Case No: CO/1095/2012

Neutral Citation Number: [2012] EWHC 3130 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2012

Before:

THE HON. MRS JUSTICE NICOLA DAVIES DBE

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Between :

The Queen on the Application of Long	**Claimant**
- and -	
Monmouthshire County Council	**Defendant**
Optimisation Development Ltd	**Interested Party**

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- -

Mr John Steel QC and Ms Jennifer Thelen (instructed by **Richard Buxton**) for the **Claimant**
Mr Richard Ground (instructed by **Eversheds LLP**) for the **Defendant**
Mr James Maurici (instructed by **Gordons LLP**) for the **Interested Party**

Hearing dates: 4, 5 & 8 October 2012

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Judgment

Mrs Justice Nicola Davies:

1. The claimant seeks to challenge the decision made on 7 November 2011 by the defendant, Monmouthshire County Council ("the Council") granting planning permission to the interested party for the demolition of the existing cattle market and associated buildings and the construction of a new library, Morrisons supermarket and associated car park and landscaping at 1 Park Road, Abergavenny ("the decision").

2. The claimant is the founding member of the Abergavenny town and surrounding rural community opposition group, "Keep Abergavenny Livestock Market" ("KALM"). She brings these proceedings on its behalf. The claimant challenges the decision on the ground that it was unlawful in that it was made:

   i) contrary to Regulation 3 of the Town and Country Planning (Environmental Impact Assessment (England and Wales)) Regulations 1999, SI 1993/293 ("the EIA Regulations");

   ii) contrary to Regulation 61(1) of the Conservation of Habitats and Species Regulations 2010 ("the Habitat Regulations");

   iii) contrary to the Development Plan Policy ("UDP") and without proper consideration of that conflict; and

   iv) contrary to the statutory obligations which bind the Council with respect to the livestock market which is currently operational in Abergavenny.

3. On 8 June 2012, Singh J granted permission to judicially review the decision on the basis that the claimant's grounds were arguable and the case is one which raises issues which are of public importance to the area of Abergavenny.

4. KALM was formed in February 2009. Its members which number approximately 25, together with more than 500 supporters, consist of individuals and farmers who use the market. KALM objected to the development proposals, in particular to the closure of the livestock market and demolition of the slaughterhouses on the site.

5. The cattle market in Abergavenny ("the cattle market") has for many years been used as a livestock market. Its use for such a purpose was, until recently, provided for by the Abergavenny Improvement Acts of 1854, 1860 and 1871. Those acts were partially repealed by an order of the Welsh Ministers which came into force on 26 March 2012. Judicial review proceedings in respect of the order were heard immediately before this judicial review challenge.

6. The site is approximately 1.9 hectares. It houses the livestock market, accommodates slaughterhouses and is predominantly hard standing. It is located in the north east section of the central shopping area of Abergavenny town centre. It is bound to the north by Park Road, beyond which lies Bailey Park. It is bound on the remaining three sides by the Abergavenny Conservation Area and by listed buildings on Lion Street which face the site.

7. The site is near to the River Usk, an EU – designated Special Area of Conservation (SAC) and Site of Special Scientific Interest (SSSI). The claimant contends that there

is potential for contaminated surface water from the site to enter the River Usk, via the River Gavenny.

8. The cattle market has previously been the subject of development proposals, one proposal in 2004 resulted in a resolution to grant planning permission for a large food store.

9. The application for planning permission by the interested party was considered by the Council's Planning Committee on 14 June 2011. A detailed planning officer report was prepared in advance of this meeting, it fully analysed the planning merits and recommended the grant of planning permission. The Committee accepted the officer's recommendation and resolved to grant planning permission subject to conditions and a Section 106 legal agreement.

10. Planning permission has been separately granted for a replacement livestock market near Raglan. That permission has not been the subject of any sustained legal challenge. A Memorandum of Understanding has been agreed pursuant to which the Council has committed to provide a livestock market within the geographical boundaries of Monmouthshire for at least 50 years.

The law

11. An application for judicial review is not an opportunity to contest the planning merits of a decision. Questions of relevance and weight are matters for the Planning Committee, *Newsmith Stainless Ltd v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74 [5-8] per Sullivan J (as he then was); *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759 Lord Hoffmann 780:

> "… the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority ..."

