details.*
>
> *Reason: Network reinforcement works are likely to be required to accommodate the proposed development. Any reinforcement works identified will be necessary in order to avoid sewage flooding and/or potential pollution incidents in accordance with policy I5 and D-MMO006 of the Vale of Aylesbury Local Plan and the National Planning Policy Framework*."

24. A public consultation took place on the application to vary under section 73 TCPA 1990, which enabled the Claimants and residents to comment on Anglian's position and IP1's proposal for addressing the difficulties that had arisen.

25. On 6 November 2024 Anglian sent its comments, stating that it did not object to the proposed variation. However, it would object to any discharge of condition 13 before the investment scheme for Buckingham Water Recycling Centre ("WRC") was delivered. It expected approval from Ofwat in December 2024. No additional flow would be accommodated until upgrades were completed and so there was no additional risk to the environment arising from this change. Anglian expected to be consulted on any discharge of condition 13 and it would only recommend discharge if the upgrades for Buckingham WRC had been completed.

26. The Council granted IP1's application for a further permission which varied condition 13 under section 73 TCPA 1990 on 10 December 2024. Although commonly described as a variation, the legal effect of the Council's decision was to grant a new permission, subject to the condition/s as varied (see *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2019] 1 WLR 4317, per Lord Carnwath at [33]).

27. Under the section 73 permission, the only change from the OPP was the removal of paragraph 1 of condition 13 which imposed a pre-commencement condition. This meant that a pre-commencement submission of details for approval by the Council was no longer required. However, by paragraph 2 of condition 13, the development could not be occupied until confirmation had been provided to the Council that the upgrades required to accommodate the additional flows from the development had been agreed with Anglian and completed.

28. Wildfish sent pre-action letters to the Council on 16 and 20 December 2024, challenging the lawfulness of the decision to grant the section 73 permission on 10 December 2024. The Council rejected the allegations made. Wildfish decided not to file a claim.

Application to amend the description of the RMA

29. On 14 January 2025, IP1 wrote to the Council asking that the description of the RMA application made on 25 May 2023 be amended as follows (the underlined words are as amended):

> "Reserved matters being sought for appearance, landscaping, layout and scale for 153 dwellings on land off Walnut Drive and Foscote Road and discharge of condition 22 (biodiversity net gain) and condition 8 (CMP) of outline approval 16/00151/AOP, as varied by application 24/02780/VRC (condition 13 - Foul water drainage scheme) approved on the 10th December 2024."

30. The application to amend was approved by the Council.

Communications on drainage in 2025

31. On 27 January 2025, Ofwat sent an email to Wildfish ("the Ofwat email") explaining that it had rejected the request for investment at Buckingham WRC because the funding and programme proposed only addressed current non-compliance, not future growth. Anglian had not been complying with its permit. Anglian had already been funded to meet current permits, and customers should not be forced to pay again. The amount that Anglian had requested from Ofwat was less than would be required to put it back into compliance. Wildfish forwarded the Ofwat email to the Council, and the Council posted it on its website on 4 February 2025.

32. Between 27 January and 5 February 2025, there was an exchange of emails between the Council's planning officer and Anglian.

33. On 27 January 2025, the planning officer said:

> "…. I have been forwarded some comments made by Anglian Water in respect of an application for a health centre in Buckingham which would also need to be served by the Buckingham WRC which at the current time has insufficient capacity. The comments state that:

> *"Buckingham WRC was included for a named growth scheme in our PR24 submission to OFWAT. The scheme was assessed by OFWAT but did not meet their criteria for any funded enhancement allowance in the final determination (released in December 2024). We are currently reviewing and analysing all of our final determination results. We, therefore, submit a holding objection until the end of February, by which time a decision on the investment at Buckingham WRC will be made."*
>
> I would be grateful if you could explain what 'funded enhancement allowance' means? I was of the understanding that the works to the Buckingham WRC, as a named scheme within the Business Plan would be completed within the period 2025-2030. Is that still the case or has this position changed? Or is it that you are reviewed the names schemes in terms of priorities? I would be grateful for your further assistance and look forward to hearing from you. . ."

34. Anglian replied on 27 January 2025, as follows:

> "What this means is that the funding we asked for in our business plan hasn't been allocated as it did not meet Ofwats criteria, they are saying we cannot spend customer bills to deliver a growth scheme at this WRC. We are currently trying to understand what this means and what, if anything we can commit to. I have no more information at this time, but I will keep you updated when a decision is made."

35. On 28 January 2025, the planning officer replied:

> "Thanks for coming back to me. We are looking to report the reserved matters application for my Maids Moreton site to Committee on 13th February 2025 (with my report being published 5th Feb, with any updates reported verbally at the meeting). As you know this site has outline planning permission for up to 170 dwellings (and the reserved matters application sets out the provision of 153 dwellings). My understanding is that you are still obliged to accommodate the development as it has planning permission and the variation of condition application (condition 13, foul drainage) that we have approved (24/02780/VRC) still requires details to be approved prior to occupation. I would be grateful for any further comments as soon as possible please as I am sure this is a matter the objectors will raise at Committee."

36. On 5 February 2025, Anglian responded saying:

> "Sorry for not replying sooner. You are correct. Any site with an existing consent, including outline, has a right to connect and we are obligated to manage those flows."

37. On 28 February 2025, Anglian sent an email to the Council which stated:

> "Since the 13th January 2025, Anglian Water have issued holding objections for planning applications which would be served by the Buckingham Water Recycling Centre (WRC). This was whilst a decision on investment was being made following OFWAT's final determination, released in December 2024.
>
> Funding has now been confirmed for the Buckingham WRC, and therefore we are in a position to withdraw our holding objections, and replace our response with a requested condition. Please find our requested condition below:
>
> This site is within the catchment of Buckingham Water Recycling Centre (WRC), which currently lacks the capacity to accommodate the additional flows generated by the proposed development. However, Buckingham WRC is included within our Business Plan as a named growth scheme with investment delivery planned between 2025-2030. To ensure there is no pollution or deterioration in the receiving watercourse due to the additional foul flows that would arise from the development, we recommend a planning condition is applied if permission is granted.
>
> Condition: Prior to occupation written confirmation from Anglian Water must be submitted confirming there is sufficient headroom at the water recycling centre to accommodate the foul flows from the development site.
>
> Reason: to protect water quality, prevent pollution and secure sustainable development having regard to paragraphs 7/8 and 187 of the National Planning Policy Framework.
>
> Please note our change in holding objection to condition relates only to the Water Recycling Centre part of our planning responses…..
>
> Please use this email to supersede Buckingham Water Recycling Centre comments issued by Anglian Water from the 13th January to date."

38. In an email from Ofwat to Wildfish dated 28 March 2025, Ofwat advised as follows:

> "Buckingham sewage treatment works (STW) is receiving an enhancement allowance of £0m for growth at sewage treatment works. Our adjustment to the enhancement growth allowance for Buckingham is because the Company has been funded previously to meet existing permit conditions. This should not mean that the scheme is not going ahead if the STW is under capacity and not meeting its permit conditions. Any costs to address non-compliance with existing permit conditions should

> be borne by the company, not customers, as compliance with permits has already been funded as part of base expenditure allowances.
>
> Buckingham STW is receiving an enhancement allowance of £5.5m for phosphorus removal."

39. On 3 April 2025, Anglian responded to a request made by Wildfish under the Environmental Information Regulations 2004, including the following:

> "**1. Whether Anglian has a binding or other commitment in place for investment for the sewage works (please specify the basis of the commitment if there is one)**
>
> Buckingham WRC was identified as a WRC we wished to invest in however we have received no allowance for this upgrade from Ofwat in our business plan for the coming AMP. This is confirmed in Ofwat's email of 27 January 2025.
>
> As you may be aware we have applied to the CMA for a redetermination of our business plan. As such, we cannot rule out that funding will not be granted for the Buckingham WRC growth scheme in due course. You will be able to review the redetermination on the conclusion of the CMA process in due course.
>
> Despite Ofwat's decision not to approve funding we are reviewing opportunities to enable us to deliver the scheme and will be able to confirm once we have received the CMA's redetermination….."

Officer's report 5 February 2025

40. On 5 February 2025, the OR which recommended approval of IP1's RMA and discharge of conditions 8 and 22 was published for the meeting of the Strategic Sites Committee ("the Committee") on 13 February 2025 (see OR/"Proposal" and OR/1.1). Applying the planning balance, the OR concluded that overall the proposal would be in accordance with the development plan read as a whole, and there were not material considerations that would indicate a decision otherwise.

41. OR/1.6 confirmed the position in regard to variation of condition 13:

> "1.6. Policy D-MMO006 requires development proposals to provide an updated assessment of wastewater treatment works capacity to be carried out to identify the need for infrastructure upgrades and how and when these will be carried out to inform site delivery. Condition 13 of the outline permission required the details submitted for approval to include a foul water drainage scheme for the site, including a waste water treatment capacity assessment to identify the need for any infrastructure upgrades

> and a programme for carrying out the works to inform site delivery to accompany the reserved matters application. Planning application 24/02780/VRC was submitted to vary this condition on the basis that the reserved matters scheme does not include the necessary detail as required by this condition. The VRC application sought to amend the wording of the condition such that any necessary upgrade works are carried out in advance of any occupation of the development to ensure that the development can still be serviced appropriately at the time it is required. This application has been approved and the Applicants have requested the current application description also includes reference to the approved variation of condition application in respect of the amended foul drainage condition. Anglian Water are obligated to accommodate the needs of the development (at the time the planning permission was given). Given the staged build out of the development and that the updated planning condition would still ensure that the necessary upgrades and capacity are secured prior to the occupation of the development, it is considered that in the specific circumstances of this case, this conflict with an element of Policy D-MMO006 should be given limited negative weight."

42. At OR/2.12, the planning officer referred to the updates and amendments submitted by IP1.

43. OR/3.0 included a summary of the section 73 permission. Members were advised as follows:

> "Concerns have been raised in representations regarding the position of the outline planning consent and the subsequent Section 73 consent in respect of this reserved matters application. To assist Members in this regard, legal advice has been sought and the advice has confirmed that it is not necessary to make a fresh reserved matters application simply because there is now a new permission (24/02780/VRC). Rather, this existing reserved matters application can be considered with reference to the new Section 73 permission. This matter has been addressed in para 1.6 of the Officer's report. The Town and Country Planning Act 1990 at Section 73 allows for conditions to an application to be varied, although applicants cannot seek to extend the time limit through this mechanism. Having regard to these matters it is considered that Officers have had appropriate regard to the Section 73 application and assessed the merits of the proposals in the reserved matters application in recommending this reserved matters application for approval. This has been confirmed as a legitimate approach.
>
> The approved S73 application is a legally valid planning permission and therefore Members are at liberty to consider the reserved matters application before them in the normal manner, having regard to the planning history."

44. OR/5.5 confirmed that allocation policy MMO006 requires compliance with various criteria, including:

> "e. an updated assessment of wastewater treatment works capacity needs to be carried out, working with Anglian Water, to identify the need for infrastructure upgrades and how and when these will be carried out to inform site delivery."

45. The planning officer addressed foul water drainage at OR/5.129 to 5.136, as follows:

> "Foul Water
>
> 5.129 The applicant has been in discussion with Anglian Water regarding the development of the site. As part of the application documents a Pre-Planning Assessment Report by Anglian Water (report amended 16 August 2023) appeared to indicate that there is sufficient capacity in the water supply network to serve the development. This report also indicated that 'The foul drainage from the proposed development is in the catchment of Buckingham Water Recycling Centre, which currently has capacity to treat the flows from your development site.' In Anglian Water's consultation response of 9th November 2023, they also commented that the impacts on the public foul sewerage network were acceptable at this stage but requested to be consulted on the discharge of condition 13 of 16/00151/AOP. This condition required the following:
>
> The details to be submitted for approval in writing by the Local Planning Authority in accordance with Condition (1) above shall include a foul water drainage scheme for the site. The scheme shall include a waste water treatment capacity assessment to identify the need for any infrastructure upgrades and a programme for carrying out the works to inform site delivery. No part of the development shall be occupied until confirmation has been provided to the local planning authority that the scheme and programming of any wastewater upgrades required to accommodate the additional flows from the development have been agreed with Anglian Water; and all wastewater upgrades required to accommodate the additional flows have been completed. The development shall be carried out in accordance with the approved details.
>
> Reason: Network reinforcement works are likely to be required to accommodate the proposed development. Any reinforcement works identified will be necessary in order to avoid sewage flooding and/or potential pollution incidents in accordance with policy I5 and D-MMO006 of the Vale of Aylesbury Local Plan and the National Planning Policy Framework.
>
> 5.130 Representations have been received raising objections to the position given in respect of foul water and further

investigations have been undertaken with Anglian Water. Their comments stating the drainage strategy was acceptable related to the local foul network, it did not relate to the receiving waste recycling centre (WRC) which is Buckingham WRC. Anglian Water have confirmed that Buckingham WRC does not currently have dry weather flow headroom to accommodate the additional flows from this development site. However, as the site has outline permission Anglian Water is obligated to accommodate the additional flows. Anglian Water advised that this process is managed by them, and it is not a process the developer can engage in or has any influence over. Anglian Water identified Buckingham WRC as requiring investment in their Drainage and Wastewater Management Plan and their draft Business Plan. In Anglian Water's 'Our Plan for the future – Buckinghamshire' (October 2024). This document identifies the level of investment as being over £59 million to include: £37 million on new filters and creating one wetland area to improve river quality and £2 million to reduce storm overflow spills.

5.131 The Business Plan was subject to review by Ofwat in December 2024, with the Business Plan covering the period 2025-2030 and Anglian Water had commented that it could not guarantee that the proposed investment strategy would not change due to risks and prioritisation. Further updates have been provided by Anglian Water to the effect that the scheme (Buckingham WRC growth investment) was assessed by OFWAT but did not meet their criteria for any funded enhancement allowance. They are currently reviewing and analysing all of their final determination results and are issuing holding objections to new planning applications until the end of February, by which time an investment decision will be made. Officers have gone back to Anglian Water who have not provided an update other than to reiterate that any site with an existing consent, including outline, has a right to connect and they are obligated to manage those flows.

5.132 The applicants applied via a Section 73 application (24/02780/VRC) to vary the wording of condition 13 of permission 16/00151/AOP relating to foul drainage. This application requested to remove the first part of the condition but to retain the second part which requires confirmation that the scheme and programming of any wastewater upgrades required to accommodate the additional flows from the development have been agreed with Anglian Water; and all wastewater upgrades required to accommodate the additional flows have been completed prior to the occupation of the development. This application has been approved.

