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Case No: CO/589/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2012

Before:

MR JUSTICE KEITH

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Between:

(1) Anthony Elliott **(2) John Payne**	**Claimants**
- and -	
(1) The Secretary of State for Communities and Local Government **(2) The London Development Agency** **(3) The London Borough of Bromley**	**Defendants**

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Mr Robert McCracken QC and Ms Annabel Graham Paul (instructed by **Richard Buxton & Co**) for the **Claimants**
Mr Rupert Warren QC (instructed by **Treasury Solicitors**) for the **First Defendant**
Mr Richard Ground (instructed by **Herbert Smith LLP**) for the **Second Defendant**
The Third Defendant did not appear and was not represented

Hearing dates: 7 and 8 March 2012
Further written representations: 16, 19, 22 and 28 March and 10 April 2012

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Approved Judgment

Mr Justice Keith:

Introduction

1. The Crystal Palace was the most distinctive feature of the Great Exhibition in Hyde Park in 1851. After the exhibition, it needed a permanent home, and the site which was selected for it was the Penge Place Estate in Sydenham Hill. It was to be set in a park designed by Sir Joseph Paxton. The palace was erected there, and the park opened in 1854. The palace was destroyed by fire in 1936, but the park, which eventually became known as Crystal Palace Park, has nevertheless been described as "a national asset". It is listed in English Heritage's Register of Historic Parks and Gardens at Grade II*. Many of the buildings in the park, including the National Sports Centre and the Italian Terraces, are widely known. But the condition of the park is deteriorating. Both the park and several of the listed buildings within it are on the Heritage at Risk Register. That led the London Development Agency ("the LDA") to come up with a strategy for the regeneration of the park to be carried out over a period of perhaps 20 years. In due course, the LDA was granted a 125 year lease of the site of the National Sports Centre and grounds immediately surrounding it and of a farm in the park, together with an option to take a 125 year lease of the whole park, though the LDA never took up that option.

2. The LDA's proposals became known as the Masterplan. It is to be implemented in three phases at an estimated cost of £68m. It has the full support of the local planning authority (the London Borough of Bromley ("Bromley")), the Mayor of London, English Heritage, Natural England and the Garden History Society. But there is principled opposition to the proposals from a number of groups, not least of which is the Crystal Palace Community Association. Their major concern is that the scheme for the regeneration of the park is grandiose and ambitious. The implementation of the LDA's proposals and the subsequent maintenance of the park are never likely to be sufficiently funded. Those elements of the proposals which would enhance the park are therefore unlikely to be completed. But of particular relevance for the present case is the objectors' anxiety about the form which some of the funding will take. Much of the funding will come from public sources, but some of it will come from the residential development of parts of the park. Most of the park is designated as Metropolitan Open Land, and one of the proposed developments will take place on it. Very special circumstances are necessary to outweigh the very strong presumption against development on such land.

3. On 1 November 2007, the LDA applied to Bromley for planning permission for its proposals. Part of the application was for outline planning permission only. The application was regarded as sufficiently important for the Secretary of State for Communities and Local Government to decide that the application should be determined by himself. Following a lengthy hearing before an inspector appointed by the Secretary of State, the inspector submitted a long report to the Secretary of State dated 26 April 2010 in which he recommended that planning permission should be granted subject to various conditions. The Secretary of State took a different view about some of those conditions, but apart from that he granted both full and outline planning permission for the LDA's proposals. The letter in which his decision was given was dated 13 December 2010. Two members of the Crystal Palace Community Association, Mr Anthony Elliott and Mr John Payne, now question the

validity of the Secretary of State's decision by an application under section 288(1) of the Town and Country Planning Act 1990 ("the 1990 Act").

4. There are five grounds of challenge. They are confined to discrete aspects of the Secretary of State's decision. In these circumstances, it is unnecessary to say anything further by way of introduction. Relevant findings by the inspector in his report and the reasons given by the Secretary of State for adopting or rejecting the inspector's recommendations will be referred to in the context of each ground of challenge together with any documents, legislative provisions and authorities which are material to that ground. Since the last of the five grounds alleges that the Secretary of State failed to give sufficient reasons for the conclusions he reached, I shall not be considering that ground separately. I shall do so in the context of each of the other grounds.

Ground 1: Conditions 58-60

5. The proposals which the inspector was considering included proposals for two residential developments in the park. They were close to the Rockhills and Sydenham Gates respectively. The residential development close to the Rockhills Gate was on Metropolitan Open Land, but not the residential development close to the Sydenham Gate. The inspector concluded that there were very special circumstances which were sufficient to outweigh the very strong presumption against development on such land. The Secretary of State agreed with that conclusion.

6. One of the reasons which influenced the inspector's conclusion on the topic was that the Rockhills residential development (as well as the Sydenham residential development) would produce a significant part of the funding for the cost of the improvements to the park. It was estimated that the sale of the two sites on which the developments would take place would raise in the region of £12.8m, but that was prior to the recession. It was therefore important to secure other sources of funding for the LDA's proposals, and to ensure that the construction of the developments did not begin until that funding was in place. Accordingly, among the conditions which the inspector thought should be imposed on the grant of planning permission were conditions 58-60, which were in these terms under the heading "Securing park improvements":

> "58 No works to construct any residential units in a phase of development shall take place until:
>
> > a) details have been submitted to and approved in writing by the Local Planning Authority identifying those park improvements forming part of the development which must be completed prior to first occupation of those residential units together with a cost plan for those improvements (such details and cost plan to be in accordance with the outline specification annexed to these conditions unless otherwise agreed by the Local Planning Authority); and
> >
> > b) an amount equal to the cost of the park improvements as shown in the approved cost plan has

> been deposited in a designated bank account or other fund approved by the Local Planning Authority for the purpose of funding the park improvements.
>
> 59 In the event that the net profits from the sale of any residential units or the net proceeds from the sale of land upon which any residential units are to be constructed (as applicable) exceeds the amount deposited in the designated bank account or other fund referred to in condition 58 prior to the start of works to construct those residential units, then none of the residential units shall be occupied unless the excess profits of the proceeds (as applicable) have been deposited in the same designated bank account or other fund referred to in condition 58.
>
> 60 No residential units in a phase of development shall be occupied until the park improvements approved in writing by the Local Planning Authority pursuant to condition 58 have been completed and a statement of account submitted to the Local Planning Authority identifying the cost of those park improvement works and the extent to which they were funded from the designated bank account or other fund referred to in condition 58."