12. In reaching a decision, the Planning Committee is entitled and required to exercise its judgment having had regard to the recommendation of their planning officers. The officer's report is addressed to members of the Planning Committee who may be expected to have substantial local and background knowledge, *R v Mendip DC, ex p Fabre* (2000) 80 P. & C.R. 500.

EIA developments

13. The Town and Country Planning (Environmental Impact Assessment) Regulations 1999 ("the EIA Regulations") provide for determinations to be made as to whether planning applications for certain types of project should be subject to an Environmental Impact Assessment ("EIA"), a process referred to as "screening". Determinations as to whether an EIA is required are made by local planning authorities as "screening opinions" and by the Secretary of State as "screening directions". The development in issue came within the provisions of Schedule 2 of

the EIA Regulations, it being an "Urban Development Project" (shopping centre and car parks) on a site in excess of 0.5 hectares.

14. Schedule 3 to the EIA Regulations sets out the selection criteria which must be considered for screening of Schedule 2 development. They include: "Characteristics of development" including size, cumulation with other development, pollution and nuisance (paragraph 1). "Location of development", this includes:

> "The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to –
>
> (a) the existing land use;
>
> …
>
> (c) the absorption capacity of the natural environment, paying particular attention to the following areas –
>
> (iv) nature reserves and parks;…
>
> (viii) landscapes of historical, cultural or archaeological significance." (paragraph 2)

"Characteristics of the potential impact" which include the extent, probability, duration and reversibility of the impact (paragraph 3).

15. Regulation 3 of the EIA Regulations prohibits the granting of planning permission for a Schedule 2 development which is "likely to have significant effects on the environment by virtue of factors such as its nature, size or location" unless the EIA procedures have been followed. In respect of all Schedule 2 development the local planning authority must make its own formal determination of whether or not an EIA is required by way of a screening opinion.

16. As to the screening opinion, a number of principles are identified in the relevant authorities:

i) A screening opinion does not involve a detailed assessment of factors relevant to the grant of planning permission and does not require all considerations to be mentioned. In *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA 157 Moore-Bick LJ (with whom Jackson LJ agreed) said:

> "11. … the decision taken on a screening opinion must be carefully and conscientiously considered and must be based on information which is both sufficient and accurate. The opinion need not be elaborate, but must demonstrate that the issues have been understood and considered …
>
> 20. … I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily

include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term screening opinion.

21. Having said that, it is clear from *Mellor* that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion itself or in separate reasons, if necessary combined with additional material provided on request."

In *Zeb v Birmingham District Council* [2010] Env. L.R. 30 Beatson J said:

"It is important to remember what the purpose of a screening opinion is. It is to ascertain whether a development proposal requires an environmental assessment under the Directive. Detailed reports are not required. What is required is an initial assessment of an intended proposal. One sees this from the terms of the Regulations, in particular paragraph 5(2)(aa). That refers to sufficient information to identify any planning permission granted for development for which a subsequent application is made. In relation to the nature and purpose of the development, paragraph 5(2)(b) states that a "brief description" is required. Although an authority is empowered to call for further information, the default position, (see paragraph 5(4)), is that an authority is required to adopt a screening opinion within three weeks of a request. That default position gives some indication of the level of detail and the investigation required of the authority."

ii) As to the reasons they "can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for the decision": *South Bucks District Council and another v Porter* (No 2) [2004] 1 W.L.R. 1953. A negative screening direction does not need to contain the reasons, these can be given subsequently, *R (Mellor) v Secretary of State for Communities and Local Government* (2010) Env LR 2 by the Court of Justice;

iii) In assessing possible environmental effects remediation measures can, to a certain extent, be taken into account. *Jones v Mansfield District Council* [2003] EWCA Civ 1408 Dyson LJ (as he then was) at [38]:

> " … It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply because all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see Gillespie). The effect of the environment must be "significant". Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment."

R (Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869, Pill LJ at [43]:

> "The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker."

iv) The judgment as to whether a development has significant effects upon the environment is a matter of planning judgment for the decision maker, only reviewable on *Wednesbury* grounds, *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [31, 36 and 43].

Habitats Regulations

17. Article 6(3) of Directive 92/43/EEC on the Conservation of Natural Habitats and Wild Fauna and Flora (the "Habitats Directive") provides that:

> " … any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned

> and, if appropriate, after having obtained the opinion of the general public."

18. Regulation 61(1) of the Habitats Regulations states:

> "61(1) "A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of that site in view of that site's conservation objectives."