5.133 It is considered that the development could be brought forward and its need accommodated within the capacity of the

> sewerage undertaker's asset at Buckingham Water Recycling Centre, in time for the first occupation of the development as set out in the amended condition 13. It is important to note that Anglian Water raised no objections to the application on the basis that their asset at Buckingham WRC is still protected. On this basis this application was supported and condition 13 has been amended and this is now reflected in the description of this application.
>
> 5.134 Anglian Water have confirmed that they are already obliged to accommodate the permission for the outline development of this site for up to 170 dwellings. Whilst the timeline and funding for the upgrades to the Buckingham WRC are not known at this time, the condition relating to foul drainage requires provision to be made prior to occupation.
>
> 5.135 Notwithstanding the above, Officers have taken the representations received on this matter into account, however, the comments made do not change the conclusions reached. It remains the situation that Anglian Water are obliged to accommodate the development which has planning permission and through a funded scheme (to be determined by Anglian Water) of improvements to the Buckingham WRC. There is a real prospect therefore that these upgrades will take place and that there is time for this matter to be resolved and to enable the development to be occupied, which is the trigger for the provision of the foul water scheme to serve the development as set out in condition 13 of permission 24/02780/VRC. Therefore, there is no planning reason why the determination of this reserved matters application cannot proceed on this basis.
>
> 5.136 Having regard to the above matters, it is considered that the development could be appropriately flood resilient, that surface water can be accounted for and there would be sufficient capacity in the water supply and further that the foul drainage for the development would be adequately catered for. As such the development would accord with policies I4 and I5 of the VALP and with the NPPF in this regard and as these matters should not attract any negative weight."

46. Under the heading "Discharges of conditions", the planning officer reviewed the position in regard to most of the conditions. Conditions 8 and 22 which IP1 applied to discharge together with the RMA were addressed at OR/5.194 and OR/5.195. Under the heading "other conditions requiring detail to accompany the reserved matters application", the OR advised, where appropriate, whether or not further assessment was required, and whether the condition could be discharged. Despite the heading, only some of these conditions included a provision that the details should be submitted for approval in accordance with condition 1.

47. In regard to condition 13, the OR stated, at OR/5.203:

> "5.203 As discussed in the Officer's report above, an application to vary the wording of condition 13 has been submitted and has been approved (24/02780/VRC) such that the necessary upgrades must be carried out prior to occupation of the development."

48. At OR/5.213, the planning officer listed conditions which "require further detail to be submitted to and approved in writing by the LPA, but are not submitted for discharge at this time".

49. At OR/5.192 – 5.193, the planning officer gave advice on the application of the EIA Regulations. She reminded Members that a screening opinion was undertaken in 2015. At OPP stage, a further screening opinion was not considered to be necessary. She advised that, as there had been no significant change in circumstances, no further screening was required.

50. Appendix A included extensive comments and objections from the Town/Parish Councils, residents, and members of the Maids Moreton and Foscote Action Group. Among other matters, Maids Morton Parish Council referred to the letter from Anglian dated 24 July 2024 and expressed concern that foul water that could not be accommodated would end up in the river. Members of the public and the Maids Moreton and Foscote Action Group objected on the grounds that Buckingham WRC did not have capacity and a programme of works had not been provided as required by condition 13.

Supplementary OR

51. The planning officer provided an updating report ("the Supplementary OR") on 12 February 2025, the day before the meeting on 13 February 2025.

52. Eleven new objections had been lodged. One objection stated:

> "Little prospect of Buckingham Water Recycling Centre being upgraded for years, condition 13 is unachievable."

The Committee meeting

53. At the Committee meeting on 13 February 2025, the planning officer acknowledged the "considerable local concern regarding the foul drainage for this development" and advised that "although there are no definitive timescales, the upgrade works to take place at this time. Anglian are obliged to accommodate the development as it has planning permission and there will be no occupation until the upgrades are carried out. So overall, officers have concluded the application and details of appearance, landscape layout and scale approved, with the development plan read."

54. Members raised concerns that the lack of time or investment for the necessary upgrades might result in the development being built out before the upgrades being delivered. To Councillor Wheelhouse's question relating to when there will be an upgrade to the sewage works, IP1's consultants said:

> "what I'll explain is what I do know at the moment… so their funding has been approved by it's £11 billion over the next five years…..of that £11 billion, there's £280 million that has been attributed to …. 67 sewage treatment centres around their area…. basically the details of what is going to be spent at each treatment centre is not available as yet. And I believe that …the figure that's going to be invested at Buckingham, ….as I understand it, that detail will be provided by the end of ….February. Sorry. So at the moment… we know there's going to be some work in Buckingham, the amount that's going to be spent is unknown at the moment, but they are duty bound as you have an outline planning permission to provide that volume down at the treatment works. But obviously, they've got to take a view on the whole of Buckingham that's going to be using that facility."

55. Councillor Wheelhouse asked the planning officer if there could be a condition that the development could not commence until the wastewater upgrade had happened. The officer advised: "So, in terms of the condition for the drainage upgrades to be carried out prior to commencement, the applicants applied to vary the condition from the outline because they were aware of the upgrades that were required. And so it's prior to occupation. . . and we're satisfied that that's an acceptable approach, that the need arises upon application of the dwellings. And so that condition as amended does satisfy that. So, I don't think it would be reasonable of us to change that or to require it to be changed to commencement."

56. Members resolved to approve the application (nine in favour and three abstaining).

57. The decision notice was issued on 4 March 2025 in the same terms as IP1's application and the proposal in the OR:

> "Subsequent to your application that was valid on the 25th May 2023 and in pursuance of their powers under the above mentioned Act and Orders, Buckinghamshire Council as Local Planning Authority HEREBY GRANT APPROVAL to the access, appearance, landscaping and scale to:-
>
> Reserved matters being sought for appearance, landscaping, layout and scale for 153 dwellings on land off Walnut Drive and Foscote Road and discharge of condition 22 (biodiversity net gain) and condition 8 (CMP) of outline approval 16/00151/AOP, as varied by application 24/02780/VRC (condition 13 - Foul water drainage scheme) approved on the 10th December 2024
>
> AT:-
>
> Land Off Walnut Drive And Foscote Road Maids Moreton Buckinghamshire MK18 1QQ
>
> Subject to the following conditions and reasons

….."

Planning history: Wood

58. Much of the planning history set out above for Wildfish is also relevant to the Wood claim. I set out below the planning history specifically in regard to biodiversity net gain, which is raised in Grounds 1 and 2 of the Wood claim.

OPP and Defra 2.0 metric

59. At the OPP stage, IP1's consultants (FPCR) produced a series of biodiversity net gain assessments. The OPP was determined based on the assessment dated 16 February 2022 (revision E). That assessment comprised a report and an accompanying spreadsheet which set out the biodiversity net gain. The February 2022 assessment was itself a revision to an earlier assessment submitted in October 2020, which was the first produced for the OPP using the Defra 2.0 biodiversity net gain metric.

60. The Defra 2.0 metric was produced as a 'beta' version in 2019. The spreadsheets comprising the biodiversity net gain calculations for the OPP were completed by using the Defra 2.0 metric calculator published by Natural England ("the Calculation Tool"). The Calculation Tool was part of a suite of documents issued by Natural England as part of 'metric 2.0' which also included the Biodiversity Metric 2.0 User Guide ("the Guide") and the Technical Supplement for Metric 2.0 ("the Technical Supplement"), among other guidance.

Previous judicial review

61. In the unsuccessful judicial review claim to the grant of OPP (*Hardcastle*), Professor Shreeve, who advises the Maids Moreton and Foscote Action Group on biodiversity net gain, provided a witness statement on their behalf. However, in those earlier proceedings, no point was taken concerning the hedgerow 'difficulty of creation' multiplier in the Defra 2.0 metric in the biodiversity net gain assessments for the OPP, which now plays a central part in the Wood claim.

RMA Application

62. Further revisions of the biodiversity net gain report were produced for the RMA application, made on 25 May 2023. All of them used the Calculation Tool to assess biodiversity net gain, in the same manner as had been done at OPP outline stage.

63. Professor Shreeve commented on revision K (submitted in October 2024) in a report submitted to the Council on 4 November 2024, asserting that the multiplier for 'difficulty of creation' of hedgerows was incorrect and there would be a loss of 25.39% based on his calculations using the 0.1 value set out in the Technical Supplement.

64. The Council's Senior Ecological Adviser (Ms Natalie White) issued a response on 4 December 2024, addressing Professor Shreeve's report (which she attached) and concluded that the correct multiplier had been used.

65. Professor Shreeve issued a further note in response on 4 December 2024 in which he stated for the first time that "Biodiversity Metric 2 (beta version) has some cells that do not calculate correctly". The note also stated that there was an error identified in a consultation response produced by Natural England in August 2020. However, Professor Shreeve subsequently acknowledged that this point is not identified expressly by Natural England in that consultation response.

66. Revision N (issued by FPCR in January 2025) was the report used for the determination of the RMA application. The report explained, at paragraph 2.5, that, although a version 3.0 of the metric had been released over the determination period of the application for OPP, revision N was undertaken using the Defra 2.0 metric in common with the earlier reports, in accordance with the Defra guidance notes. Further, in common with the earlier revisions, the report stated that there would be a 19.44% gain in linear habitats on the site (paragraph 3.36). The section headed "Conclusions" stated as follows:

> "**4.0 Conclusions**
>
> 4.1 The proposed development aims to retain areas of ecological value where possible and proposed soft landscaping should more than mitigate for unavoidable losses of existing habitats. The overall development will provide a net gain of 3.04 habitats units (10.04%) and an additional 1.25 hedgerow/linear units (19.44%) and therefore complies with the Local Planning requirements and Condition 22 of the Outline planning permission.
>
> 4.2 The net gain provided for both habitats and linear features exceeds the 10% minimum standard set through by the mandating of Part 6 of the Environment Act on 12 February 2024. This net gain was offered in advance of the mandatory requirement and without a regional or policy requirement for biodiversity net gain. Consequently, the commitment to a net gain for habitats and linear features, exceeding that required by the Environment Act or local policy requirement, on land which is of low ecological value is a positive benefit of the proposals and should be considered as such when undertaking the planning balance exercise."

67. FPCR issued a series of technical notes, dated 17 January 2025 and 29 January 2025, which explained, *inter alia*, that: (1) version 2.0 had been used for consistency in accordance with Natural England's and Defra's guidance; (2) it was not possible to change the multiplier in the Calculation Tool; (3) the difficulty multiplier in the Technical Supplement differed from that used in the Calculation Tool and there was therefore uncertainty as to the correct number to be used; (4) subsequent versions of the metric changed the multiplier from a higher to a lower difficulty; and (5) a 0.67 multiplier in Defra 2.0 metric represented a "very precautionary assessment … compared with current versions of the metric".

68. On 6 February 2025, Professor Shreeve provided a response to the 29 January 2025 technical note in which he acknowledged that the Natural England consultation response "does not itemise the specific issues" which he had highlighted in his earlier note. Professor Shreeve went on to state that the wrong multiplier had been applied (and

protected) within the Calculator Tool, that the multiplier "should be 0.1 not 0.67 as used in the spreadsheet", and concluded in that case there would be a resulting loss of 26.9% hedgerow units. Professor Shreeve again stated that the 0.67 multiplier had been wrongly applied in an email to the Council's ecology officer sent on 7 February 2025.

69. As noted at OR/5.159, Natural England, in their consultation response to the RMA application, stated that the statutory metric (i.e. version 4.0) should be used to reflect the latest position on the metric. Officers, however, decided that as "[t]he outline application was assessed using the Metric 2.0 [...] it would be appropriate to continue with the use of this metric for consistency and on this basis condition 22 of the outline permission states that the calculations must be undertaken using the Defra 2 metric and guidance".

70. Revision N was reviewed by the Council's ecologists, as confirmed expressly in the OR at OR/5.145, OR/5.164 and the OR's summary of ecology comments.

71. The OR addressed biodiversity net gain at OR/5.139 – 5.159, as follows:

> "*Ecology*
>
> 5.139 VALP Policy NE1 seeks to ensure the protection and enhancement of biodiversity. A net gain in biodiversity will be sought on minor and major developments. These gains must be measurable using best practice in biodiversity and green infrastructure accounting. Policy MME1 of the MMNP states that development proposals should provide a measurable biodiversity net gain and not have an unacceptable impact on flora, habitats or biodiversity and take opportunities to enhance habitats and green infrastructure.
>
> 5.140 NPPF paragraph 180 states that planning decisions should contribute to and enhance the natural and local environment by protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils and minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures.
>
> 5.141 The Environment Act 2021 introduced the mandatory need for biodiversity net gain (BNG) requiring developments such as this to provide at least a 10% net gain in biodiversity. The outline application was granted planning permission prior to this requirement coming into effect, however, condition 22 of the permission requires the following:
>
> Prior to commencement of development updated Biodiversity Net Gain Calculations must be submitted and be approved in writing by the local planning authority, alongside the Ecological Mitigation, Compensation and Enhancement Plan and the Landscape and Ecology Management Plan. The calculations must be undertaken using the Defra 2 metric and guidance and

result in a net gain in both habitat and hedgerow units of at least 10% having regard to net gain being delivered across the overall development site.

Reason: To comply with the requirements of Policies D-MMO006 and NE1 of the Vale of Aylesbury Local Plan and the NPPF.

5.142 The outline application was accompanied by an Ecological Enhancement Plan, a Biodiversity Net Gain Assessment and biodiversity metrics. The metrics at that time indicated that the development could provide a net gain of 11.51% and in terms of linear features and the hedgerows, given the loss of such features where access points were provided for example, a net loss of -0.96 hedgerow units. However, at that time it was noted that further mitigation for hedgerow loss could be provided at the detailed design stage through the provision of more hedgerow or native species planting which could be secured through the Ecological Enhancement Plan and landscaping details.

5.143 There have been several iterations of the ecological information and reports accompanying the application submitted by the applicants to address inconsistencies in the information or to provide updates following amendments made to the planning proposal. These have been reviewed by the Council's Ecology Officer.

Biodiversity Net Gain

5.144 Condition 22 of the outline permission which is proposed to be discharged as part of this reserved matters application, requires updated Biodiversity Net Gain Calculations to be submitted to and approved in writing by the LPA alongside the Ecological Mitigation, Compensation and Enhancement Plan (the EDS) and the Landscape and Ecology Management Plan.

5.145 The BNG figures have been updated with regards to habitats and hedgerows as a number of concerns were raised by the Council's Ecology Officer regarding the detail submitted, in respect of seed mix, soft landscaping proposals, consistencies with other reports, errors in the calculations and requests were made for detail to assist in providing clarity for how the figures have been arrived at. The applicant has provided further clarification over sealed/impermeable areas and inconsistencies throughout and other matters and assessor comments have been added to the metric to give clarity to this document. Further technical notes, responses and an addendum have been provided to clarify the changes made and these matters are discussed below. These have addressed a number of matters raised as a result of reviewing Rev. N of the Metric and subsequent responses and the Addendum provided by the Applicant and

have been resolved to the satisfaction of the Council's Ecologists, as set out below.