7. The inspector explained his thinking behind these conditions at paras. 1296-1298 of his report as follows:

> "1296. Commitment to substantial minimum capital contributions arising from housing developments would be made through Condition 58 and the Outline Specification for Park Works. Moreover, the contributions could be confidently anticipated by funding bodies, were they delayed, either by slow restoration of land values or lack of availability of the Rockhills site [since the Rockhills site was at the time a camping and caravan site leased to a caravan club.]
>
> 1297. I see no difficulty in the successful operation of Condition 60, which prohibits occupation of the residential units until the specified Park works have been completed. The money for the Park works would be available before construction of the residential units began, and the two building operations would run in parallel. There would be a useful incentive to show that the Park works were organised so as to give confidence that completion to programme would be achieved, since the housing developer would be reluctant to commit funds for the Park works unless convinced of this.
>
> 1298. In the worst scenario, the capital generated by the housing developments might be consumed without any further funding being secured. This would leave the Park with only a

> small fraction of the Masterplan proposals complete and the housing development on the periphery of the Park in place, albeit with land released from the caravan and camping site for public use. Given the fit between [the] Masterplan proposals and the funding profile I think this is extremely unlikely, even in the coming period of economic restraint."

The inspector came to that view on the basis of conditions 58 and 60. As for condition 59, he said at para. 1316 that it was "necessary to ensure that the full profits from the residential development, above a guaranteed minimum, are directed to the appropriate elements of the Masterplan proposals". And he added, in connection with condition 58, that "the Outline Specification sets a framework of priority for the works towards which funding derived from the residential development would be directed."

8. The Secretary of State agreed with the thinking behind these conclusions. In a letter dated 21 July 2010 to the LDA's representatives, in which he tracked the language of para. 1298 of the inspector's report, the Secretary of State agreed with the inspector that

> "… in the worst case scenario, the capital generated by the housing developments might be consumed without any further funding being secured. This would leave the park with only a small fraction of the Masterplan proposals complete and the housing development on the periphery of the park in place, albeit with land released from the caravan and camping site for public use. However, given the fit between [the] Masterplan proposals and the funding profile, the Secretary of State agrees in principle with the inspector … that this is extremely unlikely, even in a period of economic restraint."

However, the letter went on to state that the Secretary of State had "serious concerns … about the proposed use of conditions to try to ensure that the capital contributions arising from the housing development are used for park improvement works". The problem was that conditions 58-60 "do not provide a legitimate way of ensuring that the capital contributions arising from the housing development are used for park improvement works", since they "require the payment of money" which "would amount to a tax and … the principle that there can be no taxation without clear support in law would thus be breached". The Secretary of State's view was that "any arrangements for the payment of any monies for the improvement works, as originally set out in Conditions 58-60 and [the outline specification] should be the subject of a planning obligation". He therefore invited the LDA "to submit a reformulated section 106 agreement incorporating those provisions contained in Conditions 58-60 and [the outline specification of the inspector's report]". In those circumstances, the Secretary of State deferred his final decision on the application for planning permission "to enable the submission of a reformulated section 106 agreement" covering those matters. The letter stated that the Secretary of State did not regard that as an opportunity for the parties to address any other issues raised during the inquiry.

9. The Secretary of State's concern about the legitimacy of conditions 58-60 was based on Circular 11/95 issued by the Department of the Environment and the Welsh Office on the use of conditions in planning permission. Para. 83 of the Circular reads in part:

> "No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute, except where there is specific statutory authority. Conditions requiring, for instance, the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works on land within the application site, to overcome planning objections to the development e.g. provision of an access road …"

10. The claimants' "primary" point is that the Secretary of State erred in law in regarding conditions 58-60 as unlawful. Section 70(1)(a) of the 1990 Act gives local planning authorities a wide power to grant planning permission "subject to such conditions as they think fit". Conditions 58-60 satisfied the criteria laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 for conditions attached to the grant of planning permission to be lawful, namely that they had to have been imposed for a planning purpose and not for any ulterior one, and to have related reasonably and fairly to the development which was being permitted. It was acknowledged on behalf of the claimants that conditions 58-60 required the payment of money, but it was contended that the conditions were not the sort of conditions prohibited by Circular 11/95. The conditions were necessary to ensure that the harm caused by the development on Metropolitan Open Land was mitigated by securing that the proceeds of sale were used for improvements to the park. In other words, the conditions secured the benefit which would in due course justify what would otherwise have been inappropriate development. They did not take away from the developer funds which it would otherwise have had, and they were not therefore a form of, or equivalent to, taxation.

11. Two other points were made on behalf of the claimants. They are alternative to each other. If the conditions were unlawful, the Secretary of State could not have used a planning obligation under section 106 of the 1990 Act to get over the problem. That would have been a device to circumvent the law. If conditions 58-60 were necessary in order to mitigate the harmful effect of inappropriate development in the park, and if they really did amount to an illegitimate tax, the only rational course open to the Secretary of State would have been to refuse planning permission altogether. On the other hand, if the conditions were lawful, the Secretary of State rejected the mechanism which the inspector thought was appropriate to mitigate the harmful effects of inappropriate development in the park without considering the advantages which conditions have over planning obligations under section 106. Five such advantages were suggested:

(i) Planning obligations under section 106 are only enforceable by the local planning authority. That is a serious weakness if the local planning authority has a financial incentive to divert funding for its own purposes. That is to be contrasted with the power of the Secretary of State as well as the local planning authority to secure compliance with the conditions by serving enforcement and stop notices under sections 182 and 185 of the 1990 Act if it is expedient to do so.

(ii) Planning obligations under section 106 are only enforceable by civil proceedings. That is to be contrasted with the power of the Secretary of State to secure compliance with conditions by a breach of condition notice under section 187A of the 1990 Act which makes any future non-compliance with conditions a criminal offence.

(iii) Planning obligations under section 106 can be modified by the parties to the agreement in which the obligations are recorded. The claimants would not be able to participate in the process and would not have a say as to whether any proposed modifications were appropriate.

(iv) Section 106(3)(b) of the 1990 Act provides that planning obligations under section 106 can bind the successors-in-title of the parties to the agreement in which those obligations are recorded. But section 106 only applies to agreements to which a "person interested in land" is a party. Since the LDA does not have a legal interest in the sites on which the two residential developments were to be built, it is questionable whether any agreement to which it is a party can be said to include a planning obligation at all. That appears to follow from what the Court of Appeal said in *Jones v Secretary of State for Wales* (1974) 28 P. & C. R. 280 about the statutory predecessor of section 106.