19. In *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin) Owen J stated:

> "1. The Habitats Directive must be interpreted and applied by reference to the precautionary principle, which reflects the high level of protection pursued by Community policy on the environment – see *Waddenzee* paras 44 and 58;
>
> 2. A competent national authority may only authorise a plan or project after having determined that it will not adversely affect the integrity of the protected site in question – Article 6(3) and *Waddenzee* paras 56 and 57;
>
> 3. Unless the risk of significant adverse effects on the site in question can be excluded by the competent authority on the basis of objective information, the plan or project must be the subject of an appropriate assessment of its implications for the site;
>
> 4. If, following an appropriate assessment, doubt remains as to whether or not there will be significant adverse effects on the integrity of the site, the competent authority must refuse authorisation of the plan or project, unless Article 6(4) applies."

20. Regulation 61 requires an appropriate assessment if it is concluded that the project is likely to have a significant effect upon a site. It includes a screening stage in order to determine whether or not an appropriate assessment is required.

21. Mitigation measures can be taken into account when considering the screening assessment. *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin). However:

> "[i]f the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because

> it will not have been able to exclude the risk of a significant effect on the basis of objective information." (Sullivan J [75])

22. It has been recognised that Habitats issues are not to be addressed by "hiving them" off into conditions, *Re Sandale Development* [2010] NIQB 43.

Planning policy

23. Policy DES 1(g) of the Monmouthshire Unitary Development Plan provides that:

> "All development should be of a good standard of design and respect the qualities of the character of its context. It will be required to: … (g) incorporate existing features that are of historical, visual or nature conservation value, and use the vernacular tradition where appropriate."

The local planning authority must make the decision in accordance with the Development Plan unless material considerations indicate otherwise (Planning and Compulsory Purchase Act 2004 s.38(6)).

Grounds of challenge

Grounds 1 and 2: **The defendant failed to carry out a lawful EIA screening exercise**
Factual background

24. The screening exercise undertaken by the Council involved various consultations: e.g. with the Environment Agency, the Countryside Council for Wales ("CCW"), Cadw, the Welsh Government's historic environment service, Glamorgan Gwent Archaeological Trust and the Council's Highways, Environmental Health and Biodiversity & Ecology Officer. The conclusion reached was that an EIA was not required. The officer report records at para. 1.1 that "[t]he scheme was screened for an EIA but was found not to have significant effects".

25. On 22 December 2010, the Council produced a negative screening opinion (the "screening opinion") which stated:

> "I refer to the above planning application and the pre-application correspondence submitted by Peacock and Smith in November of this year. Having reviewed the proposals and consulted with the Assembly Government (Highways), the Environment Agency, The Countryside Council for Wales, Cadw, Glamorgan Gwent Archaeological Trust and the Council's own Highways, Environmental Health, and Biodiversity Officers, it is considered that the proposal is not likely to have significant environmental effects and will not, therefore, require a full Environmental Impact Assessment under the Regulations."

26. Some 10 months later, in September 2011, the claimant's solicitors requested a copy of the screening opinion. By this time, the Planning Committee, having considered the officer report, had resolved to grant planning permission. By a letter dated 30

September 2011 the Council provided: (i) the screening opinion; (ii) the covering letter under which it was sent; and (iii) other correspondence referred to in the screening opinion.

27. By a letter dated 2 November 2011 the claimant's solicitors wrote to the Welsh Ministers seeking a screening direction in respect of the proposed development and requested that the Council agree not to issue the decision notice until the request for a screening direction had been addressed. On 9 November 2011 the Council responded, advising that the decision notice had been issued. On 17 November 2011 the Council wrote to the developer's agents advising that European case-law (*Mellor* above) allowed reasons for a screening opinion to be given either in the opinion itself or subsequently if these were requested. The Council explained that although the claimant's solicitors had not expressly requested further reasons it was treating its letter to the Welsh Ministers as such a request and that enclosed with the letter were the detailed reasons for the screening opinion dated 17 November 2011.