Reduction in overall BNG baseline site area:

……

Changes to the baseline habitat areas as a result of identification of errors:

……

Hedgerow Creation Multiplier

5.153 Concerns had been raised by third parties in the use of the multiplier. The Council's Ecology Officer considers the response prepared by the applicant to provide a satisfactory justification for the use of 0.67 as the difficulty multiplier in the calculation of proposed hedgerow units. Principally, the multipliers in the Metric cannot be changed, these are protected cells that are pre-defined as set by Defra/Natural England. It is acknowledged that the Technical Supplement referred to by third parties indicates a difficulty multiplier of 0.1 (meaning high difficulty) for the creation of native species rich hedgerows. However, and pertinently, updated versions of the metric apply a difficulty multiplier for creation of native species rich hedgerows of 1.0. Therefore, in contrast to the concern raised by third parties, the use the Defra 2.0 metric that applies a multiplier of 0.67 provides a more precautionary assessment of the post-development value for hedgerows compared with current versions of the metric. Officers have considered this matter and are satisfied with the approach.

Other matters relating to BNG Assessment:

…….

5.155 The submitted updated metric (version N) states that the net gain for area habitats would be 3.04 units or 10.04%. This would be marginally in excess of that required in condition 22 of the outline permission. Clarity over the hedgerows has also been provided, in particular to confirm that the hedgerows within the site are largely to be retained. The details now show that based on the development coming forward there would be an increase of 1.25 hedgerow units resulting in an increase of 19.44%.

5.156 It is worth noting that the current application was submitted prior to the implementation of statutory biodiversity gain duty under the Environment Act 2021 that now requires development to deliver a minimum of 10% biodiversity gain (with exemptions). The current applications are assessed against

> policy and on the basis that Condition 22 requires the delivery of 10% BNG onsite. If the same development proposals (i.e. post development habitats) were to be assessed using the Statutory Biodiversity Metric using current baseline habitats (as they are onsite today), then the calculations would show a much greater increase in biodiversity than 10%. This is in part due to changes in the metric, but also due to the lower value nature of the baseline habitats. It is relevant to note that under the current applications, the proposed development stands to deliver a greater value for biodiversity than would be required by law if assessed using the Statutory Biodiversity Metric and up to date baseline conditions.
>
> 5.157 In addition, planning condition 23 requires the developer to submit a post-construction BNG Audit Report. The condition states that this must be produced in line with the details set out in the approved LEMP. Therefore, prior to the occupation of the last five houses to be built, the developer will be held accountable for delivering the habitats and hedgerows onsite that are currently proposed.
>
> 5.158 Having regard to the above matters and noting the detail of the submitted documents, it is considered that the requirements of condition 22 have been addressed and as such this condition may be discharged in so far as it requires the submission of information.
>
> 5.159 It is noted that in the Natural England consultation response, they advise that the statutory biodiversity metric should be used, not Metric 2.0 which has been superseded. The outline application was assessed using the Metric 2.0 and as such it would be appropriate to continue with the use of this metric for consistency and on this basis condition 22 of the outline permission states that the calculations must be undertaken using the Defra 2 metric and guidance."

72. At OR/5.195, the OR confirmed that condition 22 had been discharged in so far as it required the submission of information.

73. The OR included the latest comments from the Council's Ecology Team dated 4 February 2025 and Members were told that previous comments were available online. They stated:

> "**Summary**
>
> No Objection
>
> The revised BNG Metric (Revision N January 2025) and accompanying BNG Assessment Report (Rev N January 2025) indicate the development proposals will result in a net gain in

biodiversity units for both habitat units (10.04%) and hedgerow units (19.44%).

Conclusion

Numerous issues have been raised over the past iterations of the BNG Metric. Concerns have been raised not only by the Council's Ecology Officers but also by third parties.

In the latest revision of the BNG submissions (Revision N), the applicant has undertaken a very detailed review of the information supporting the metric. This has included identifying errors that have now been rectified and satisfactorily explained.

Following intense scrutiny, by the Council's Ecology Officers, of the changes in Rev N of the BNG submissions it is considered that Rev N contains accurate and reliable information.

Revision N demonstrates that the development can deliver 10.04 % BNG in habitat units and 19.44% in hedgerow units. It is therefore concluded that it is likely that the development proposals meet the requirements of condition 22.

The discussion below provides a detailed account of the changes and understanding of the applicant's explanation for the changes. It also sets out concerns raised by the Council's Ecology Officers that were subsequently addressed.

……

Discussion

Context - Rationale for revised submissions in relation to BNG

In January 2025, the applicant submitted the above listed revised submissions in response to comments received by third parties in December 2024. The comments concerned two main issues:

A. The area of the site used in the Biodiversity Net Gain calculation being larger (8.88 ha) than the site area given in the Officers Report (8.649 ha), and;

B. The multiplier used to calculate units for the creation of native species rich hedgerows.

The FPCR Technical Note Biodiversity Net Gain, 17 January 2025, addresses the first point regarding the site area. As set out in the note, a revised BNG Metric and accompanying BNG Assessment Report (Rev N) has been submitted.

The FPCR Technical Note Biodiversity Net Gain (Addendum), 29 January 2025, addresses the second of the above points. The Addendum also provides clarification of matters raised by the Ecology Officers on the January submissions, which are discussed under a separate section below.

…..

B. Hedgerow Creation Multiplier

Section 6 of FPCR's Addendum 29.01.25 sets out the applicant's response to a concern raised by third parties.

The Ecology Officers consider the response prepared by the applicant to provide a satisfactory justification for the use of 0.67 as the difficulty multiplier in the calculation of proposed hedgerow units. Principally, the multipliers in the Metric cannot be changed, these are protected cells that are pre-defined as set by Defra/Natural England. It is acknowledged that the Technical Supplement referred to by third parties indicates a difficulty multiplier of 0.1 (meaning high difficulty) for the creation of native species rich hedgerows. However, and pertinently, updated versions of the metric apply a difficulty multiplier for creation of native species rich hedgerows of 1.0 (low difficulty of creation). Therefore, it is agreed, in contrast to the concern raised by third parties, the use the Defra 2.0 metric that applies a multiplier of 0.67 provides a more precautionary assessment of the post-development value for hedgerows compared with proceeding versions of the metric.

……

Final Notes

It is in our professional opinion worth taking into consideration the following points.

The current applications (23/01636/ADP and 23/02826/ADP) were submitted prior to the implementation of statutory biodiversity gain duty under the Environment Act 2021, which now requires development to deliver a minimum of 10% biodiversity gain (with exemptions). The current applications are assessed against policy and on the basis that Condition 22 requires the delivery of 10% BNG onsite. If the same development proposals (i.e. post-development habitats) were to be assessed using the Statutory Biodiversity Metric using current baseline habitats (as they are onsite today), then the calculations would show a much greater increase in biodiversity than 10%. This is in part due to changes in the metric, but mainly due to the lower value nature of the baseline habitats. The point being made is that, under the current applications, the proposed development

> stands to deliver a greater value for biodiversity than would be required by law if assessed using the Statutory Biodiversity Metric and up to date baseline conditions.
>
> In addition, planning condition 23 requires the developer to submit a post-construction BNG Audit Report. The condition states that this must be produced in line with the details set out in the approved LEMP. Therefore, prior to the occupation of the last five houses to be built, the developer will be held accountable for delivering the habitats and hedgerows onsite that are currently proposed.
>
> ……"

74. The objections from members of the public on ecology matters were summarised in Appendix A to the OR as follows:

> "Ecology:
>
> - Inaccurate assessment of BNG in respect of sealed surfaces, street trees, landscaping, ponds
>
> - No confidence that 10% BNG can be achieved
>
> - Calculations have been manipulated to produce net gain
>
> - Double counting of urban street trees and grassland
>
> - Metrics do not reflect 0.14ha for LEAP/NEAP
>
> - No plans to support proposed increase in frontages/verges
>
> - Reduction in new trees not reflected in metric
>
> - Lack of tree pits and underground apparatus means street trees should not form part of calculations
>
> - No evidence that the protected species surveys have been undertaken to an acceptable standard
>
> - Lack of meaningful detail in Natural England's advice
>
> - Insufficient detail in CEMP
>
> - BNG calculations are based on an incorrect site area of 8.88ha.
>
> - The (BNG) multiplier for the 'Difficulty of Creation' (0.67) which has been used to calculate the biodiversity units of new hedgerow is incorrect.
>
> - The (BNG) value used is that for enhancement, not creation.

> - BNG methodology does not allow the contribution of urban street trees in a non-urban context.
>
> - BNG reports conflict with CEMP and LEMP
>
> - Loss of hedgerow
>
> - Written confirmation from BC Ecologist confirming that objection is now withdrawn and that the planning condition 22 can be discharged is required."

75. In the Supplementary OR, new objections were recorded, including:

    i) FPCR's technical notes and changes to baseline are presented as fact when they provide no context or evidence that is credible.

    ii) No confirmation from the Council Ecologist that the new information is acceptable and condition 22 can be released

76. The Council approved the RMA application and the discharge of conditions 8 and 22 on 4 March 2025.

Statutory framework

Planning

77. Section 72(1) TCPA 1990 makes provision for conditions to be imposed on a grant of planning permission made under section 70(1) TCPA 1990.

78. Section 73 TCPA 1990 provides for the variation of conditions, as follows:

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
>
> > (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
> >
> > (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

…

(5) Planning permission must not be granted under this section for the development of land in England] to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be started;

(b) an application for approval of reserved matters (within the meaning of section 92) must be made."

79. By section 92(1) TCPA 1990, "outline planning permission" means planning permission, granted in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority …. of matters not particularised in the application ("reserved matters").

80. Subsection 92(2)(a) TCPA 1990 provides that, where outline planning permission is granted for development including the carrying out of building or other operations, any reserved matter application for approval must be made not later than the expiration of three years beginning with the date of the grant of outline planning permission.

81. Article 6 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the DMPO") provides:

"6. An application for approval of reserved matters—

(a) must be made in writing to the local planning authority and give sufficient information to enable the authority to identify the outline planning permission in respect of which it is made;

(b) must include such particulars, and be accompanied by such plans and drawings, as are necessary to deal with the matters reserved in the outline planning permission; and

(c) except where the authority indicate that a lesser number is required, or where the application is made using electronic communications, must be accompanied by 3 copies of the application and of the plans and drawings submitted with it."

82. "Reserved matters" are defined in Article 2 of the DMPO as follows:

""reserved matters" in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect which details have not been given in the application:

(a) access;

(b) appearance;

(c) landscaping;

(d) layout; and

(e) scale;"

83. Article 27(1) of the DMPO provides:

> "Applications made under a planning condition
>
> 27.—(1) Subject to paragraph (3), an application for any consent, agreement or approval required by a condition or limitation attached to a grant of planning permission must—
>
> (a) be made in writing to the local planning authority and must give sufficient information to enable the authority to identify the planning permission in respect of which it is made; and
>
> (b) include such particulars, and be accompanied by such plans and drawings, as are necessary to deal with the application."

Council meetings

84. Section 100D(1) LGA 1972 makes provision for the inspection and publication of background papers in respect of reports prepared for Council meetings. The planning officer is required to provide a list of the background papers prior to the meeting.

85. Section 100D(5) LGA 1972 defines "background papers" as follows:

> "(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report,
>
> but do not include any published works."

86. The definition of a "background paper" under section 100D(5) LGA 1972 does not extend to <u>any</u> document described in a report, summarised for the benefit of decision-making members of a committee, or relied on: *R (Kinsey) v Lewisham LBC* [2022] EWHC 1774 (Admin), per Fordham J. at [40]. The document must be relied on to a material extent in preparing the report (section 100D(5)(b) LGA 1972) and must "disclose any facts or matters on which [...] the report or an important part of the report is based" (section 100D(5)(a) LGA 1972).

Water Industry Act 1991

87. In *Barratt Homes Ltd v Dwr Cymru Cyfnngedig (Welsh Water)* [2009] UKSC 13, Lord Phillips gave a judgment with which the other JSCs agreed.

88. Lord Phillips set out the primary statutory duties at [6]:

> "**The Water Industry Act 1991**
>
> "94 General duty to provide sewerage system
>
> (1) It shall be the duty of every sewerage undertaker--
>
> (a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and
>
> (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.
>
> . . . "
>
> "106 Right to communicate with public sewers
>
> (1) Subject to the provisions of this section--
>
> (a) the owner or occupier of any premises, or
>
> (b) the owner of any private sewer which drains premises,
>
> shall be entitled to have his drains or sewer communicate with the public sewer of any sewerage undertaker and thereby to discharge foul water and surface water from those premises or that private sewer."

89. Lord Phillips explained the operation of the statutory scheme as follows:

> "23. The right to connect to a public sewer afforded by section 106 of the 1991 Act and its predecessors has been described as an "absolute right". The sewerage undertaker cannot refuse to permit the connection on the ground that the additional discharge into the system will overload it. The burden of dealing with the consequences of this additional discharge falls directly upon the undertaker and the consequent expense is shared by all who pay sewerage charges to the undertaker. Thus in Ainley v Kirkheaton Local Board (1891) 60 LJ (Ch) 734 Stirling J held that the exercise of the right of an owner of property to discharge into a

> public sewer conferred by section 21 of the 1875 Act could not be prevented by the local authority on the ground that the discharge was creating a nuisance. It was for the local authority to ensure that what was discharged into their sewer was freed from all foul matter before it flowed out into any natural watercourse."
>
> "27. It follows that the duty imposed on Welsh Water by section 94 of the 1991 Act requires them to deal with any discharge that is made into their sewers pursuant to section 106 It does not follow, however, that where a new development is constructed, Welsh Water are obliged, at their own expense, to construct a sewer to accept the sewage from the development if one does not already exist. Section 98 entitles a developer, among others, to requisition a public sewer, or a lateral drain linking with a public sewer, in order to service the buildings being constructed, but on terms that he meets the costs of so doing. Section 101 provides that the place or places where the public sewer and drain are to be located are to be agreed between the requisitioner and the undertaker or, in default of agreement, to be determined by OFWAT."
>
> "31. The scheme of the legislation, as reflected in the above provisions and as affecting a developer, can be summarised as follows:
>
> i) Where connection of a development to a public sewer requires consequential works to accommodate the increased load on the public sewer, the cost of these works falls exclusively upon the undertaker.
>
> ii) Where works are done, whether by or on the requisition of the developer, that will be used exclusively by the development, the costs of such works fall exclusively on the developer.
>
> iii) In specified circumstances the undertaker is entitled to require the developer to carry out the works in a manner other than that proposed by the developer, or to alter the works carried out by the developer. In either case the undertaker has to bear the costs involved.
>
> iv) Costs that are borne by the undertaker are passed on to all who pay sewerage charges. These include those who occupy the houses in the development."

90. Lord Phillips identified the "real problem" with the scheme at [41]:

> "41. The real problem that is demonstrated by the facts of this case arises out of the "absolute right" conferred by section 106 of the 1991 Act on the owner or occupier of premises to connect those premises to a public sewer without any requirement to give

> more than 21 days notice. While this might create no problem in the case of an individual dwelling house, it is manifestly unsatisfactory in relation to a development that may, as in the present case, add 25% or more to the load on the public sewer. The public sewer may well not have surplus capacity capable of accommodating the increased load without the risk of flooding unless the undertaker has received sufficient advance notice of the increase and has been able to take the necessary measures to increase its capacity."