(v) Some breaches by the local planning authority of conditions – for example, any proposal to use the funds for some other purpose – would be unlawful and susceptible to challenge by judicial review. No such remedy would be available if the local planning authority was subject only to planning obligations under section 106.

12. In evaluating these arguments, it is important not to lose sight of the fact that the Secretary of State's reluctance to proceed by way of conditions was initially expressed in a letter which represented his provisional views only. It is necessary to take into account the events which subsequently took place. Following the Secretary of State's letter of 21 July 2010, the LDA's solicitors wrote to the Secretary of State on 24 September 2010 contending that his concern about breaching the principle of "no taxation without clear support in law" was unfounded. Mr Payne wrote to the Secretary of State in similar terms on 1 November 2010. But since the objectives which conditions 58-60 sought to achieve could just as easily be realised by suitable planning obligations under section 106, the LDA had turned its attention to such a course. The result was that on 23 September 2010 Bromley and the LDA concluded an agreement which was expressed to be supplemental to a previous section 106 agreement of 7 September 2009 "in order to address the matters referred to" in the Secretary of State's letter of 21 July 2010. Under that supplemental agreement, the LDA agreed that no development would be carried out on the site of the National Sports Centre, unless planning agreements had been concluded between Bromley and

the persons with an interest in the land on which the two residential developments were to be built ("the developers") in which the developers agreed not to carry out any development of the two residential sites until sums equal to the cost of the improvements to the park identified in a cost plan for those improvements had been approved by Bromley had been paid into a designated bank account or other fund held in the joint names of the developers and Bromley for the purpose of funding the improvements to the park.

13. It was in the light of that that in the final decision letter of 13 December 2010, the Secretary of State said that the supplemental section 106 agreement would "fulfil the purpose for which it is intended and meet the specific concerns raised" in the letter of 21 July 2010. The letter added that the Secretary of State was satisfied that the provisions of the supplemental agreement "provide a legitimate way of ensuring that the capital contributions arising from the housing development are used for park improvement works". The Secretary of State also agreed that in the light of the supplemental section 106 agreement conditions 58-60 should be replaced by two new conditions which prohibited the commencement of any development on the two residential sites until the work on the site of the National Sports Centre had commenced. The consequence was that one of the "material considerations" (to use the language of section 70(2) of the 1990 Act) to which the Secretary of State had had regard was the need to ensure that the construction of the developments would not begin until appropriate funding for the improvements to the park was in place, and the supplemental section 106 agreement and the two new conditions met that need.

14. I am sceptical about the claimants' contention that the Secretary of State regarded conditions 58-60 as unlawful. It looks to me as if he simply regarded them as contrary to para. 83 of Circular 11/95. That did not necessarily mean that he regarded them as unlawful. It was for the Secretary of State to decide whether conditions 58-60 were contrary to planning policy, and the court can only interfere if the Secretary of State's view that conditions 58-60 were the sort of conditions which Circular 11/95 prohibited was one which it was not open to the Secretary of State to reach. But that debate is really a sideshow. The real point is that when the Secretary of State came to his final decision, there were two mechanisms for securing the objectives which he wanted to achieve: conditions 58-60 recommended by the inspector and the supplemental section 106 agreement with the two new conditions which had been formulated to meet the Secretary of State's concerns over conditions 58-60. When it came to deciding which of those two mechanisms to adopt, the Secretary of State did not engage with either the LDA or the claimants over their view that conditions 58-60 did not breach the principle of "no taxation without clear support in law". The Secretary of State took the course of least resistance. Whether his view or that of the LDA and the claimants of the legitimacy or otherwise of conditions 58-60 was correct, the Secretary of State adopted the mechanism of planning obligations – despite para. 12 of Circular 11/95 suggesting that, all things being equal, conditions were preferable to planning obligations – because that enabled his objectives to be achieved without having to reach a considered view on whether conditions 58-60 were really prevented by planning policy. That is how I read the relevant passage in his letter of 13 December 2010, and on that basis there is no substance in the contention that he failed to give sufficient reasons for preferring the mechanism of planning obligations to conditions 58-60.

15. That is also the answer to the point that the use of planning obligations was just a device to circumvent the law, or to be more accurate, to circumvent planning policy. It was nothing of the kind. It was simply an alternative means of achieving the desired objective without the risk of the mechanism which was used to achieve that objective being regarded as contrary to planning policy. In any event, even if it were the case that conditions 58-60 would have been contrary to planning policy, it does not follow that planning obligations which have precisely the same effect would also be contrary to planning policy. Circular 11/95 applies to conditions, not planning obligations, and a section 106 agreement was permitted by section 106(1)(d) to include an obligation requiring sums to be paid to the local planning authority.

16. I therefore turn to the argument that the Secretary of State failed to consider the advantages which conditions had over planning obligations under section 106. Two preliminary points should be made. First, in his letter of 1 November 2010 responding to the Secretary of State's invitation to comment on the letter of 21 July 2010, Mr Payne made the point that "the degree of protection to important acknowledged interests would be materially reduced by the use of obligations rather than conditions for the substantive funding requirements". He gave two examples – the ones referred to in paras. 11(i) and 11(v) above. In his final decision letter of 13 December 2010, the Secretary of State said in terms that he had taken into account the comments made in response to his letter of 21 July 2010. To say, therefore, that the Secretary of State had not considered the advantages which conditions had over planning obligations is misconceived. Secondly, the particular advantages relied on by the claimants which conditions are said to have over planning obligations would apply to all proposed developments, not just the LDA's proposals in this case. Since planning obligations are a feature of almost every large planning scheme, the claimants' argument means that planning obligations may well have been used incorrectly many times before.