28. The "Statement of detailed reasons for Screening Opinion" contained the following:

> "… OPINION
>
> Having regard for the above appraisal and the consultation responses received, the Local Planning Authority does not consider that the proposal requires an Environmental Impact Assessment. The reasons for adopting this opinion in December 2010 were as follows:
>
> 1. Pollution
>
> There is potential for contamination of local watercourses from surface water discharges. However, the introduction, as a standard requirement, of an appropriate surface water drainage system including oil interceptors and the use of appropriate procedures in the construction phrase, would prevent uncontrolled run-off. There is also potential for pollution from the release of contaminants in the soils, subsoils and groundwater at the site associated with its use as a livestock market. However, such risks can be suitably managed and in these circumstances the risk to the local watercourses and the habitats they support is not sufficient to warrant an EIA. The Environment Agency in their consultation response identified the potential pollution risk from contaminants but did not consider that this justified an EIA. The Countryside Council for Wales and the Council's own Biodiversity Officer did not consider that the likely impacts justified an EIA.
>
> 2. Ecological impacts
>
> The likely environmental impact on local watercourses and their habitats is not considered likely to be significant, as noted above. This comment is made in the context of the EIA Regulations and the information submitted about the proposed

development; it is not intended to prejudge the outcome of the Appropriate Assessment process which would be carried out under different legislation.

…

The Countryside Council for Wales do not consider that the likely impact of the proposals justify an EIA. The Council's own Biodiversity Officer also expressed the view that a full EIA was not necessary.

6. Historic and cultural impacts

The archaeological resource at the site can be suitably investigated and recorded as can the older market buildings. The surrounding area contains a mix of uses and buildings, including buildings within the adjoining conservation area and some listed buildings. The likely impact of the proposed development on these buildings is not considered such as to warrant an EIA. Similar, the historic park on the opposite side of the trunk road would not be directly affected and it is considered that the impact on its setting would not be such as to warrant an EIA."

8. Socio-economic impacts

The need for a new supermarket within Abergavenny town centre is long established. The Council sponsored the three towns initiative in 1997 which … identified the Cattle Market site as the best location for a new supermarket to help regenerate Abergavenny town centre … Since May 1997 when the Monmouth Borough Local Plan was adopted, the Cattle Market has been included within the designated Central Shopping Area to facilitate its redevelopment for retail purposes, and the Monmouthshire Unitary Development Plan (adopted June 2006) has maintained this position. Supporting documents … have all evidenced the leakage of trade to other towns due to the lack of a towncentre supermarket … The benefits in reducing journeys by private car to other centres, and in supporting town centres such as Abergavenny with top up and spin off shopping are widely accepted, but in Abergavenny's case, the proximity of the proposed Morrison's site to the Communities First disadvantaged area of North Abergavenny is a major socio-economic potential benefit … While the socio-economic benefits of meeting the need for a new supermarket in the town centre are firmly established, the Council recognises that appropriate alternative provision needs to be made for the displaced use. An application for the relocated cattle market at High House Farm, Bryngwyn, near Raglan … approved by Planning Committee … The High House Farm proposal is relevant to the Abergavenny

> redevelopment proposal in that the Council's commitment to Bryngwyn evidences that the market can be relocated, and its importance to the rural economy will not be lost … The Bryngwyn site in particular is more central to Monmouthshire's main farming areas, and is not proposed to have any commercial development around it. Therefore in socio-economic terms, the related trade … should still be directed to Abergavenny, the nearest town to High House Farm."

The Screening Reasons concluded:

> "In terms of the tests set out above in the introduction, it was concluded that: the development would not have significant effects on the environment by virtue of factors such as its size, nature of location and that (1) it would not have more than local significance, (2) the site is not particularly sensitive or vulnerable, and (3) there are no complex or potentially hazardous effects."

The claimant's case

29. The claimant accepts that the question of whether or not a project is likely to have significant effects on the environment is to be answered by the planning authority applying the relevant criteria and exercising its judgment. What is said is that a planning authority must exercise that judgment within public law limits. The Council has not done so in that the decision reached is irreconcilable with the material put before the Council on the following matters:

Conservation

a) the Urban Design Framework 2004 notes that the slaughterhouses are of sufficient value and should be retained;

b) it has been recommended that the adjacent conservation area should be extended to include the cattle market;

c) the site lies in the vicinity of a number of listed buildings;

Watercourses

d) a watercourse on the site flows into the River Usk, EU-designated SAC and SSSI;

Socio-economic effects

e) the decision would have wide socio-economic effects on the town population and local farming community.