91. Lord Phillips added:

> "43. The Court of Appeal suggested that the practical answer to this problem lies in the fact that the building of a development requires planning permission under the Town and Country Planning Act 1990. The planning authority can make planning permission conditional upon there being in place adequate sewerage facilities to cater for the requirements of the development without ecological damage. If the developer indicates that he intends to deal with the problem of sewerage by connecting to a public sewer, the planning authority can make planning permission conditional upon the sewerage authority first taking any steps necessary to ensure that the public sewer will be able to cope with the increased load. Such conditions are sometimes referred to as Grampian conditions after the decision of the House of Lords in *Grampian Regional Council v Secretary of State for Scotland* [1983] 1 WLR 1340. Thus the planning authority has the power, which the sewerage undertaker lacks, of preventing a developer from overloading a sewerage system before the undertaker has taken steps to upgrade the system to cope with the additional load."

Legal principles

Judicial review

92. In a claim for judicial review, the claimant must establish a public law error on the part of the decision-maker. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. A legal challenge is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin).

The development plan and material considerations

93. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

94. The public law requirement to take into account material considerations was considered by the Supreme Court in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52, per Lord Hodge and Lord Sales, at [116] – [122]. A decision-maker is required to take into account those considerations which are expressly or impliedly identified by statute, or considerations which are "obviously material" to a particular decision that a failure to take them into account would not be in accordance with the intention of the legislation, notwithstanding the silence of the statute. The test whether a consideration is "so obviously material" that it must be taken into account is the *Wednesbury* irrationality test.

95. A local planning authority is at liberty to give material considerations whatever weight it thinks fit, or no weight at all, provided that it does not lapse into *Wednesbury* irrationality (*Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Hoffmann at [56]). All matters of judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court.

Irrationality

96. The test for irrationality was described by the Divisional Court (Leggatt LJ and Carr J.) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649:

> "98. …. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

Sufficient inquiry

97. In *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at [99] – [100], Hallett LJ considered the scope of the duty to carry out a sufficient inquiry, as follows:

> "Duty to carry out sufficient inquiry/Tameside duty
>
> 99. A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, where he said (at page 1065B):
>
> > "*The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*".
>
> 100. The following principles can be gleaned from the authorities:
>
> > 1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
> >
> > 2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).
> >
> > 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).
> >
> > 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R(Khatun) v Newham LBC* (*supra*) at paragraph [35]).
> >
> > 5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case,

> does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*per* Laws LJ in (*R (London Borough of Southwark) v Secretary of State for Education* (*supra*) at page 323D).
>
> 6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)."

Officer reports

98. In *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, Lindblom LJ gave the following guidance on criticisms of officer reports to committees:

> "42 The principles on which the court will act when criticism is made of planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *v Selby District Council, Ex p Oxton Farms* [2017] PTSR 1103: see, in particular, the judgment of Judge LJ. They have since been confirmed several times by this court, notably by Sullivan LJ in *R (Siraj) v Kirklees Metropolitan Borough Council* [2011] JPL 571, para 19, and applied in many cases at first instance: see, for example, the judgment of Hickinbottom J in *R (Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [15].
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] WLR 411, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a

> material way—so that, but for the flawed advice was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R (Loader) v Rother District Council* [2017] JPL 25 or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43. There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, *R (Williams) v Powys County Council* [2018] 1 WLR 439. But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

99. The Chancellor, Sir Geoffrey Vos, added further guidance:

> "62 I too agree with Lindblom LJ's judgment, but would add a few words from a more general perspective. In the course of the argument, one could have been forgiven for thinking that the contention that the presumption in favour of sustainable development in the National Planning Policy Framework had been misapplied in the planning officer's report turned on a minute legalistic dissection of that report. It cannot be over-emphasised that such an approach is wrong and inappropriate. As has so often been said, planning decisions are to be made by the members of the planning committee advised by planning officers. In making their decisions, they must exercise their own planning judgment and the courts must give them space to undertake that process.
>
> 63 Appeals should not, in future, be mounted on the basis of a legalistic analysis of the different formulations adopted in a planning officer's report. An appeal will only succeed, as Lindblom LJ has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who

> have picked apart the planning officer's advice on which they relied."

Reasons

100. There is no statutory or general common law duty on a local planning authority to give reasons for a decision to grant planning permission. However, in *R (CPRE Kent) v Dover DC* [2017] UKSC 79; [2018] 1 WLR 108, the Supreme Court held that, in the interests of openness and fairness, a formulated statement of reasons should be given in certain cases, typically where permission has been granted in the face of substantial public opposition, and against the advice of officers, for projects which involve major departures from the development plan. Members are entitled to depart from their officers' recommendations for good reason, but the reasons should be capable of articulation and scrutiny (per Lord Carnwath JSC at [59] – [60]).

101. Where a local planning authority resolves to approve the recommendation of an officer's report, it can be assumed that they accepted the reasoning of that report (*R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061; [2017] 1 WLR 411 per Lewison LJ at [7]).

102. In *CPRE Kent*, at [35], Lord Carnwath held that the standard of reasons to be applied was that set out by Lord Brown in *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, at [36].

103. Acknowledging the differences between a stand-alone decision letter of the Secretary of State or an inspector which sets out all the relevant background and a decision of a local planning authority, Lord Carnwath said, at [42]:

> "In the case of a decision of a local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However, the essence of the duty remains the same, as does the issue for the court: that is, in the words of Lord Bingham MR in the *Clarke Homes* case, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why.""

WILDFISH: GROUNDS 1 and 2

104. Grounds 1 and 2 of Wildfish's claim overlap and so may be conveniently considered together.

Wildfish's submissions

Ground 1

105. Wildfish divided Ground 1 into two limbs, as follows:

i) The Council erred in law in approving a substantial alteration to the application for RMA and discharge of conditions which substantially altered the character of the application; and

ii) The Council unlawfully failed to consult on the application for RMA, as amended.

106. Wildfish submitted that in the first RMA application, made on 25 May 2023, IP1 applied for the discharge of condition 13, seeking pre-commencement approval of the programme of waste water treatment works.

107. The use of section 73 TCPA 1990 to amend condition 13, rather than section 96A TCPA 1990, necessarily implied that the change was considered to be material and not capable of being dealt with under section 96A.

108. In January 2025, the Council agreed to IP1's request to amend the RMA application to exclude the discharge of details required under condition 13.

109. No RMA approval application was made in respect of the section 73 permission.

110. The decision purported to grant RMA approval for the OPP but without the programme of necessary waste water treatment envisaged in the original application.

111. In these circumstances, especially because the change in the application was triggered by the section 73 permission, this was a substantial alteration to the original RMA application as it altered the whole character of the application (per Lord Keith in *Inverclyde District Council v Secretary of State for Scotland* (1982) 43 P & CR 375, at p.397). This is the case whether one considers the decision addressed the OPP or the section 73 permission. It was therefore not competent. The Council lacked discretion to accept such an amendment.

112. The time limit of 18 months for an application for RMA, pursuant to condition 2 of the OPP, had already expired, on 24 September 2023. Therefore a new application could not be made.

113. A further consultation was required, on the RMA application, as a matter of common law fairness, because of the nature of the changes. The changes appeared to envisage either the development being built out and unoccupied for a significant period of time until Buckingham WRC was upgraded, or connection in the absence of upgrades, leading to further raw sewage discharges from Buckingham WRC.

Ground 2

114. Wildfish submitted that the RMA application was an application to discharge reserved matters in the OPP. It was not open to the Council to approve reserved matters on the OPP "as varied by" the section 73 permission. A separate application to approve reserved matters under the section 73 permission was required. The Council's approach unlawfully circumvented the prohibition in subsection 73(5) TCPA 1990 on extending the time limit for discharge of reserved matters on an outline permission. It was *ultra vires* the statutory scheme and irrational.

Conclusions

115. I accept the submissions made by the Council and IP1 on Grounds 1 and 2.

Condition 13: not a reserved matter

116. The claim as originally pleaded (e.g. paragraphs 10 and 17 of the Statement of Facts and Grounds) assumed that condition 13 concerned a reserved matter, and this assumption underlies the submissions on Ground 1, even though by the date of the hearing, Wildfish no longer argued that condition 13 concerned a reserved matter.

117. The drainage scheme, required by condition 13, was not, in law, capable of being a reserved matter. Section 92 TCPA 1990 applies only to "reserved matters" as defined under a development order.

118. The reference in paragraph 1 of condition 13 to submitting details for approval "in accordance with condition 1" did not and could not make condition 13 a reserved matter. Properly interpreted, this means that the drainage scheme had to "accord with" i.e. be consistent with the reserved matters, for example, in relation to site boundaries and layout.

119. As the Planning Practice Guidance ("PPG") explains:

> "**What is an outline planning application**?
>
> An application for outline planning permission allows for a decision on the general principles of how a site can be developed. Outline planning permission is granted subject to conditions requiring the subsequent approval of one or more 'reserved matters'.
>
> (Paragraph: 005 Reference ID: 14-005-20140306. Revision date: 06 03 2014)
>
> **What are reserved matters**?
>
> Reserved matters are those aspects of a proposed development which an applicant can choose not to submit details of with an outline planning application, (i.e. they can be 'reserved' for later determination). These are defined in article 2 of the Town and

> Country Planning (Development Management Procedure) (England) Order 2015 as:
>
> 'Access' …..
>
> 'Appearance' ……
>
> 'Landscaping'……
>
> 'Layout' ……
>
> 'Scale' ……
>
> (Paragraph: 006 Reference ID: 14-006-20140306. Revision date: 06 03 2014)
>
> **Is there a time limit for making an application for approval of reserved matters?**
>
> Under section 92 of the Town and Country Planning Act 1990, applications for approval of reserved matters must be made within a specified time-limit, normally 3 years from the date outline planning permission was granted.
>
> (Paragraph: 007 Reference ID: 14-007-20140306. Revision date: 06 03 2014)"

120. In *R (Murray) v Hampshire CC* [2003] JPL 224, upheld by the Court of Appeal in [2003] EWCA Civ 760, the Court confirmed that the development order defined "reserved matters" for the purposes of section 92 TCPA 1990. Furthermore, the Court held that the requirement, in section 92(2) TCPA 1990 to specify a time limit of no more than 3 years for applying for RMA only applied to reserved matters. Applications for discharge of conditions which were not reserved matters were governed by the general time limit in section 91 TCPA 1990.[2]

121. Applying *Murray* to this case, as the drainage scheme in condition 13 was not a "reserved matter", the time limit of 18 months for approval applications for reserved matters in condition 2 (made pursuant to section 92(2)(a) TCPA 1990) did not apply. The general time limit in section 91 TCPA 1990 applied to the discharge of condition 13.

122. It follows that any reference to reserved matters being "sought" in the RMA application did not include approval of the matters required under condition 13. No information was submitted with the RMA application to comply with condition 13, nor did the application separately mention discharge of the condition. Article 6 to the DMPO requires that an application for approval of reserved matters must include such particulars as are necessary to deal with the reserved matters.

[2] The time limits in section 91 TCPA 1990 have been amended since the decision in *Murray*. See the Note provided by Mr Streeten for the Council on 22 October 2025.

123. It also follows, contrary to Wildfish's skeleton argument, paragraph 17, the effect of the amendment was not "to remove the original OPP foul water condition 13 from the scope of the reserved matters for which the applicant was seeking discharge." Condition 13 was never within the scope of the reserved matters.

The effect of a grant of permission under section 73 TCPA 1990

124. Parliament has prescribed a comprehensive statutory code for planning control: see *Pioneer Aggregates Limited v Secretary of State for the Environment* [1985] AC 132 at 140-141[3].

125. The PPG summarises the effect of a grant of permission under section 73 TCPA 1990 as follows:

> "**What is the effect of a grant of permission under section 73?**
>
> Permission granted under section 73 takes effect as a new, independent permission to carry out the same development as previously permitted subject to new or amended conditions. The new permission sits alongside the original permission, which remains intact and unamended. It is open to the applicant to decide whether to implement the new permission or the one originally granted.
>
> A decision notice describing the new permission should clearly express that it is made under section 73. It should set out all of the conditions imposed on the new permission, and, for the purpose of clarity restate the conditions imposed on earlier permissions that continue to have effect."
>
> (Paragraph: 015 Reference ID: 17a-015-20140306)

126. In *Lambeth LBC*, Lord Carnwath explained the effect of section 73 TCPA 1990, at [9] to [12]:

> "9. The background to this section (formerly section 31A of the Town and Country Planning Act 1971) was described by Sullivan J in *Pye v Secretary of State for the Environment, Transport and the Regions* [1998] 3 PLR 72:
>
> > "… Prior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of the conditions had the right to appeal against the original planning permission, but such a course enabled the Local Planning Authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to 'go back on the original decision' to grant planning permission. So the applicant might find that he had lost his

[3] See Holgate LJ in *Fiske v Test Valley Borough Council* [2024] EWCA Civ 1541 at paragraph 56.

> planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.
>
> It was this problem which section 31A, now section 73, was intended to address …While section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and un-amended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.
>
> In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to 'go back on the original planning permission' under section 73. It remains as a base line, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained.
>
> The original planning permission comprises not merely the description of the development in the operative part of the planning permission …but also the conditions subject to which the development was permitted to be carried out …"

This passage was approved by the Court of Appeal in *Powergen United Kingdom plc v Leicester City Council* [2000] JPL 1037, para 28, per Schiemann LJ.

10. Sullivan J's comment that such applications are "commonly" referred to as applications to "amend" the conditions was echoed by Schiemann LJ, who noted, at para 1, that such an application is commonly referred to as "an application to modify conditions imposed on a planning permission". This usage is also consistent with the wording used in the statute under which section 31A was originally introduced. It was one of various "minor and consequential amendments" introduced by section 49 and Schedule 11 of the Housing and Planning Act 1986, described as "(d) applications to vary or revoke conditions attached to planning permission".

11. It is clear, however, that this usage, even if sanctioned by statute, is legally inaccurate. A permission under section 73 can only take effect as an independent permission to carry out the same development as previously permitted, but subject to the new or amended conditions. This was explained in the

> contemporary circular 19/86, para 13, to which Sullivan J referred. It described the new section as enabling an applicant, in respect of "an extant planning permission granted subject to conditions", to apply "for relief from all or any of those conditions". It added:
>
> > "If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted."
>
> 12. Although the section refers to "development" in the future, it is not in issue that a section 73 application can be made and permission granted retrospectively, that is in relation to development already carried out. …"

127. Wildfish criticised the Council for describing the section 73 permission as an amendment or variation of the OPP. However, as Lord Carnwath held, at [33]:

> "..... Once it is understood that it has been normal and accepted usage to describe section 73 as conferring power to "vary" or "amend" a condition, the reasonable reader would in my view be unlikely to see any difficulty in giving effect to that usage in the manner authorised by the section - that is, as the grant of a new permission subject to the condition as varied."