17. It may be that conditions have at least some of the advantages over planning obligations relied on by the claimants, though it is to be noted that planning obligations can be enforced by injunction (see section 106(5)), and in the event of a breach of a planning obligation to carry out operations, the local planning authority can go onto the land, carry out the operations itself, and recover the reasonable cost of doing so from the developer (see section 106(6)). Moreover, although planning obligations can be modified without recourse to people in the position of the claimants, there is no reason why any such modification cannot be challenged by judicial review if the local planning authority has acted in a way which gives rise to such a claim. In any event, the debate about the respective enforcement regimes for conditions compared with planning obligations has little to do with the central issue – which is whether the Secretary of State could rationally have formed the view that the supplemental section 106 agreement coupled with the new conditions was a reliable mechanism for securing the benefit which he wanted to achieve. It could hardly be said to be an unreliable mechanism simply because of differences in the respective enforcement regimes, especially if one of the reasons why the Secretary of State chose the mechanism he did was to avoid having to reach a considered view on whether his initial thinking that planning policy prevented the use of the particular conditions recommended by the inspector was correct.

18. That brings me to one final point. The hearing of the case was originally fixed for one day. It went into a second, and by lunchtime on the second day I had heard the Secretary of State's and the LDA's counsel's response to the arguments advanced by the claimants' counsel. There was no time left to hear the claimants' counsel in reply. That was why the claimants' counsel put their submissions in reply in writing. (In any event, the claimants' leading counsel, Mr Robert McCracken QC, was not available that day). Those submissions contained completely new criticisms about the supplemental agreement, although they were incorrectly described as additional reasons for preferring the enforcement regime applicable to conditions. The only one of those criticisms which in my opinion is capable of having any substance was that the supplemental agreement was "likely to have unintended, perverse consequences", namely that until someone prepared to develop the two residential sites came forward, work could not begin on the site of the National Sports Centre, even if funding for that work became available from another source, and that could result in the two residential sites being sold at an undervalue to encourage developers to come forward. I do not think that such a consequence could be said to undermine the Secretary of State's decision to regard the supplemental agreement as providing "a legitimate way of ensuring that the capital contributions arising from the housing development are used for park improvement works". Linking the commencement of works on the site of the National Sports Centre to a developer committing itself to develop the two residential sites ensured that what the Secretary of State described in his letter of 21 July 2010 as "past problems of unco-ordinated piecemeal development leading to short-term aims and conflicting solutions" would be avoided.

19. For these reasons, the first ground of challenge fails.

Ground (2): The abolition of the LDA

20. A few weeks after the inspector submitted his report to the Secretary of State, the Government announced that the Regional Development Agencies, including the LDA, were to be abolished by 31 March 2012. That announcement was a matter of concern to people like the claimants who opposed the Masterplan since it was the LDA which was to be responsible for co-ordinating the strategy to implement it. Indeed, its role was described by the inspector as "Masterplan Co-ordinator". In that role, it would be "supporting" Bromley in "facilitating discussions" between Bromley and other local authorities "regarding the funding and governance of the development". It would also be responsible for preparing and reviewing with Bromley the phasing of the development, and for managing and co-ordinating the works, and with Bromley it would be endeavouring to secure grant funding. The LDA's role was described by the inspector as "crucial to the success of the proposals".

21. One of the bodies which opposed the Masterplan was the Crystal Palace Foundation. On 18 August 2010, it wrote to the Secretary of State posing three questions for him to consider: (i) which body would be charged with performing the "crucial" role of Masterplan Co-ordinator for works to be carried out over a period of 20 years, (ii) how would those functions and the Masterplan itself be funded, and (iii) without the LDA undertaking the role of Masterplan Co-ordinator, would the proposed development be acceptable in planning terms? In his final decision letter of 13 December 2010, the Secretary of State said that he had "carefully considered" the matters raised in the Crystal Palace Foundation's letter, but that he was satisfied that

they did not raise "any new substantive issues which require consideration in the context of the applications currently before him and which have not already been considered at the Inquiry and in the Inspector's report". The claimants' case is that the Secretary of State was wrong to conclude that the abolition of the body which had assumed the role of Masterplan Co-ordinator and which was crucial to the success of the proposals did not raise "new substantive issues" which he had to consider.

22. This is a particularly unpromising line of challenge in the light of the previous section 106 agreement of 7 September 2009 between Bromley and the LDA, in which, by clause 1.9.1, the LDA's obligations under the agreement were to be assumed by its successors-in-title or assignees or any person deriving title through the LDA. Moreover, para. 2 of the schedule to the agreement went further. It gave Bromley the power to appoint a new Masterplan Co-ordinator instead of the LDA or its successors-in-title. Under the heading "Role of the LDA", it provided:

> "The LDA shall be the Masterplan Co-ordinator from the date of the Planning Permission until such time as another organisation is appointed by [Bromley], whereupon the LDA shall be released from the obligations contained in this Schedule and they shall pass to the successor organisation."

It is inconceivable that these provisions had escaped the Secretary of State's attention, especially as the inspector had made the point in para. 1324 of his report that the LDA's role as the Masterplan Co-ordinator had been underpinned by the section 106 agreement. So if the role of Masterplan Co-ordinator was to be assured (a) by the assumption of the LDA's obligations by its successors-in-title or (b) by the appointment by Bromley of a body to take over from the LDA, the only question which could conceivably have remained for the Secretary of State to consider was whether the LDA's successors-in-title or any new organisation appointed by Bromley would have the same commitment to the Masterplan as the LDA. Press reports at the time suggested that funding for the "Crystal Palace Park revamp" had been delayed, but the issue here is not about funding, at least not directly. It is true that the inspector said at para. 1301 of his report that "[c]redible future governance of the Park would be necessary for its own sake *and to give the confidence to funding bodies*" (emphasis supplied), but the issue for present purposes is whether a successor organisation would have the commitment to fulfil the role of Masterplan Co-ordinator which included its willingness to do what it could to generate funding for the Masterplan. No submissions were advanced on behalf of the claimants to suggest that there was anything which might have caused the Secretary of State to think that the LDA's successors-in-title or any new organisation would not carry out the important co-ordinating role which the LDA had assumed.

23. Events which have occurred since the Secretary of State's final decision letter of 13 December 2010 have shown that the Greater London Authority is the LDA's successor-in-title. Section 191 of the Localism Act 2011 came into force on 31 March 2012. It provided for the abolition of the LDA on that date, and empowered the Secretary of State, after consulting the Mayor of London, to transfer the property, rights and liabilities of the LDA to, amongst other bodies, the Greater London Authority. Indeed, it had been announced on 21 June 2011 that the functions of the LDA would be assumed by the Greater London Authority, and that also took place on

31 March 2012, along with the transfer to the Greater London Authority of the LDA's property, rights and liabilities. And although the issue is not about funding as such, it is to be noted that in his final draft consolidated budget for 2012-13, the Mayor of London announced that he had made provision for £2.5m to be spent on the regeneration of the park in the following financial year (in addition to £2m for the maintenance of the National Sports Centre). Moreover, Bromley has been taking its own steps to ensure that the regeneration of the park is properly managed. Last year, its executive committee was asked to approve the creation of a management body which would investigate the appointment of a non-profit making body for that purpose, and if such a body was created, to report to the executive committee by the end of 2012 on its proposals for such a body.