30. In issuing its screening reasons and describing the site as not being a "particularly sensitive or vulnerable" location, the Council failed to have proper regard for, and assess in accordance with the EIA Regulations, the historic, cultural, environmental and socio-economic sensitivity of the site. The screening reasons do not demonstrate that the Council had considered the likely effect of the development in relation to

conservation issues, drainage into a sensitive EU-designated water course and socio-economic concerns.

Conservation

31. Items (a) – (c) paragraph 29 above, were of central importance to the matters enumerated in Schedule 3 to the EIA Regulations but were either not referenced or referenced merely in passing. As to item (a) the claimant relies upon the following entry from the officer's report in respect of the Urban Design Framework, revision C, of August 2004:

> "The existing buildings associated with the slaughterhouse complex, whilst not listed, are considered to be of sufficient townscape value to warrant their retention in part, or in whole, and are fundamental to the realisation of the overall aims for the revitalisation of Abergavenny."

32. As to item (b) Mr Steel QC, on behalf of the claimant, informed the Court that there was a belief amongst those he represented that implementation of this recommendation by the Council had been delayed. There is no evidence to substantiate this point.

33. As to the culturally sensitive nature of the site, the claimant relies upon the following extracts from the officer's report:

> "Even without Conservation Area status this site is of importance, being bounded by the Conservation Area on three sides, and by listed buildings, while to the north is the Grade II registered Bailey Park."

> "The Cattle Market adjoins but lies outside the Conservation Area. It is nonetheless of historic interest given the important role of the Cattle Market in the history of the town, a livestock market already having been established at the present site north of Lion Street in 1863. Reference has already been made to the desire for the scheme to reflect the historic layout and boundary treatments of the Cattle Market."

34. The claimant also relies upon a number of objections, made from a conservation perspective, which are said to demonstrate the cultural value and sensitive nature of the site given its historic origin and proximity to the historic core of Abergavenny:

    i) The Council's conservation officer objected to the demolition of the slaughterhouses;

    ii) The Design Commission for Wales stated that the development will create a suburban enclave with a tenuous relationship to the Conservation Area;

    iii) Bryn y Cwm Forum stated "[t]hat the retention of the abattoir buildings, which have architectural, historic and bat roost value have been insufficiently examined."

iv) Pontypool Park Estate Offices and KALM also objected to the loss of the market and slaughterhouses.

35. Further, the site is located within the vicinity of the historic park and garden known as "Bailey Park" which is included in the Register of Historic Parks and Gardens in Wales. This is the principal public open space in Abergavenny. Cadw in its response noted:

> "The registered park of Bailey Park lies immediately to the north of the proposed development and I can confirm that the development could have an impact on its setting."

In a letter dated 19 January 2011, Cadw stated:

> "south boundary of the park, including the main entrance on the south side, would be opposite the north boundary of the development. The treatment of this boundary and development adjacent to it is highly sensitive in visual terms as they would be highly visible from the entrance to the park and from its south end."

Cadw suggested measures in mitigation which was adopted. It is the claimant's case that this fact does not detract from the underlying sensitivity of the site.

36. As to item (c) the following remarks in the screening reasons regarding listed buildings are said to be conclusory:

> "The surrounding area contains … some listed buildings. The likely impact of the proposed development on these buildings is not considered such as to warrant an EIA."

Further, under "the absorption capacity of the natural environment" the screening reasons reference only the River Usk SAC and SSSI and the local registered historic park (Bailey Park).

37. It is the claimant's contention that arriving at a conclusion regarding the slaughterhouses and neighbouring conservation area by reference to the officer's report is insufficient. The officer's report concerned planning merits, these are different to the environmental effects which are mandated to be considered pursuant to Schedule 3 to the EIA Regulations. As conservation reasons had been of concern previously, this issue was required to be addressed more fully. In particular, the screening reasons fail to articulate why, in the context of these conservation issues, the decision that an EIA was not required, was reached. Given that these issues (the slaughterhouses, conservation areas, and listed buildings) were clearly significant to the development of the site, the omission in the screening reason is surprising, and in error.

Watercourses

38. The SAC is 760 metres from the site, the site is 200 metres from the River Gavenny. Surface water on the site at present discharges into a culverted watercourse on the

site, this in turn discharges into Cibi Brook and then into the River Usk. There is no direct impact from the proposed development upon the SAC. The issue is whether there is a potential impact of surface water continuing to discharge into the River Usk, as presently occurs, causing "pollution" during construction and operation of the retail store.