The amendment to the RMA application

128. In *Inverclyde District Council v Secretary of State for Scotland* (1982) 43 P & CR 375, the House of Lords held that an application lodged within the prescribed time period for reserved matters might still be amended after that time provided the amendment did not alter the whole character of the application. Lord Keith of Kinkel stated, at p. 397:

> "Finally, it is necessary to consider the question whether it was within the powers of the first respondent to call for the submission of further detailed plans and information, which would have the effect of amending the original application, notwithstanding the expiration of the time-limit of three years imposed by condition (2) of the outline permission for the application for approval of reserved matters….. [The appellant's] counsel was prepared to accept that amendment of an application must be permissible within the three-year period, considering that at any time within that period the applicant would be free to put in a fresh application. He maintained, however, that once the period had come to an end, no amendment whatever could validly be made. It is to be observed that neither in the Act of 1972 nor in the Order of 1975 is any procedure laid down for the manner in which applications of this nature are to be dealt with, apart from the provisions about entry in the

> register. This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon. There is, however, one obvious limitation upon this freedom to amend, namely that after the expiry of the period limited for application for approval of reserved matters (which in this case was three years but which might be different-see section 39 of the Act of 1972) an amendment which would have the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent. In this context it is to be noted that section 40(7) (b) of the Act of 1972 provides: "an application for approval of a reserved matter, if it is made after the date by which the conditions require it to be made, shall be treated as not made in accordance with the terms of the permission." This makes it clear that application for approval of all reserved matters must be made before the date fixed by the conditions. So an application which dealt with some only of the reserved matters could not competently be amended after that date so as to deal also with others."

129. Those remarks were cited with approval by the Court of Appeal in *R (Fulford Parish Council) v City of York Council* [2019] EWCA Civ 1359, at [36].

130. In *R (Holborn Studios) v LB Hackney* [2017] EWHC 2823 (Admin), John Howell KC, sitting as a Deputy High Court Judge, said:

> "65 Although the relevant legislation contains no provision permitting the amendment of an application for planning permission, courts have recognised that amendments to such applications may be made. Initially the appellate committee so held in the context of an application for the approval of reserved matters that did not require public consultation: see *Inverclyde District Council v Secretary of State for Scotland* 1982 SLT 200, 204, per Lord Keith of Kinkel. Subsequently it was held that it was also possible to amend an application for planning permission, as it would not be in the public interest to deter developers from being receptive to sensible proposals for change, although the change might be so substantial that it would be impermissible even if there was consultation about it: see *R (British Telecommunications plc) v Gloucester City Council* [2002] 2 P & CR 33, paras 33—37, per Elias J. The substantive limitation on the nature of the changes that may be made by an amendment appears to be whether the change proposed is substantial or whether the development proposed is not in

> substance that which was originally applied for, whether or not others have been consulted about the change: see *R (British Telecommunications plc) v Gloucester City Council*, at paras 38—40; and *Breckland District Council v Secretary of State for the Environment* (1992) 65 P & CR 34, 41."

131. The PPG advises, at paragraph 14-008:

> "Applications for approval under outline permission may be made either for all reserved matters at once, or individually. Even after details relating to a particular reserved matter have been approved, one or more fresh applications can be made for approval of alternative details in relation to the same reserved matter. Once the time-limit for applications for approval of reserved matters has expired, however, no applications for such an approval may be submitted."

132. The only amendment to the RMA application in January 2025 was to include a reference to the section 73 permission, granted on 10 December 2024 (see paragraph 30 above). The purpose of this amendment was to clarify that the existing RMA was to be considered with reference to the section 73 permission. This is clear from the OR at paragraph 1.6 where reference was made to legal advice received by the Council that the RMA could be considered "with reference to the new s.73 Permission".

133. In my judgment, in view of the effect of the section 73 permission, which sits alongside the original permission, IP1 was entitled to rely upon it at reserved matters stage, and it was proper for the RMA application to be amended to make reference to it, for clarity and for certainty.

134. I do not consider that the reference to the section 73 permission, and the determination of the RMA application pursuant to the section 73 permission, resulted in a substantial change to the character of the RMA. The substance of the RMA – the matters submitted for approval – did not change. No part of the RMA as originally submitted was removed or excluded from consideration as a result of the amendment. The only condition that was amended was condition 13.

135. The RMA application never included details of a programme for carrying out foul or waste water treatment. IP1's schedule of conditions, with descriptions and accompanying notes, referred to a foul water drainage scheme being submitted with the application. However, on the basis of information given by the Council and IP1 at the hearing, I accept that no such scheme was submitted. The only document submitted was a plan of the proposed pipework for foul and surface drainage within the Site.

136. The original application and the amended application sought (1) approval for reserved matters, namely, appearance, landscaping, layout and scale; and (2) discharge of conditions 8 and 22 (see paragraphs 15 and 31 above). The "Proposal" put to the Committee, and summarised at paragraph 1.1 of the OR, also sought approval of those reserved matters and discharge of conditions 8 and 22 (paragraph 42 above). The Committee's decision notice granted approval for those reserved matters and conditions 8 and 22 (paragraph 60 above).

137. Under the heading "Discharges of conditions", the OR advised the Committee to discharge conditions 8 and 22, at OR/5.194 - 5.195, which Members duly did. The OR also provided an updating review in respect of the other conditions for the benefit of the Committee: see OR/5.194 – 5.213. Although the OR advised the Committee that some of the conditions could be discharged because the required information had been submitted, lawful discharge could only formally take effect by means of a decision of the Council. The decision notice of 4 March 2025 did not include the discharge of any conditions beyond the reserved matters and conditions 8 and 22.

138. It was not necessary for IP1 to make a new application for RMA under the section 73 permission because the description of the RMA was modified to enable it to be considered with reference to the section 73 permission as well as the OPP. In my view, the OR gave clear and correct advice to the Committee on this issue at section 3.0 (paragraph 45 above). I do not consider that the OR was misleading.

139. It cannot be inferred that there was a substantial change to the whole character of the RMA merely because IP1 applied for permission under section 73 TCPA 1990, rather than applying for a non-material amendment under section 96A TCPA 1990. It is for the applicant to determine the power under which it applies, not the Council.

140. I do not accept Wildfish's submission that the Council was acting *ultra vires* or irrationally by extending the time for which a reserved matters application could be made, thus circumventing the restriction in section 73(5) TCPA 1990. The section 73 permission did not extend the 18 month time limit for reserved matters imposed by condition 2 of the OPP, nor did it change the reserved matters which were being approved under the OPP. In any event, as condition 13 was not a reserved matter, the time limit in condition 2 never applied to it.

141. Even in the absence of the section 73 permission, since condition 13 was not a reserved matter, the failure to submit a foul water scheme at the same time as the RMA would not have been a breach of condition 2. At most it would have been a breach of condition 13, and it would have remained open to the Council to exercise its discretion to discharge condition 13 at a later date or approve a subsequent section 73 permission in the same terms.

142. I agree with the submissions of the Council and IP1 that Wildfish's grounds raise technical matters of form rather than substance. Their purpose is to mount a collateral attack on the Council's exercise of planning judgment in granting the section 73 permission, under which the pre-commencement condition was removed and the pre-occupation condition was retained.

Consultation

143. On the issue of consultation, I was referred to *Wheatcroft (Bernard) Ltd v Secretary of State for the Environment* [1982] JPL 37 and my judgment in *R (London Borough of Hillingdon) v Mayor of London & Anor* [2021] EWHC 3387 (Admin), at [118]. In *Holborn Studios* John Howell KC held:

> "75 When there is a statutory duty of consultation, the question whether re-consultation is required if there is a change to the

> proposal on which there has been consultation depends on what fairness requires. That will depend inter alia on the purposes for which the requirement of consultation is imposed, the nature and extent of any changes and their potential significance for those who might be consulted: see e g *R (Stirling) v Haringey London Borough Council* [2014] PTSR 1317, paras 23—24, per Lord Wilson JSC; and para 44, per Baroness Hale of Richmond DPSC and Lord Clarke of Stone-cum-Ebony JSC; and the *Keep Wythenshawe Special case* 148 BMLR 1, paras 73—75, per Dove J.
>
> ……
>
> 78 In considering whether it is unfair not to reconsult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended.
>
> ……
>
> 85 It must none the less be borne in mind that what fairness requires in the circumstances falls to be determined by reference to the circumstances as they appeared to the authority at the relevant time (or as they ought to have appeared had the authority not acted unreasonably) and that it is not sufficient to establish that a decision is unlawful merely to show that it would have been better or fairer for there to have been re-consultation. "The test is whether the process has been so unfair as to be unlawful" see the Keep *Wythenshawe Special* case 148 BMLR 1, paras 77 and 87, per Dove J; and *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] PTSR 982, para 60."

144. There was no statutory obligation to hold a public consultation on the RMA application.

145. Before supplementing a procedure laid down in legislation, the Court must be clear that the statutory procedure is insufficient to achieve justice (see *Wiseman v Borneman* [1971] AC 297 at 308B-C). It is not enough for a claimant to persuade the court that some procedure other than the one adopted by the decision-maker would have been better or more fair, rather they must show that the procedure followed was actually unfair. Parliament has entrusted to the decision-maker the making of the decision and also the choice as to how the decision is made (see *R v Secretary of State for the Home Department ex p. Doody* [1994] 1 AC 531 per Lord Mustill at 560H-561A).

146. In *R (Better Streets) v Royal Borough of Kensington and Chelsea* [2023] RTR 24, Lane J. helpfully summarised the legal principles at [36] - [38]:

> "*Consultation: legal principles*

> 36 In *R. (Plantagenet Alliance Ltd) v The Secretary of State for Justice* [2014] EWHC 1662 (Admin), the Divisional Court, at paragraph 98 of its judgment, summarised the general principles concerning the duty to consult, as derived from the authorities. The Divisional Court noted, first, that there is no general duty to consult at common law and that the government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision.
>
> 37 I would add here that, in the case of a democratically-elected public authority, such as the defendant, the courts will be particularly cautious about inferring that a duty to consult has arisen. As Laws LJ held in *R. (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755 at paragraph 41, "Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest… Often they must balance different, indeed opposing interests across a wide spectrum. Generally, they must be the masters of procedure as well as substance…".
>
> 38 As held in *Plantagenet Alliance*, a duty to consult may arise where there has been an established practice of consultation or where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Here again *Bhatt Murphy* is relevant. At paragraph 49, Laws LJ held that where there has been no assurance either of consultation or as to the continuation of the policy in question, "there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power."

147. The Courts have made clear, in the context of consultation, that it is important to bear in mind "the dangers and consequences to too readily requiring re-consultation" since "if the courts are too liberal in the use of their powers of judicial review to compel consultation on any change, there is a danger that the process will prevent further change": *Keep Wythenshawe Special Ltd v NHC Central Manchester CCG* [2016] EWHC 17 (Admin), per Dove J. at [73], citing Silber J. in *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) (and the cases there cited) relied upon in *Holborn Studios* at [85]. For that reason, re-consultation should only be required where the differences between that which was consulted upon and that which the consulting party subsequently wishes to permit were "fundamental" and "of a very high order of significance" (see *Keep Wythenshawe Special Ltd* at [75]).

148. In this case, there had been a full public consultation prior to the grant of the OPP in March 2022, followed by a legal challenge by a member of the Maids Moreton and Foscote Action Group.

149. There was another full public consultation prior to the grant of the section 73 permission in December 2024, in which the Claimants and other objectors were able to participate. Wildfish had the opportunity to challenge the grant of the section 73 permission, and

went as far as sending pre-action letters to the Council, but eventually decided not to do so.

150. The evidence demonstrates that Wildfish and the Maids Moreton and Foscote Action Group (of which Ms Wood was an active member) were closely following the progress of this planning application. I have no doubt that they knew when the Committee meeting would take place and that they were monitoring the Council's website and identifying new documents as they were posted. Wildfish was taking a pro-active role in obtaining information from Ofwat and Anglian. The objectors had the benefit of seeing the very detailed OR and the material annexed to it (including consultation responses), which were published on the website on 5 February 2025, in good time for the meeting on 13 February 2025, when the concerns were discussed. The Supplementary OR indicated that there were eleven further objections lodged after the OR was published.

151. Members were advised of the objections that had been made, and the planning officer's response to them: see OR/Section 3.0, OR/5.129 – 5.136, Appendix A (consultation responses), Supplementary OR. It is reasonable to assume that these objections were considered and taken into account by officers and Members (as expressly confirmed at OR/5.135). The transcript extracts indicate that officers and Members considered the concerns raised by objectors at the Committee meeting on 13 February 2025 (see paragraphs 53 – 55 above) and were satisfied that it was appropriate to grant the applications.

152. Finally, the only change to the RMA application was the addition of the reference to the section 73 permission. That did not alter the whole character of the application, for the reasons I have set out above. Wildfish and other objectors were already familiar with the potential effect of the section 73 permission and had had the opportunity to comment on it. The particular concerns raised by Wildfish in this claim, namely, that the development might be built out but unoccupied, or occupied and resulting in raw sewage overspill, were not new. The Council had already explained why they did not consider these concerns to be justified.

153. For these reasons, fairness did not require a further public consultation.

154. In conclusion, for the reasons set out above, Grounds 1 and 2 of the Wildfish claim do not succeed. The application to refuse relief under section 31(2A) of the Senior Courts Act 1981 does not arise.

WOOD: GROUND 3

155. I consider Ground 3 of the Wood claim at this stage because it overlaps with Grounds 1 and 2 in the Wildfish claim.

Ms Wood's submissions

156. Ms Wood submitted that the Council's acceptance of the RMA application was *ultra vires* because of its limited ability to accept amendments once the time limit for such

applications has expired (in this case, 24 September 2023). Ms Wood relied upon the authorities on the amendment of a planning application cited in the Wildfish claim.

157. Ms Wood submitted that, on 17 October 2024, a substantial further resubmission was provided, including a further new set of documents, described as an "amended planning application pack". A new site notice was provided. This contained several significant changes:

i) The number of dwellings was reduced from 163 to 153.

ii) A large area of woodland stretching the length of the northeastern edge of the development (approximately 300m x 50m) was reduced by approximately 50% and removed entirely from the easternmost field. At the OPP stage, this woodland boundary was relied upon as part of the mitigation strategy.

iii) The number of urban street trees to be planted was increased from 47 to 169, with these now proposed to be spread across the entirety of the site, including the landscape buffers and biodiversity areas, not just the urban area of the development.

iv) The House Pack submitted for the initial application and resubmitted in October 2023 and March 2023, with minor amendments, was entirely replaced.

v) The number of drainage ponds was reduced from 3 to 2, accompanied by a different drainage strategy, with the latter document showing an increase in the site area from 8.64ha to 8.88ha.