24. It might have been better if the Secretary of State had actually said in his final decision letter of 13 December 2010 that there was no reason to suppose that any successor organisation of the LDA would not be committed to performing the role of Masterplan Co-ordinator. But that is what he must have meant when he said that the abolition of the LDA did not raise a "new substantive" issue which required further consideration. In the circumstances, the issue was not a "principal important controversial" one (to use the language which Lord Brown approved in *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953 at [36]) such that reasons had to be given for the Secretary of State's conclusion on it.

25. For these reasons, the second ground of challenge fails.

Ground 3: Outline planning permission

26. The LDA's application for planning permission which the Secretary of State was determining was a hybrid application. On the face of it, that meant that it was an application for *full* planning permission for what the application form referred to as "[the] National Sports Centre and surrounding area", and an application for *outline* planning permission for the remainder of the LDA's proposals. At the beginning of the inquiry, the Crystal Palace Community Association took the point that the application for planning permission was invalid because that part of the application which was for outline planning permission sought outline planning permission for matters which could not be the subject of outline planning permission. The inspector did not agree. He thought that the part of the application which was for outline planning permission sought outline planning permission for matters which could be the subject of outline planning permission. The Secretary of State went along with the inspector's view. By this ground of challenge, the claimants argue that the Secretary of State erred in law in agreeing with the inspector on this issue.

27. The LDA's application for planning permission was made pursuant to section 58(1)(b) of the 1990 Act which provides that planning permission may be granted by the local planning authority (or, as here, by the Secretary of State if he decides to determine the application himself) on application to the authority in accordance with a development order. At the time of the inquiry, the relevant development order was the Town and Country Planning (General Development Procedure) Order 1995 ("the 1995 Order"). Between the submission of the inspector's report to the Secretary of State and the Secretary of State's decision on the LDA's application, the 1995 Order was superseded by the Town and Country Planning (Development Management

Procedure) (England) Order 2010 ("the 2010 Order"). Since the language of the relevant articles is identical in both orders, it is not necessary for me to decide which order governed the LDA's application, but for convenience I propose to refer to the articles in the 1995 Order because that was the Order to which I was referred at the hearing.

28. The claimants' case is beguilingly simple. Art. 3 of the 1995 Order relates to applications for outline planning permission. Art. 3(1) provides:

> "Where an application is made to the local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for the authority's subsequent approval."

The phrase "outline planning permission" has a limited meaning. It is defined in Art. 1(2) of the 1995 Order as meaning

> "… a planning permission for the erection of a building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters …"

Since outline planning permission can therefore be granted only for the erection of a building, the definition of "building" in Art. 1(2) is important. "Building" is defined as including

> "… any structure or erection, and any part of a building, as defined in this article, but does not include plant or machinery or any structure in the nature of plant or machinery…"

The argument is that the following features of the LDA's application for planning permission were for things other than the "erection" of a building, even with the extended definition of "building": (a) an application for the change of use of part of the camping and caravan site to public open space, (b) an application for the change of use of a former museum in the park to a park rangers' facility, (c) an application for the removal of existing hard surfaces and the establishment of new car parking facilities (which the claimants described as major engineering operations), (d) an application for landscaping (which the claimants described as radical and having been sought for its own sake, and much of which, they contended, amounted to engineering operations), and (e) an application for what was described as "alterations to ground levels with new pedestrian paths" (which the claimants also said was sought for its own sake and amounted to engineering operations).

29. The main argument advanced on behalf of the Secretary of State challenges the premise on which the claimants' argument is based. It is said that the LDA's application never included an application for outline planning permission at all. It was a hybrid application only in the sense that it was a detailed application in respect of the National Sports Centre and the surrounding areas, but it was not detailed in respect of any of the other proposals, save in respect of means of access to the park. Since it was not an application for outline planning permission, it was open to the local planning authority to exercise its inherent power to grant planning permission

subject to a condition specifying reserved matters for the authority's subsequent approval, and it did not matter if there were features of the application which were for things other than the "erection" of a building, since that was a requirement only of an application for outline planning permission.

30. A possible difficulty with this argument is that the application form completed on behalf of the LDA which sought planning permission in the first place described the application as being one for outline planning permission. Section 5 of the form included a number of boxes identifying the different types of application which could be made. The one box which was ticked was the box marked "outline". It is said on behalf of the Secretary of State that the form is not really designed for large developments, that there was not even a box for a hybrid application, and that "outline" in the form only meant "not detailed". That is said to explain why the schedule attached to the application form which identified the proposals for which planning permission was being sought referred to the application as being "PART OUTLINE". What it meant was that part of the application was not detailed.

31. It does not look as if, at the hearing before the inspector, the LDA argued that the application was not in part an application for outline planning permission. So when the inspector addressed the point taken on behalf of the Crystal Palace Community Association, he simply considered whether there were features of that part of the application which was an application for outline planning permission which were for things other than the "erection" of a building. In those circumstances, I propose to address first the alternative argument advanced on behalf of the Secretary of State, and the one advanced on behalf of the LDA at the hearing before the inspector, which is as follows. The schedule attached to the application form described the proposals for which planning permission was sought as a "[c]omprehensive phased scheme for landscaping and improvement of [the] park". It then set out the various things which the scheme comprised. The first was the "demolition of and alterations to existing structures and buildings". The outline planning permission which the LDA claimed it was applying for was the erection of those buildings, and when the application form sought outline planning permission for things other than the erection of these buildings, the things for which outline planning permission was being sought all related to "reserved matters" for which the subsequent approval of the local planning authority was being sought.