158. Ms Wood submitted that the changes made to the application in the IP1's resubmission on 17 October 2024 were so substantial that they altered the whole character of the development originally applied for, and so were impermissible, applying *Inverclyde DC*. By allowing the amendments to the RMA application, the Council was undermining the statutory scheme, contrary to the principles in *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997, per Lord Reid at 1030B-D.

159. OR/2.12 stated:

> "2.12 A number of amended plans and details, including several updates to the BNG metric and report, and also layout and landscaping have been submitted. Amendments have been sought to correct inconsistencies and to seek to achieve the most appropriate development of the site. The LPA has sought to work proactively with the applicant as required by the NPPF. The LPA has consulted upon the amendments as appropriate to ensure transparency in the decision-making process. It is at the discretion of the Local Planning Authority, as decision maker, over whether to accept amendments to validated planning applications prior to determination, as set out in the National Planning Policy Guidance."

160. This advice was significantly misleading. Members were not directed to the correct question, in line with the legal principles. Nor were they advised on the nature of the

amendments, and their timing and content. Therefore the Council failed to exercise its discretion on a proper basis, and the decision should be quashed.

Conclusions

161. I accept the submissions made by the Council and IP1.

162. Members were aware that there had been amendments to the RMA application, which were referred to in the body of the OR and in the summary of objections. They were available for inspection.

163. The threshold test for whether amendments to a RMA may be allowed was established in *Inverclyde DC*, namely, whether the amendments would have the effect of "altering the whole character of the application, so as to amount in substance to a new application", per Lord Keith at 897. Whether the October 2024 amendment amounted "in substance" to a new application was a matter of judgment for the Council, which may be challenged only on conventional public law grounds. Ms Wood's attempt to apply a further test based upon *Padfield* are misplaced.

164. As to whether the OR addressed the wrong legal test at OR/2.12, the guidance in *Mansell*, at [42], applies. The question is whether, "on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected". It is only if the advice was significantly or seriously misleading, so that but for the flawed advice, the Committee's decision would or might have been different, that the court will be able to conclude that the decision itself was rendered unlawful by the advice.

165. The OR advised Members, at OR/2.12:

> "It is at the discretion of the Local Planning Authority, as decision maker, over whether to accept amendments to validated planning applications prior to determination, as set out in the National Planning Policy Guidance."

166. The PPG (Reference ID 14-061-20140306) states, under the heading, "Can an applicant amend an application after it has been submitted?", that whether to accept changes (and whether those changes need to be reconsulted upon), or whether those changes "are so significant as to materially alter the proposal such that a new application should be submitted" is "at the discretion of the local planning authority".

167. On any fair reading of the OR, the planning officer referred Members to the correct test for them to apply, as set out in the PPG. Absent a clear positive indication to the contrary, Members should be taken to have understood and applied that Guidance (see *Jones v Mordue* [2015] EWCA Civ 1243 at [28] and *R (Co-Operative Group Limited) v West Lancashire BC* [2021] EWHC 507 (Admin) per Holgate J. at [38]).

168. In order to succeed under this ground, Ms Wood must show that no reasonable authority would conclude that the character of the application remained unchanged. Ms Wood has failed in this respect.

169. Dealing with the changes identified by Ms Wood, in turn:

i) A change in the number of dwellings originally proposed from 163 to 153 (i.e. a reduction of just over 6%) cannot be said to be "substantial" according to the ordinary meaning of the term. The OPP granted permission for "up to 170" dwellings. That wording imposed a maximum and envisaged that the number could turn out to be smaller.

ii) The reduction of the originally proposed woodland habitat occurred prior to the amendment in October 2024. Mr Goodman, Senior Director at FPCR Consultants, described at paragraph 13 and 14 of his witness statement ("Goodman WS/13 - 14") how amended plans and reports were submitted to the Council on 16 October 2023, including the changes to the woodland habitat. The OPP was determined in the knowledge that landscaping would be finalised at reserved matters stage. Whether the landscape mitigation remained adequate was a matter of planning judgment to be exercised at the point when the RMA application was determined.

iii) The additional urban street trees were always shown on the layout and landscaping plans (see Goodman WS/16 - 17).

iv) There were changes to the house pack, resulting in one document for market housing and a separate document for affordable housing.

v) The removal of a balancing pond to the northwest of the Site occurred prior to the October 2024 amendment. Goodman WS/13 - 14, describes its inclusion in the amended plans and reports submitted to the Council on 16 October 2023.

170. In my judgment, the Council was rationally entitled to conclude, in the exercise of its discretionary judgment, that the changes contained in the October 2024 amendment, whether individually or cumulatively, were not substantial and did not change the character of the application either as originally submitted, or revised pursuant to subsequent amendments.

171. For these reasons, Ground 3 of the Wood claim does not succeed.

WILDFISH: GROUND 3

Wildfish's submissions

172. Under Ground 3, Wildfish made a number of different criticisms of the Council:

i) Officer advice to Members was mistaken and irrational in advising that condition 13 could be discharged in time to enable the development to be occupied, as the timeline and funding for the upgrades to Buckingham WRC were not known. There was no rational basis for the assumption that condition 13 would ever be discharged.

ii) The Council failed to discharge the *Tameside* duty of inquiry. Officers did not seek the views of Anglian as to the timeline for the upgrades to Buckingham WRC in the absence of Ofwat funding. Nor did the Council inquire at all into the potential consequences of connecting the development to the existing

sewerage system in the absence of upgrades (i.e. additional raw sewage discharges).

iii) At the hearing Wildfish did not pursue the allegation in paragraph 60 of its skeleton argument that officers should have advised Members that there was a breach of the requirement of Policy MMO006 for an updated assessment of wastewater treatment works capacity needs, to identify the needs for infrastructure upgrades and how and when they would be carried out.

iv) By failing to disclose or explain the Ofwat email, Members were misled, a mandatory material consideration was left out of account, and a background document was not listed, in breach of section 100D LGA 1972.

v) Officer advice to Members to the effect that Anglian was obliged to accommodate the foul waste and surface water requirements of the development because of the outline planning permission was misleading. *Barratt Homes Ltd* states only that sewerage undertakers are obliged to accept new connections when new development is built out, not simply when it has outline planning permission, referring to section 106(1) of the Water Industry Act 1991 ("WIA 1991").

vi) This advice can only relevantly have been given in order to direct members that the lack of necessary upgrades at Buckingham WRC would not hinder the development at the Site. It was therefore an argument that relied on a breach of condition 13 and the creation of new flows into the Buckingham WRC in circumstances where it was already over-capacity. This over-capacity means that additional flows will aggravate the adverse effect of untreated sewage being discharged into the adjacent rivers and waterbody network (principally the Ouse), by increasing such discharges. The adverse effect on the rivers and waterbody network of additional untreated sewage discharges was an obviously material consideration that was not addressed by the Council.

vii) Members were never advised, as they ought to have been, that the consequence of accepting that the development might be connected to the sewage network prior to the necessary upgrades would be increased untreated discharges. Nor were they advised, as they ought to have been, that the amended condition 13 would be redundant once the development had been built out and the developer's right to connect had arisen. They were therefore significantly misled by officers.

viii) The suggestion at OR/5.131 that Anglian is obligated to manage the flows itself is misleading. The suggestion is that Anglian will provide the necessary upgrades to the Buckingham WRC, rather than simply allowing the untreated discharges to occur. OR/5.132 likewise suggests that the flows from the Site would have to be accommodated "within the capacity of [Buckingham WRC] in time for the first occupation." OR/5.135 similarly states that Anglian are "obliged" to "accommodate the development which has planning permission and through a funded scheme… of improvements to the Buckingham WRC." This advice was repeated orally at the meeting. These statements all confuse (i) Anglian being obliged to receive the sewage once the development is connected up pursuant to the statutory obligation to connect; with (ii) any obligation on

Anglian to undertake the upgrades in time for that connection. The first of these propositions is correct, the second is not.

ix) In its Detailed Grounds of Defence, at paragraphs 71 – 73, the Council relied upon Anglian's obligation to manage the flows from the development pursuant to section 94 WIA 1991. This is incorrect as section 94 is a general duty and not one that arises upon connection to a new development. In any event, the reference to being obliged to manage flows was obviously a reference to the obligation under section 106 WIA 1991.

x) For all these reasons, the advice to Members was significantly misleading and the OR also failed to give adequate reasons that properly grappled with the issues.

Conclusions

Legal principles

173. I refer to the legal principles set out at paragraphs 92 to 103 above. I also adopt the following propositions of law advanced by the Council.

174. There is no rule that the existence of difficulties, even if apparently insuperable, should necessarily lead to the refusal of planning permission for a desirable development. A would-be developer may be faced with difficulties of many kinds, but if they consider that it is in their interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties may be (see *British Railways Board v Secretary of State for Environment* [1994] JPL 32 per Lord Keith of Kinkel at [38]).

175. All matters of judgment are within the exclusive jurisdiction of the decision-maker. A local planning authority determining an application for planning permission is free, provided that it does not lapse into *Wednesbury* irrationality, to give material considerations whatever weight it thinks fit or no weight at all (*Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Hoffmann at [56]).

176. A claim for judicial review does not afford an opportunity to review the planning merits of the first instance decision-maker. Therefore, a claimant seeking to allege *Wednesbury* unreasonableness in a planning case faces an especially steep uphill struggle (see *R (Newsmith Stainless Ltd) v SoS* [2017] PTSR 1126 at [7] per Sullivan J.).

177. Planning decisions are made by the members of the planning committee advised by planning officers. Committee reports are not written for lawyers but for councillors, who are well-versed in local affairs and local factors. Planning committees approach such reports using that local knowledge and much common sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied (*Mansell* at [63] per Sir Geoffrey Vos C.).

178. When considering a challenge based on officers' reports, the question is always whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected. It is only if the advice in the officer's report is such as to misdirect the members in a material way that the court will be able to conclude that the decision itself was rendered unlawful by that advice (see *Mansell* per Lindblom LJ at [42]).

179. What level of detail to include in a report is a matter of expert judgment for the officer in question which can only be challenged on rationality grounds (see *R (Fabre) v Mendip DC* [2017] PTSR 1112 per Sullivan J. at 1120D). Failing to take this approach creates a real danger that officers will draft reports with excessive defensiveness, lengthening and over-burdening them (see *R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) per Sales J. at [43]).

180. There is no requirement to refer to every material consideration, and an adverse inference that the local authority has misunderstood something or failed to have regard to it will only be drawn "where all other known facts and circumstances point overwhelmingly to that conclusion" (see *South Bucks DC* per Lord Brown at [34] – [35]).

181. The *Tameside* duty is a facet of rationality. A decision-maker is only under a duty to take such steps to inform himself as would any reasonable decision maker. It is for the public body and not the court to decide upon the manner and intensity of the inquiry to be undertaken (subject to *Wednesbury* review). The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (see *R (Jayes) v Flintshire County Council* [2018] EWCA Civ 1089 at [14] per Sir Keith Lindblom SPT and *Balajigari v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]).

182. Reasons may be briefly stated and need only refer to the main issues in dispute, not to every material consideration. A reasons challenge will only succeed where the party aggrieved can satisfy the court that he has been substantially prejudiced by a failure to provide an adequately reasoned decision (*South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, at [36]).

Wildfish's challenge

183. Applying those legal principles to this case, I do not consider that Council officers gave irrational, misleading, incomplete or incorrect advice to Members, as Wildfish alleged. Nor do I consider that the OR failed to grapple with the issues and give adequate reasons.

184. As I set out at paragraphs 87 – 91 above, the Supreme Court in *Barratt* confirmed that, by sections 94 and 106 WIA 1991, the owner or occupier of premises is entitled to connect to the public sewer and the sewerage undertaker is responsible for dealing with the consequences of the additional discharge. Lord Phillips said, at 31(i), "where connection of a development to a public sewer requires consequential works to accommodate the increased load on the public sewer, the costs of these works falls

exclusively upon the undertaker". I agree with the Council that it is clear that the statutory duties extend beyond connection and include any extensions that may be required to accommodate an increase in foul water flows.

185. The Court identified the practical difficulties which could arise if the undertaker had not been able to "accommodate" the increased load on the public sewer in time. The Court of Appeal suggested that the practical answer was for the planning authority to make planning permission conditional upon there being in place adequate sewerage facilities to cater for the requirements of the development without ecological damage. The planning authority can make planning permission conditional upon the sewerage authority first taking any steps necessary to ensure that the public sewer will be able to cope with the increased load.

186. In its correspondence with the Council, Anglian confirmed on 3 July 2024 that as the Site had outline planning permission, it was "obligated to accommodate the additional flows". I note that the term "accommodate" was used in *Barratt*. Anglian had advised the Committee in similar terms at OPP stage. Anglian confirmed the position again in an email dated 5 February 2025.

187. Although strictly the legal obligation under section 106 WIA 1991 is triggered by 21 days advance notice from an owner or occupant, this can cause practical difficulties if a required expansion of the infrastructure is not yet in place. Therefore it was reasonable, and indeed sensible, for Anglian to acknowledge and anticipate prospective increases in demand, and to liaise with the planning authority in advance of completion of a large development. The Council was entitled to rely upon Anglian's assurances, and it was rational for it to do so.

188. At OR/5.129 – OR/5.136, the OR accurately advised Members of Anglian's acceptance of its statutory obligations. The OR also provided a detailed and factually correct summary of the history and current position of concerning foul water draining. At paragraph 5.130, it noted that Buckingham WRC did not currently have dry weather flow headroom to accommodate the additional flows from the Site. Buckingham WRC had been identified as requiring investment in Anglian's Drainage and Wastewater Management Plan and its draft Business Plan. At OR/5.131, the OR noted that the Buckingham WRC growth investment scheme had been assessed by Ofwat who found that it did not meet their criteria for any funded enhancement allowance. As a result of this, the OR clearly explained that Anglian were conducting reviews and issuing holding objections to new planning applications until the end of February by which time an investment decision would be made.

189. Thus, the material information in the Ofwat email, namely, that Ofwat had not agreed to fund the Buckingham WRC growth investment scheme because it did not meet their criteria, was already before the Committee. The officer did not materially mislead the committee with respect to the funding position at the Buckingham WRC, nor was there a failure to consider a mandatory material consideration by not expressly referring to an email that was sent by Ofwat to an objector, not the Council, and which was not relied upon by the planning officer as the basis for her advice. The rationality test for an obviously material mandatory consideration was not met. The planning officer was aware of the email because it had been sent to the Council by Wildfish and posted on the Council's website as part of the material submitted to it. It was a matter for the planning officer's judgment as to whether to refer to it expressly in the OR.

190. The planning officer explained to Members the effect of the section 73 permission at OR/5.132, which retained in the revised condition 13 the requirement to obtain confirmation that the upgrades required to accommodate the additional flows from the development had been completed prior to occupation. Therefore there was no prospect of people occupying the Site and discharging their sewage into the Buckingham WRC unless or until the Buckingham WRC had been expanded. As recommended in *Barratt*, at [43], the Council was proposing to use its powers to control occupancy of a large development to prevent overloading of the sewerage system and pollution, before any required upgrade was implemented. Anglian did not oppose this condition. Indeed, in its consultation responses on the section 73 permission, Anglian stated it would only recommend discharge of condition 13 once the upgrades of Buckingham WRC had been completed.

191. The planning officer and Members were entitled to take the view that there was no need for the Council to undertake further inquiries pursuant to the *Tameside* duty. The RMA application did not seek to discharge condition 13, nor require Members to reach a view on when the development could be occupied. Anglian was in the midst of addressing the funding issue for improvements to Buckingham WRC and so it was not possible to provide an expected timeframe for the programme of works. The planning officer and Members were entitled to proceed to make a decision on the RMA application on the basis that adequate capacity could be provided in due course.

192. At OR/5.135, the planning officer expressly took into account the representations made, and concluded as follows:

> "Notwithstanding the above, Officers have taken the representations received on this matter into account, however, the comments made do not change the conclusions reached. It remains the situation that Anglian Water are obliged to accommodate the development which has planning permission and through a funded scheme (to be determined by Anglian Water) of improvements to the Buckingham WRC. There is a real prospect therefore that these upgrades will take place and that there is time for this matter to be resolved and to enable the development to be occupied, which is the trigger for the provision of the foul water scheme to serve the development as set out in condition 13 of permission 24/02780/VRC. Therefore, there is no planning reason why the determination of this reserved matters application cannot proceed on this basis."

193. In my judgment, it was rational for the Committee to accept this advice and conclude that there was a real prospect that the upgrades would take place to enable the development to be occupied.

194. Furthermore, although there were no exceptional circumstances which required reasons to be given, the reasons in the OR (which Committee is presumed to have adopted) clearly met the standard in the *South Bucks* case.

195. Finally, Wildfish submits that the Council acted in breach of section 100D LGA 1972 by not listing the Ofwat email as a "background paper" for the Committee meeting, and making a copy available for inspection.

196. The Ofwat email is summarised at paragraph 31 above.

197. In accordance with standard practice, the Ofwat email was posted on the Council's website as it was a document submitted to the Council by an objector, Wildfish. That did not confer upon it the status of a "background paper". It is clear from OR/5.131 that the planning officer's summary of the factual position was based on information supplied to the Council by Anglian, not by the email from Ofwat to Wildfish. Therefore I consider it fell outside the scope of the definition in subsection 100D(5) LGA 1972.

198. But even if I am wrong about that, I consider that there was substantial compliance with the requirements of section 100D LGA 1972 and no prejudice was caused to Wildfish by any non-compliance.

199. In *R (Greenfields (IOW) Limited) v Isle of Wight Council* [2025] EWCA Civ 488, the Court of Appeal affirmed the correct analytic approach to procedural compliance in a planning context, applying *R v Soneji* [2006] 1 AC 340, and *A1 Properties Ltd v Tudor Studios RTM Co Ltd* [2024] 3 WLR 601 (at [61] – [63]). That was also the approach taken in *R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills District Council* [2023] EWHC 1995 (Admin), per Holgate J. at [140] and *R (Bradbury) v Brecon Beacons NPA* [2025] 4 WLR 58, per Lewis LJ at [49]. That approach involves asking whether Parliament would have intended the procedural breach in question to result in the invalidity of the decision challenged, having regard to the substance of the duty, and the extent of any prejudice to the claimant.

200. Applying that test to the facts of this case, the Ofwat email was uploaded onto the Council's website on 4 February 2025, and the Committee was made aware, at OR/5.131, that Anglian's proposed scheme did not meet Ofwat's criteria for any funded enhancement allowance for upgrading Buckingham WRC. There was compliance in substance with the purpose of the duty under section 100D LGA 1972, which is to enable access to the documents underlying an officer's report, and no prejudice to Wildfish, which was plainly aware of the document.

201. Further, relief should be refused under section 31(2A) of the Senior Courts Act 1981, and/or as a matter of the court's discretion, as it is highly likely that the outcome for Wildfish would not have been substantially different had the email been listed and published as a background paper.

202. For the reasons set out above, Ground 3 of the Wildfish claim does not succeed.

WILDFISH: GROUND 4

Wildfish's submissions

203. The development is an infrastructure project falling under schedule 2 to the EIA Regulations 2011 (see paragraph 10(b)(ii)) as it consists of more than 150 dwellings. It therefore required screening.

204. On 24 November 2015, a negative screening opinion was issued in respect of the proposed development. That decision had been overtaken by a change in circumstances

requiring reconsideration, in particular, "the prospect now countenanced of additional untreated sewage discharges" (Wildfish skeleton argument, paragraph 72).

205. There is an obligation to keep a negative screening determination under continual review up to the time planning permission is granted. There is an obligation to re-do screening if any change occurs which might lead to a different screening outcome. See *R (Champion) v North Norfolk DC* [2015] 1 WLR 3710 at [43], [45] - [46]; and *R (Milton) v Ryedale DC* [2015] EWHC 1948 (Admin), at [40] - [43], [61], [64], [67].

206. Here, as in *Swire v Ashford BC* [2021] EWHC 702 (Admin), there has been a failure to re-consider the screening decision where there has been a change of circumstances rationally capable of leading to a change in the view that the development is not EIA development. It was also clear that the planning officer and thereby the Council has failed to take into account a material consideration.

207. The planning officer's position, set out at OR/5.192 – 5.193, was rationally insupportable in light of the new information that has arisen as to the lack of capacity at Buckingham WRC and lack of funding for development, in combination with the amendment of condition 13. It is logically inconsistent to hold (as the Council has) both that: (a) the development can be connected by right to the sewerage network with all the adverse effects that would be bound to create; yet (b) that this was not something rationally capable of changing the outcome of the negative 2015 screening opinion. The failure to re-screen is therefore unlawful.

208. Even if the planning officer's view at OR/5.193 was rational on its face (which Wildfish did not accept), it could not stand in the light of the Ofwat email. This was a key material consideration that was not considered in the OR.

Conclusions

209. I accept the submissions made by the Council and IP1 on this ground.

210. The ground is premised on the assumption that the Council had changed its position and was now countenancing additional untreated sewage discharges. This is a false assumption. The planning officer and Members did not envisage any changes in the way that sewage was to be managed. As I stated under Ground 3, the planning officer explained to Members the effect of the section 73 permission, at OR/5.132, which retained in the revised condition 13 the requirement to obtain confirmation that the upgrades required to accommodate the additional flows from the development had been completed prior to occupation. Therefore there was no prospect of people occupying the Site and discharging their sewage into the Buckingham WRC unless or until the Buckingham WRC had been expanded. In its consultation responses, Anglian stated it would only recommend discharge of condition 13 once the upgrades of Buckingham WRC had been completed.

211. As I held under Ground 3, the Ofwat email did not meet the test so as to be a mandatory material consideration and the absence of an express reference to it in the OR did not mislead Members. At OR/5.131, the OR noted that the Buckingham WRC growth investment scheme had been assessed by Ofwat who found that it did not meet their criteria for any funded enhancement allowance. Thus, the material information in the

Ofwat email was before the Committee. The planning officer was aware of the email because it had been sent to the Council by Wildfish and posted on the Council's website. It was a matter for the planning officer's judgment as to whether or not to refer to it expressly.

212. A member of the Maids Moreton and Foscote Action Group applied unsuccessfully for judicial review of the grant of OPP on multiple grounds, including an alleged failure to review the EIA screening decision. The claim was dismissed on 16 November 2022 by Cranston J. in *R (Hardcastle)* v *Buckinghamshire Council* [2022] EWHC 2905 (Admin). He considered EIA screening in depth, at [135] – [157]. He said, at [156(v)]:

> "(v) Anglian Water stated on 5 November 2020 that its treatment centre did not have capacity to deal with the development, and that the development would lead to an unacceptable risk of flooding.
>
> Again, this is only half the story. Anglian Water said it was obliged to deal with the foul flows from the development and would work with the developer to ensure any infrastructure improvements to address flooding risk."

213. After reviewing a number of other changes relied upon by the claimant, as well as Anglian's statement on 5 November 2020, Cranston J. concluded:

> "157. The upshot in my view is that a reasonable planning officer would not have thought these changes, such as they were, could change the outcome of the 2015 screening individually or cumulatively. In other words, a further screening would have produced the same conclusion as the 2015 screening that the development would not have significant effects on the environment."

214. I agree with Cranston J.'s analysis, which remained applicable at RMA stage. The planning officer was aware of the history and summarised it for Members as it was relevant. Her advice that a further screening was not necessary was clearly explained and enabled Members to reach their own decision. Her advice was as follows:

> "5.192 The EIA 2017 Regulations apply to full and outline planning applications and "subsequent applications" which includes applications for approval of a matter which is required by an extant planning permission, and which must be obtained before all or part of the development permitted by the planning permission may begin.
>
> 5.193 A screening opinion was undertaken in 2015 (ref 15/03562/SO) for a proposed development which was smaller in terms of size and number of dwellings proposed, compared with the outline scheme subsequently approved. A further screening opinion for the outline application was not considered to be necessary since the nature and extent of the changes between the schemes was not considered to be different to the extent that

> individually or cumulatively, they could change the outcome of the 2015 screening opinion. That continues to be the case with this reserved matters application. It is considered that there has been no significant change in circumstances since the previous outline approval ref 16/00151/AOP and that an Environment Impact Assessment remains unnecessary."

215. In my judgment, this approach does not disclose irrationality or any other public law error on the part of the Council.

216. For the reasons set out above, Wildfish's Ground 4 does not succeed.

WOOD: GROUNDS 1 AND 2

217. Grounds 1 and 2 overlap and are conveniently considered together.

Ms Wood's submissions

Ground 1

218. Ms Wood submitted that the decision to discharge condition 22 was *ultra vires* and irrational because the Defra 2.0 metric and guidance was not used.

219. Condition 22 states that a 10% net gain in hedgerow units must be shown and that "calculations must be undertaken using the Defra 2 metric and guidance".

220. A "metric" is defined by the Cambridge Dictionary as "a system for measuring something". Inherent in the notion, a metric must be clear as to the yardstick by which it is doing the measuring. On a plain reading, the reference to "the Defra 2 metric and guidance" in condition 22 means in accordance with the correct numerical inputs to the calculation, whether undertaken manually or using the Calculation Tool.

221. The Calculation Tool is neither the metric, nor is it the guidance. It is intended to simply be a translation of the metric and guidance into an easy to use excel tool. Its use is not compulsory, and the Guide describes it as "separate" to the metric and anticipates that experienced users will look behind the Calculation Tool to the raw figures contained in the Guide and Technical Supplement.

222. It was not open to the Council to allow IP1 to choose which multiplier to use as the condition includes a clear injunction that the calculation "must use the Defra 2 metric and guidance".

223. The defence provided by the Council in the OR, which did not dispute the departure but stated that the figure used of 0.67 was still suitably precautionary, did not save the Defendant, because it represented a departure from the Defra 2.0 metric and was misleading.

224. The subsequent (and different) defence provided by the Council in its pre-action response and pleadings – that the Calculation Tool was part of or a substitute for the metric, and/or that there was no such error – was wrong. The Calculation Tool is

separate to the metric and the ecologists appeared to agree that 0.67 was not the correct Defra 2.0 metric figure. The new position adopted by the Council contradicted the advice given to Members and meant that the advice given to Members was misleading.

225. The discrepancy of approach was material. As Professor Shreeve explained (whose own calculations have not been challenged) if the correct figures are used, the result is a -25% net loss, rather than a gain.

226. Article 27 of the DMPO requires that an application to discharge a planning condition be accompanied by the necessary information and particulars. Because IP1 did not provide the biodiversity net loss or gain figure based upon the correct multiplier, there was a breach of Article 27(1)(b) of the DMPO.

Ground 2

227. The OR failed to draw to the attention of Members the obviously material consideration that an incorrect multiplier had been used. If the correct multiplier was used, there would be a loss rather than a gain, according to Professor Shreeve.

228. It was misleading for the OR to suggest that the multiplier of 0.67 was simply "more precautionary" than the latest version of the metric, for the reasons summarised in Professor Shreeve's report of 6 February 2025. The subsequent metrics do use a less precautionary multiplier but they also change the time to target condition multiplier, which reduces the overall unit value.

229. The planning officer should have investigated the result of applying the correct difficulty multiplier, pursuant to the *Tameside* duty. Professor Shreeve's calculations were not listed as background documents under section 100D LGA 1972. The result of the calculations was not summarised in the OR. There was a failure to give reasons as to why the condition was discharged, notwithstanding the fact that the correct output from the metric showed a net loss rather than a net gain.

Conclusions

230. I accept the submissions made by the Council and IP1.

Ground 1

231. In *Lambeth LBC*, Lord Carnwath summarised the principles of interpretation of planning conditions at [15] – [19] of his judgment (with which all other JJSC agreed). He concluded, at [19]:

> "19 In summary, whatever the legal character of the document in question, the starting point - and usually the end point - is to find the "natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

232. Recently, in *DM Symmetry Ltd v Swindon BC* [2023] 1 WLR 198, Lord Hodge gave the following guidance:

> "66 In *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85 and *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317 this court has given guidance on the interpretation of planning conditions. In summary, there are no special rules for the interpretation of planning conditions. They are to be interpreted in a manner similar to the interpretation of other public documents. The court asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. This court has rejected assertions that there can never be a term implied into a condition in a planning permission, but it has recognised that a court must exercise great restraint in implying terms into public documents which have criminal sanctions: *Trump International*, paras 33—36; *Lambeth London Borough Council*, para 18. As a planning permission is a document created within the legal framework of planning law, the reasonable reader is to be treated as being equipped with some knowledge of planning law and practice: see the judgment of the Court of Appeal delivered by Lewison LJ in the *Lambeth London Borough Council* case [2019] PTSR 143, para 52, and the judgment of Lewison LJ in the present case, para 64."

233. I refer to the planning history in respect of biodiversity net gain requirements, at paragraphs 59 – 76 above.

234. IP1's consultants (FPCR) used the Defra 2.0 metric and associated guidance consistently when carrying out the biodiversity net gain calculations for both the OPP and the RMA application. When granting outline permission, the Council accepted the biodiversity net gain calculations at that time, and on that basis concluded that the proposals were capable of delivering 10% biodiversity net gain, in accordance with development plan policy. Condition 22 was imposed which requires IP1 to submit "updated Biodiversity Net Gain Calculations" which "must be undertaken using the Defra 2 metric and guidance".

235. Part of the reason for imposing the condition in those terms was Policy NE1 of the Vale of Aylesbury Local Plan. Policy NE1 provides that protection and enhancement of biodiversity will be achieved by seeking a biodiversity net gain on developments which must be measurable "in accordance with any methodology [...] to be set out in the Buckinghamshire Biodiversity Accounting SPD". The SPD states at paragraph 2.2 (emphasis added):

> "The latest government metric must be used by applicants as was available in the most recent survey season prior to application unless an alternative is agreed by the council prior to application submission. The calculation is derived by use of a Biodiversity Metric set by the government. This is a spreadsheet-based tool; and can be used in conjunction with a qualitative ecological assessment. The metric is used to calculate the units of biodiversity gained or lost as a result of development on a site, and that which can be gained on a potential off-set site."