32. The claimants' response to this alternative argument has two planks. First, to treat the application as having been an application for the erection of buildings is a mis-description of what the LDA's proposals really amounted to, which was nothing less than the complete "makeover" of the park. At the hearing before the inspector, the LDA's response to this argument was to identify the many buildings within the park to which it was said that its application for outline planning permission related. Fourteen of them were referred to. The LDA made two points about them: (i) at least one of the buildings for which planning permission was sought was in each of the 8 zones of the park to which the Masterplan related, and (ii) all of those buildings would be serving the park. It is questionable whether the "residential units" would be serving the park, but leaving that aside, one can see what the LDA was saying. The proposals may to the lay mind have appeared to be a scheme for the makeover of the park, but they were in truth an application for outline planning permission for the erection of a number of buildings, with a large number of matters reserved for

subsequent approval. As far as I can tell, the inspector did not address this issue in his report, but he cannot have overlooked it, and he must be regarded as having agreed with the LDA to have rejected the argument that the application for outline planning permission was invalid. I have no doubt that the view which the inspector must be treated as having formed of the nature of the LDA's application was open to him.

33. The claimants' second response to the alternative argument advanced on behalf of the LDA and the Secretary of State is that reserved matters have to relate to the buildings for whose erection outline planning permission was sought for the reserved matters to have been the kind of reserved matters contemplated by Arts. 1(2) and 3 of the 1995 Order. That itself is highly debatable, but assuming it to be correct, the case advanced on behalf of the Secretary of State and the LDA is that the reserved matters did indeed relate to the buildings for whose erection outline planning permission was being sought.

34. To evaluate that argument, it is necessary to bear in mind how the 1995 Order defines "reserved matters". Art. 1(2) provides:

> "'reserved matters', in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application –
>
> (a) access;
>
> (b) appearance;
>
> (c) landscaping;
>
> (d) layout; and
>
> (e) scale, within the upper and lower limit for the height, width and length of each building stated in the application for planning permission in accordance with article 3(4) …"

Since "access" and "landscaping" are reserved matters, it is necessary to bear in mind how the 1995 Order defined them. They are very broadly defined in Art. 1(2) as follows:

> "'access', in relation to reserved matters, means the accessibility to and within the site, for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access networks; where 'site' means the site or part of the site in respect of which outline planning permission is granted or, as the case may be, in respect of which an application for such permission has been made …"

> "'landscaping', in relation to a site or any part of a site for which outline planning permission has been granted or, as the case may be, in respect of which an application for such permission has been made, means the treatment of land (other than buildings) for the purpose of enhancing or protecting the amenities of the site and the area in which it is situated and includes screening by fences, walls or other means, the planting of trees, hedges, shrubs or grass, the formation of banks, terraces or other earthworks, the laying out or provision of gardens, courts or squares, water features, sculpture, or public art, and the provision of other amenity features …"

In the light of these definitions, it is necessary to consider each of the features of the application for outline planning permission which are said to be either not reserved matters at all, or not reserved matters relating to the buildings for whose erection outline planning permission was being sought.

35. I deal first with landscaping. One of the arguments which was advanced to the inspector on behalf of the Crystal Palace Community Association was that "the proposed landscaping is not made necessary by the proposed buildings". The inspector rightly rejected that argument in para. 1311 of his report when he said that such an argument would "exclude many delightful but unnecessary landscaped gardens from approval under outline permission". If what was being argued was that the scale of the landscaping had to be proportionate in some way to the size of the buildings for which outline planning permission was being sought, that was not what the 1995 Order said. The other argument advanced on behalf of the Crystal Palace Community Association was that the landscaping was being sought for its own sake. What was meant by that was that the extensive nature of the landscaping was such that it could not properly be regarded as relating to the buildings for whose erection outline planning permission was being sought. What the inspector said about that in para. 1311 of his report was that landscaping could form part of an outline application "alongside a building". That was his way of saying that the proposals for landscaping in the Masterplan related to the buildings for whose erection outline planning permission was being sought. I do not believe that it was not open to the inspector, and therefore to the Secretary of State, to reach that conclusion.

36. Both the landscaping in general, as well as the removal of existing hard surfaces and the "alterations to ground levels with new pedestrian paths" in particular, are said to have amounted to "engineering operations". It was common ground before the inspector that permission for engineering operations could not be sought on their own on an application for outline planning permission. But the inspector held that that did not mean that landscaping which could only be effected by engineering operations could not be characterised as "landscaping". As the inspector said at para. 1310 of his report:

> "The engineering operations are sometimes contained within landscaping proposals, whether or not as a reserved matter whose definition embraces banks, terraces or other earthworks … There appears to be nothing within the definition of outline planning permission to prohibit this."

I agree. The same applies to the "alterations to ground levels with new pedestrian paths".

37. That reasoning also applies to the establishment of new car parking facilities. Car parking facilities come within one of the reserved matters, namely access, being accessibility for vehicles to the site on which the buildings for whose erection outline planning permission is being sought. To the extent that the establishment of new car parking facilities can only be effected by engineering operations, that did not mean that car parking facilities did not come within the definition of "access" in the 1995 Order.

38. That leaves the two features of the proposals which related to applications for change of use: the change of use of the camping and caravan site to public open space, and of the former museum to a park rangers' facility. As with engineering operations, it was common ground before the inspector that permission for change of use could not be sought on its own on an application for outline planning permission. The inspector did not regard that as a problem. He noted in para. 1310 of his report that the fact that only outline planning permission had been sought for the development of the Greenwich Peninsula had not been treated as a bar to the grant of permission for the change of use of the building previously known as the Millennium Dome.

39. That is not surprising. When it comes to an application for permission for the change of use of land or a building, the applicant does not have to provide details of the work which might have to be done to put that change of use into effect. But importantly, the LDA's application for permission for change of use was not sought *on its own* in the application for outline planning permission. The application for the change of use of the camping and caravan site to public open space and the former museum to a park rangers' facility was made in the context of applications for the erection of buildings in the zones in which the camping and caravan site and the former museum were. In my opinion, there was nothing to prevent the LDA from applying for outline planning permission in respect of erection of these buildings, together with an application for the change of use for land or buildings within the zones in which these buildings were. To the extent that the Secretary of State adopted the reasons given by the inspector on all these matters, these reasons were sufficient to enable the claimants to know why the technical point taken on their behalf about outline planning permission had failed.

40. Finally, if I had concluded that the application for outline planning permission should not have included any application relating to the change of use of the camping and caravan site and the former museum, I would not have exercised my discretion under section 288(5)(b) of the 1990 Act to quash the Secretary of State's order granting planning permission. The argument that the application for the change of use of the camping and caravan site and the former museum should have been made in the context of an application for full, as opposed to outline, planning permission is an arid one, since the quashing of the Secretary of State's order and the reconsideration of the application by the Secretary of State in the context of an application for full planning permission would be a waste of time. There would not be anything more for the Secretary of State to consider which he has not already considered in the light of the inspector's report. In these circumstances, it would not be appropriate for a

development which the inspector and the Secretary of State thought was in the public interest to be held up on technical grounds when the outcome would be just the same.

41. For these reasons, the third ground of challenge fails.

Ground 4: the Habitats Directive

42. There was evidence before the inspector that foraging bats commuted across the park. Trees in the vicinity of the Rockhills residential development would be lost if the development went ahead, and a survey conducted in 2007 and referred to in the Environmental Statement stated that their loss was likely to have a significant adverse effect on their flight-line and foraging habitats. However, the inspector concluded in para. 1199 of his report that the implementation of the Masterplan "would not critically harm bat commuting routes". In addition, the inspector noted that an outline ecological management plan would need to be approved by Bromley, and a detailed plan would be required before works commenced in any part of the development. His view was that these plans would "give scope for adequate mitigation of harmful effects". He also noted that the Environmental Statement assessed that the development would have only a minor adverse impact on the breeding and foraging habitats of bats when steps had been taken to mitigate the harm to them which would otherwise have been caused.

43. The inspector's overall conclusion was that despite the impact which the development would have in the short term on the commuting routes of bats and on their opportunities for foraging and roosting – which he clearly regarded would be relatively minor – planning permission should nevertheless be granted. He expressed this view in para. 1201 of his report as follows:

> "The alternative would be to do nothing substantial to the Park, resulting in loss of the minor beneficial effect to bats of the completed scheme. This would be unsatisfactory, not only because of the loss to biodiversity, but also because the substantial benefits of the Masterplan would be lost in other areas, including regeneration, open space, heritage, sport, and education. The Secretary of State may consider that, in total, these aspects amount to Imperative Reasons of Overriding Public Importance [*sic*] (IROPI)."

44. The reference to IROPI is a reference to a concept in Council Directive 92/43/EEC ("the Habitats Directive") which permits a development which has adverse implications for the habitats of protected species to be carried out nevertheless "for imperative reasons of overriding public interest". The inspector was not expressing a view himself on whether the benefits of the Masterplan constituted imperative reasons of overriding public interest for permitting the development. He left that to the Secretary of State. In fact, the Secretary of State did not expressly refer to it. In his letter of 21 July 2010, the Secretary of State said that he had "had particular regard to the impact on bats" which he was aware was a species protected by the Habitats Directive. He noted that consideration had to be given to retaining a particular tree which had bat roosting potential, or to mitigating its loss. He agreed with the inspector that that could best be done as part of the ecological management plan and

the measures dealing with the treatment of trees, both of which were covered by conditions recommended by the inspector. The Secretary of State concluded:

> "Overall, like the Inspector, and for the reasons given by him (IR1192-1209), the Secretary of State is satisfied that the proposals would enhance biodiversity associated with the park over the long term and that, over the construction period, subject to the mitigation measures outlined, the effect would be acceptable."

The Secretary of State did not depart from any of that in his final decision letter of 13 December 2010.

45. One of the original grounds of challenge related to what was said to be the Secretary of State's failure to consider whether the benefits of the Masterplan constituted imperative reasons of overriding public interest for permitting the development. But the skeleton argument prepared by the claimants' counsel did not refer to this argument at all. The only point taken in the skeleton argument related to the justification for the residential developments at Rockhills and Sydenham Gates, namely that they would produce a significant part of the funding for the cost of the improvements to the park. It was said that the desirability of raising money by development – for however worthy a public purpose – could not as a matter of community law constitute an imperative reason of overriding public interest for permitting the development. Such an approach was said to be inconsistent with the purpose of the Habitats Directive, since the need to raise money for public projects is always present, and could not constitute the "exceptional circumstances" which the Court of Justice of the European Union recently held in *Marie-Noelle Solvay v Région Wallone* (Case C-182/10) are required if the reasons for permitting a development are to be regarded as imperative ones of overriding public interest. When it came to the hearing of this application, both points were taken, although the one which was developed by Mr McCracken was the one which had not been referred to in his skeleton argument.

46. In order to evaluate the claimants' arguments, it is necessary to consider the relevant provisions of the Habitats Directive and their domestic implementation. The relevant provisions of the Habitats Directive are Arts. 12.1 and 16.1. Art. 12.1 requires member states to establish a system of strict protection for a number of species including bats by prohibiting, among other things, the deterioration or destruction of their breeding sites and resting places (Art. 12.1(d)). However, Art. 16.1 permits member states to derogate from the requirements of Art. 12.1 for "imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment" (Art. 16.1(c)), provided that "there is no satisfactory alternative" and that "the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range".

47. The Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations") gave effect domestically to the Habitats Directive. The core provisions for present purposes are regs. 9(1) and 9(5). Reg. 9(1) provided:

> "The appropriate authority and the nature conservation bodies must exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive."

Reg. 9(5) provided:

> "Without prejudice to the preceding provisions, a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

Two points need to be made about these provisions. First, the duties imposed by them are imposed on different bodies. Reg. 9(1) imposes duties on "[t]he appropriate authority and the nature conservation bodies". Reg. 9(5) imposed duties on "a competent authority". Secondly, the duties imposed by the provisions are different. The duty imposed by reg. 9(1) was for the relevant bodies "to secure compliance with the requirements of the Habitats Directive". The duty imposed by reg. 9(5) was for them merely to "have regard" to its requirements.

48. The claimants' case is that the Secretary of State was both the "appropriate authority" for the purpose of reg. 9(1) and "a competent authority" for the purpose of reg. 9(5) since

(a) reg. 3(1) of the Habitats Regulations defines "the appropriate authority" in relation to England as meaning the Secretary of State, and

(b) reg. 3(1) of the Habitats Regulations provides that "competent authority" is to be construed in accordance with reg. 7, and reg. 7 provides that the "competent authority" includes any Minister of the Crown.

Accordingly, when it came to exercising his functions under enactments relating to nature conservation, the Secretary of State had to exercise them in such a way as to secure compliance with the Habitats Directive, and when it came to exercising any of his functions, he had to have regard to the requirements of the Habitats Directive.