236. The Council's local guidance therefore expects the use of the relevant calculation tool (unless an alternative is agreed, which in this case was not). It also confirms that the proper approach is to 'fix' the version of the metric for the purpose of calculating biodiversity net gain in relation to planning applications. The same guidance recommends the use of the tool "in conjunction with a qualitative ecological assessment", suggesting a level of expertise, understanding, application and judgement.

237. Accordingly, the biodiversity net gain calculations for the OPP were produced using the Calculation Tool, which generated a hedgerow creation difficulty multiplier of 0.67. When IP1 applied to discharge the condition, FPCR adopted the same methodology, rationally and consistently with the relevant local policies and technical guidance.

238. The fact that condition 22 refers to Defra 2.0 metric allows comparisons to be made between the biodiversity net gain forecast at outline stage and at the point of discharge of the condition. Data from Defra 2.0 metric is intended to be comparable across different projects but, importantly, it is "unique" and "cannot be compared [...] to any other metric": see rule 4 of the Guide. This point was highlighted by the planning officer at OR/5.159. If IP1 adopted a different methodology at the point of seeking to discharge the condition, as suggested by Ms Wood, then the comparison would be impossible, and, more fundamentally, the calculations would not represent "updated Biodiversity Net Gain Calculations" (emphasis added) as required by the condition.

239. Ms Wood has taken a selective and narrow quotation from the condition rather than reading the condition as a whole (and as part of the overall permission), and in light of the reason for imposing the condition, contrary to the established principles of interpretation: see *DB Symmetry Ltd*.

240. As a matter of ordinary and natural language, condition 22 does not preclude reliance on the Calculation Tool. The term "Defra 2.0 metric" is not defined, and there is no single document going by that name. None of the relevant technical documents provide any guidance as to whether one particular document or tool should take primacy over another. Notably, Ms Wood seeks to advance her own meaning of the term, relying on a dictionary definition of 'metric' in order to support a restrictive interpretation of the condition, which does not reflect how the term would be commonly understood in industry practice. As Mr Goodman explains, "[f]rom a practitioner perspective, the 'metric' is represented by the calculation tool" (Goodman WS/5 - 6). This is also consistent with the development plan and SPD which refers to the metric as "a spreadsheet-based tool".

241. Even adopting Ms Wood's dictionary definition, in which a 'metric' is "a system for measuring something", this is entirely consistent with the Calculation Tool which "is

designed to assess biodiversity applying quantitative rather than qualitative assessment methods using spreadsheets" (Goodman WS/5).

242. In "using" the Guide and the Technical Supplement, there is nothing in these documents which precludes reliance on the Calculation Tool. At page 6, the Guide refers to the development of a calculation tool "in order to simplify the whole process of calculating biodiversity losses and gains". It does not, contrary to Ms Wood's skeleton argument at paragraph 44, suggest that the Calculation Tool is separate from the metric. Likewise, the Technical Supplement describes itself as a "key resource" for "those that need to apply the metric in detail" (paragraph 0.2) and states that it provides (*inter alia*) "the detailed data tables used in the calculation tool" (paragraph 0.3). The data tables therefore set out the data purportedly contained in the Calculation Tool, but it does not independently set the values of a 'Defra metric 2.0'. Any distinction between the Calculation Tool and the 'metric', as being advanced by Ms Wood is entirely artificial and not supported by the technical documentation.

243. Alternatively, even if Ms Wood's interpretation was correct, the User Guide and Technical Supplements do not provide a single 'correct' hedgerow difficulty of creation multiplier, nor do they purport to contain independent raw data on which a user should base their calculations to "use" the metric separately from the Calculation Tool.

244. Ms Wood has not established that the underlying premise of this Gound is correct – i.e. that the difficulty of creation multiplier should be 0.1 and not 0.67, which would result in the loss of -25% of hedgerow units as calculated by Professor Shreeve. It is not common ground, as suggested by Ms Wood in her skeleton argument, paragraphs 48 - 49, that the difficulty multiplier used in FPCR's calculations represents a departure from the Defra 2.0 metric. FPCR's technical note of 29 January 2025 simply acknowledged a difference between the Calculation Tool and the Technical Supplement.

245. As Mr Goodman explains, there is no singularly accepted multiplier which would lead to the conclusion that there is an error in the Calculation Tool. There is an inconsistency which renders the position in relation to the hedgerow difficulty of creation multiplier under metric 2.0 inherently uncertain (Goodman WS/21 – 22). This is underscored by the discrepancies in Professor Shreeve's own calculations if the 0.1 multiplier is applied, including the 25.39% loss presented in his comments on revision K as opposed to the 26.9% loss he cites in response to revision N, without any relevant change to the input to the calculations (Goodman WS/20).

246. Contrary to what is suggested at paragraph 44 of Ms Wood's skeleton argument, the Guide assumes that the user will not check the underlying data in the Calculation Tool. Chapter 4, which contains steps for using the Calculation Tool, has an optional step for "regular users of the tool [who] might want to look at the underlying data to better understand the tool's output" but specifies that this "is not required for normal operation of the tool" (paragraph 4.45). While use of the Calculation Tool may not necessarily be compulsory, it does not follow that the Guide is intended to be read with the Technical Supplement to allow calculations to be undertaken without the use of the Calculation Tool.

247. Ms Wood has failed to explain why IP1 should be required by condition 22 to "go beneath" the Calculation Tool when the Guide is clear that users generally do not need

to do so. If Ms Wood is correct, then condition 22 would impose unreasonable requirements on IP1, including the need to manually override the Calculation Tool where other users may not do so, in circumstances where the 'correct' position is unclear given the inconsistency in the Guide, Technical Supplement and Calculation Tool. There is no basis for interpreting the condition to impose a greater obligation than the law allows.

248. In my view, the Council gave careful consideration to this complex issue. The Council's Ecology Team considered in detail the arguments raised by the objectors, including Professor Shreeve. Their most recent comments, dated 4 February 2025, were included in the OR (see paragraph 73 above). Earlier comments were available online. They concluded:

> "The Ecology Officers consider the response prepared by the applicant to provide a satisfactory justification for the use of 0.67 as the difficulty multiplier in the calculation of proposed hedgerow units. Principally, the multipliers in the Metric cannot be changed, these are protected cells that are pre-defined as set by Defra/Natural England. It is acknowledged that the Technical Supplement referred to by third parties indicates a difficulty multiplier of 0.1 (meaning high difficulty) for the creation of native species rich hedgerows. However, and pertinently, updated versions of the metric apply a difficulty multiplier for creation of native species rich hedgerows of 1.0 (low difficulty of creation). Therefore, it is agreed, in contrast to the concern raised by third parties, the use the Defra 2.0 metric that applies a multiplier of 0.67 provides a more precautionary assessment of the post-development value for hedgerows compared with proceeding versions of the metric."

249. Mr Simpkin, who is the Ecology Team Leader, was appropriately authorised by the Council to make a witness statement on this issue as his team was responsible for the ecological assessment at OPP stage, the section 73 permission and the RMA application. He described the difficulty multipliers applied to hedgerows in the Defra 2.0 User Guide. Ms Wood objected, in particular, to the first line of paragraph 16 of Mr Simpkin's statement where he stated that the examples of higher difficulty had been taken into consideration by his team, "although not explicitly set out in comments to the case officer". I accept that I should place no weight on this sentence as it offends against the principle that local planning authorities should not adduce *ex post facto* evidence to justify their acts or omissions. However, on the evidence that was available to Members when the challenged decision was made, it is reasonable to infer that the Ecology Team considered the User Guide as well as Professor Shreeve's representations in their "very detailed review" and "intense scrutiny" (4 February 2025 comments) and in the detailed report by Ms White, Senior Ecology Adviser, on 4 December 2024.

250. At OR/5.139 - 5.159, the planning officer gave Members detailed advice on the biodiversity net gain issue. In regard to the hedgerow creation multiplier, the OR concluded as follows:

> "5.153 Concerns had been raised by third parties in the use of the multiplier. The Council's Ecology Officer considers the response prepared by the applicant to provide a satisfactory justification for the use of 0.67 as the difficulty multiplier in the calculation of proposed hedgerow units. Principally, the multipliers in the Metric cannot be changed, these are protected cells that are pre-defined as set by Defra/Natural England. It is acknowledged that the Technical Supplement referred to by third parties indicates a difficulty multiplier of 0.1 (meaning high difficulty) for the creation of native species rich hedgerows. However, and pertinently, updated versions of the metric apply a difficulty multiplier for creation of native species rich hedgerows of 1.0. Therefore, in contrast to the concern raised by third parties, the use the Defra 2.0 metric that applies a multiplier of 0.67 provides a more precautionary assessment of the post-development value for hedgerows compared with current versions of the metric. Officers have considered this matter and are satisfied with the approach.
>
> ……
>
> 5.155 The submitted updated metric (version N) states that the net gain for area habitats would be 3.04 units or 10.04%. This would be marginally in excess of that required in condition 22 of the outline permission. Clarity over the hedgerows has also been provided, in particular to confirm that the hedgerows within the site are largely to be retained. The details now show that based on the development coming forward there would be an increase of 1.25 hedgerow units resulting in an increase of 19.44%.
>
> 5.156 It is worth noting that the current application was submitted prior to the implementation of statutory biodiversity gain duty under the Environment Act 2021 that now requires development to deliver a minimum of 10% biodiversity gain (with exemptions). The current applications are assessed against policy and on the basis that Condition 22 requires the delivery of 10% BNG onsite. If the same development proposals (i.e. post development habitats) were to be assessed using the Statutory Biodiversity Metric using current baseline habitats (as they are onsite today), then the calculations would show a much greater increase in biodiversity than 10%. This is in part due to changes in the metric, but also due to the lower value nature of the baseline habitats. It is relevant to note that under the current applications, the proposed development stands to deliver a greater value for biodiversity than would be required by law if assessed using the Statutory Biodiversity Metric and up to date baseline conditions."

251. Thus, officers and Members accepted the Ecology Team's reasoned view that IP1 had provided a satisfactory justification for the use of 0.67 as the difficulty multiplier in the calculation of proposed hedgerow units. They preferred the view of the Ecology Team

to that of Professor Shreeve, on behalf of the objectors. In my judgment, in all the circumstances set out above, the decision to discharge condition 22 was rational and lawful.

252. Ms Wood also submitted that because IP1 did not supply a figure showing the hedgerow net gain figure resulting from applying a difficulty multiplier of 0.1, there was a breach of Article 27(1)(b) of the DMPO since the Council was not provided with the particulars necessary to discharge the condition. It was for the local planning authority to determine whether it had the information necessary to deal with the application and whether the condition for planning permission could be discharged. Consistent with the *Tameside* principle, whether the information provided was sufficient is challengeable only on grounds of *Wednesbury* unreasonableness (see *R (Jayes) v Flintshire CC* [2018] EWCA Civ 1089 at [14]). In circumstances where the Council already had the calculations provided by Professor Shreeve, and where the Council had formed its own view that the 0.67 multiplier was appropriate, it was reasonable for the Council to determine it had the information it needed to make its decision.

Ground 2

253. Ground 2 is parasitic upon Ground 1. I have already found that the Council was entitled to conclude that the multiplier used by IP1's consultants was appropriate and compliant with condition 22. The advice in OR/5.153 that the use of the 0.67 multiplier was "more precautionary" was based upon reasoned advice received from the Ecology Team, drawing on their knowledge of multipliers in later versions of the metric. Therefore the OR was not misleading and did not fail to take into account obviously material considerations.

254. I have already described the advice that the planning officer obtained from the Council's Ecology Team which was set out in the OR. Members were also referred to earlier ecology advice which was available online. Ms White's report of 4 December 2024 annexed Professor Shreeve's report in full and made a detailed response to it. The OR referred to the concerns raised by Professor Shreeve and the objectors, and gave Members sufficient information and advice on the issues raised. There was no obligation on the officers expressly to refer to the calculations provided by Professor Shreeve in the OR as well. The level of detail to include in a report is a matter of expert judgment for the officer in question which can only be challenged on rationality grounds (see *R (Fabre) v Mendip DC* [2017] PTSR 1112 per Sullivan J. at 1120D).

255. Ms Wood submitted that there was a failure on the part of the Council to comply with its *Tameside* duty of inquiry. As Sir Keith Lindblom SPT emphasised in *Jayes* at [14], the manner and intensity of the inquiry to be undertaken is a matter of judgment for the local planning authority. Only if the approach taken was irrational, in the sense that no reasonable decision-maker could have reached a decision without making further inquiries, will the decision be unlawful (see *R (Khatun) v LB of Newham* [2004] QB 37 per Laws LJ at [35]). That test is not met here.

256. Ms Wood also submitted that, in breach of section 100D LGA 1972, Professor Shreeve's calculations were not listed as background papers. However, the definition of a background paper does not extend to any document referred to in a report. The document must be relied on to a material extent in preparing the report (section

100D(5)(b) LGA 1972) and must "disclose any facts or matters on which [...] the report or an important part of the report is based" (section 100D(5)(a)). Professor Shreeve's calculations plainly did not meet this test.

257. Alternatively, even if they were background papers, there was substantial compliance with section 100D LGA 1972 and no prejudice to Ms Wood. Professor Shreeve's comments were referred to in the OR at 5.153, incorporated into a previous consultation response by officers, and published online on the Council's website. Applying the approach in *R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC* [2023] EWHC 1995 (Admin); [2024] JPL 265, at [140]; *R v Soneji* [2006] 1 AC 340 and *A1 Properties Ltd v Tudor Studios RTM Co Ltd* [2024] 3 WLR 601, there is no merit in this point. Further, relief should be refused under section 31(2A) of the Senior Courts Act 1981, and/or as a matter of the court's discretion, as it is highly likely that the outcome for Ms Wood would not have been substantially different had Professor Shreeve's calculations been listed and published as a background paper.

258. The Council was under no general duty to give reasons on an application to discharge a condition (see *R (Laing) v Cornwall Council* [2024] EWHC 120 (Admin), per HH Judge Jarman, at [32]). In any event, the reasons in the OR met the standard in *South Bucks (No 2)* at [36].

259. There is no evidence to support Ms Wood's allegation of deliberate concealment of information from Members on the part of Council officers. The impression I have gained from reading the evidence is that the planning officer and the Ecology Team dealt with this issue in a careful, conscientious and lawful manner.

260. For the reasons given above, Grounds 1 and 2 of Ms Wood's claim do not succeed. Therefore the question of relief and section 31(2A) Senior Courts Act 1981 does not arise.

Final conclusion

261. The Wildfish and Wood claims for judicial review are dismissed on all grounds.