49. What were the relevant functions of the Secretary of State? Reg. 41(1)(d) of the Habitats Regulations makes the damage or destruction of a breeding site or resting place of a wild animal of a European protected species (such as bats) a criminal offence. However, reg. 53(3) provides that reg. 41 does not apply to anything done under or in accordance with a licence granted under reg. 53(1). By regs. 53(1) and 53(2)(e), a licence may be granted for "imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment" (thereby tracking the language of Art. 16.1(d) of the Habitats Directive). Such a licence can only be granted by "the relevant licensing body", and reg. 56(3) provides that in the case of licences granted for the purpose specified in reg. 53(2)(e), "the relevant licensing body" means "the appropriate body", i.e. the Secretary of State. Accordingly the claimants' case is that one of the functions of the Secretary of State was to consider whether to grant a

licence for an activity which would otherwise be a criminal offence. In considering whether to grant such a licence, the Secretary of State had to consider whether there were imperative reasons of overriding public interest which should permit that activity, and the Secretary of State's failure to consider that issue amounted to a breach of his duties under regs. 9(1) and 9(5).

50. In my opinion, the flaw in this elaborate argument is that when the Secretary of State was considering whether to grant planning permission for the proposals in the Masterplan, he was not exercising any functions "under the enactments relating to nature conservation". He was exercising his planning functions under the 1990 Act, not his nature conservation functions under the Habitats Regulations. He might in due course be exercising his nature conservation functions under the Habitats Regulations – for example, if and when he is asked to grant a licence under reg. 56 for such purposes as makes him the relevant licensing body. But until then, his duty has been the more limited one under reg. 9(5) of the Habitats Regulations, which was to have regard to the requirements of the Habitats Directive to the extent that they may be affected by the exercise of his planning functions under the 1990 Act.

51. The extent of that duty was considered by the Supreme Court in *R (on the application of Morge) v Hampshire County Council* [2011] 1 WLR 268. The court was considering an earlier version of reg. 9(5), namely reg. 3(4) of the Conservation (Natural Habitats etc) Regulations 1994 as amended, though the language of reg. 3(4) is identical for all practical purposes. At [29], Lord Brown said:

> "… I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty."

52. The reference to Natural England is important. Natural England is the nature conservation body for England. The inspector noted that it did not object to the proposals despite the impact which they would have on the foraging and roosting habitats of bats. At [30], Lord Brown went on to say:

> "Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so."

That applies just as much to the Secretary of State when he has decided to determine the application for planning permission himself. Of course, Natural England may not in terms have expressed itself satisfied that the proposals in the Masterplan would comply with Art. 12 of the Habitats Directive. Natural England was only not objecting to the proposals – presumably on the basis that the impact on the foraging and roosting habitats of bats would be relatively modest. But the upshot was that when the Secretary of State was obliged to have regard to the requirements of the Habitats Directive to the extent that they may be affected by his planning functions under the 1990 Act, he was entitled to have regard to Natural England's views about the impact of the proposals on the foraging and roosting habitats of bats, and to grant planning permission unless it was likely that (a) a licence under reg. 53 would be required and (b) when it was applied for, it would be refused.

53. Judgment in *Morge* was handed down on 9 January 2011, a few weeks after the Secretary of State made the decision which is being challenged in this case. At that time, the test was the more onerous one adopted by the Court of Appeal in *Morge* – reported at [2010] PTSR 1882 – and in *R (on the application of Woolley) v Cheshire East Borough Council* [2010] Env. LR 57, namely that if the planning committee was uncertain whether or not a licence under reg. 53 would be granted, planning permission should be refused. So if the Secretary of State took the view that it was likely that a licence under reg. 53 would be granted if it was sought, all the more so for him to have thought that it was unlikely that it would not be granted if it was sought.

54. That brings me to the question whether the Secretary of State addressed the issue whether there were imperative reasons of overriding public interest for permitting the development, because he would have had to consider that to comply with his duty under reg. 9(5) of the Habitats Directive. Although he did not refer to "IROPI" as the inspector had done, he would have seen the inspector's reference to "IROPI", and it is inconceivable he did not know what that was a reference to, or that he thought that it could be ignored – especially as the inspector had said in terms that "IROPI" was something which the Secretary of State had to consider. It would have been better if the Secretary of State had spelt out that he had considered the issue, but I have concluded that he must have done so. On that basis, there is no substance in the contention that he failed to give sufficient reasons for his conclusions on "IROPI". The reasons which he gave in his letter of 21 July 2010 were sufficient.

55. I turn to the second plank of the claimants' case on the topic of bats, namely that the need to raise funds for a development could not amount to an imperative reason of overriding public interest for permitting the development. What the Secretary of State had to consider was whether there were imperative reasons of overriding public interest for permitting the development despite the adverse impact which they would have on the foraging and roosting habitats of bats. That involved a balancing exercise in which the relatively modest impact which he thought the LDA's proposals would have on bats' habitats when steps to mitigate that impact had been implemented had to be weighed up against the overall benefits to the local community and to our national heritage, as well as to foraging bats in the long term, which the implementation of the proposals would provide. As the court said in *Solvay* at [74], "[t]he assessment of any imperative reasons of overriding public interest and that of

the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration."

56. The court went on to say at [76] and [77] that "[w]orks intended for the location or expansion of an undertaking [will] only in exceptional circumstances" satisfy the condition that the development "must be of such importance that it can be weighed up against [the] directive's objective of the conservation of natural habitats …". But you cannot get from that that if a particular feature of a set of proposals was included only because it would provide some of the funding for the development as a whole, and if it happened to be that aspect of the development which would have an impact on the conservation of natural habitats, there cannot have been imperative reasons of overriding public interest for permitting the development.

57. For these reasons, the fourth ground of challenge fails.

Conclusion

58. It follows that the claimants' application questioning the validity of the Secretary of State's decision to grant the LDA outline planning permission for its proposals must be dismissed. There will be no need for the parties to attend court when this judgment is handed down, because at the hearing I was told that it had been agreed that if the application was dismissed, the claimants should only be ordered to pay the Secretary of State's costs amounting to £2,500.00 inclusive of VAT, and that there should be no order relating to the LDA's costs. Those are the orders for costs which I make. If the claimants wish to apply for permission to appeal, their solicitors should notify my clerk of that within seven days of the handing down of this judgment, and I will consider that question without a hearing on the basis of such written representations as are made. However, any appellant's notice will still have to be filed within 21 days of the handing down of this judgment.