39. The Council acknowledged that there were risks to the River Usk but determined they could be addressed by mitigation (Conditions 32 and 33). At the time of the decision, the mitigation measures proposed to control the potential pollution risk to the EU SAC and SSSI were not specified in any detail.

40. In the absence of any clear information regarding the mitigation measures, the Council was not in an informed position to rely on mitigation to avoid the need for an EIA. Thus, the Council has failed to comply with its obligations to properly consider and assess the selection criteria in Schedule 3 to the EIA Regulations.

Socio-economic reasons

41. The desire for a new supermarket is addressed but the screening reasons fail to identify, and ultimately grapple with, the socio-economic impact of the development, which include the loss of the livestock market in Abergavenny, the loss of jobs, and the relocation of the livestock market to Raglan.

42. Further, the Council misdirected itself as to the scope of matters to be taken into account in accordance with Schedule 3 of the EIA Regulations, and in particular the "location of the environment". The fact that planning permission has been granted for a replacement market at Raglan does not absolve the Council from further consideration of the effects of relocation. The reasons given by the Council for not considering the move are insufficient. Further, the failure to consider the move to Raglan ignores the development's cumulation with other development contrary to Schedule 3, paragraph 1 of the EIA Regulations.

Ground 3: The Council failed to carry out an Appropriate Assessment as required by the Conservation of Habitats Regulations Directive

43. The claimant's case is that:

i) The proposed development gives rise to an identifiable risk of pollution to the River Usk SAC; the claimant relies upon an extract from an email in December 2010 from the CCW which stated:

> " … The nearest designated site is the River Usk Special Area of Conservation and Site of Special Scientific Interest. As surface water from this site is likely to enter the River Usk (presumably via the River Gavenny) there is potential for the designated site to be indirectly affected. Without appropriate safeguards and mitigation in place there could be a reduction in water quality. This can be addressed by ensuring that agreed safeguards are in place both during construction and operation of the site as part of any planning permission and should therefore not be a significant issue."

ii) The Council did not carry out an appropriate assessment rather it undertook a screening assessment;

iii) The Council's conclusion that there was not likely to be significant effects relied on proposed mitigation, and while that is acceptable in principle there was insufficient certainty about such mitigation such that the Council failed in its obligations under the Habitats Regulations. It failed to adopt the correct approach as set out in *Akester* above by relying upon non-specific mitigation.

44. During the hearing, Mr Steel QC stated that as a matter of law, it is not possible under the EIA and Habitats regime to determine at the screening stage that a development is not likely to have significant effects on the environment by reason of the imposition of a condition which requires, post the grant of planning permission, the submission and approval of a scheme which will mitigate what might otherwise be adverse effects.

Ground 4: The Decision was made without regard to Unitary Development Plan (UDP) DES(1)(g)

45. The decision is irreconcilable with UDP Policy DES1(g). Policy DES1(g) is part of the Statutory Development Plan. Section 38(6) of the Planning and Compulsory Purchase Act 1994 requires that the decision must be in accordance with the Development Plan unless material considerations indicate otherwise. No reasons were given as to why the decision should not be in accordance with the policy, and therefore why the features of recognised historical value (the slaughterhouses) would not be required to be incorporated.

46. The officer's report does not specifically address the conflict between the development and the requirements of DES1(g), nor does it analyse or seek to justify a departure from the policy. The destruction of the slaughterhouses was in direct conflict with the development plan policy. The members of the Planning Committee were not appraised of the need to balance a policy in the development plan which would be breached, as against issues which might "indicate otherwise". What is challenged is the failure to grapple with this disagreement and explain, by reference to material considerations, why there is departure from the policy both in the officer's report and the screening reasons.

Ground 5: The decision cannot be lawfully implemented

47. The decision requires the closure of the market. At the time it was made, the decision was ultra vires the Council's power to grant such permission. At the time of the application the Council had, and has, an obligation to maintain a market on the site. Further, to the extent the Council relied, in its decision making, upon the statement of the Welsh Minister announcing his intention to make an order repealing the Abergavenny Acts, that determination was itself unlawful as the Welsh Ministers had no power, on the facts and law, to repeal Section 28. In the alternative, the decision was one which, given the obligation on the Council imposed by the Abergavenny Acts, no rational local planning authority would take. The claimant accepts that the arguability of this ground is dependent upon her succeeding upon her challenge to the original order in separate but related proceedings for judicial review.

Response of the defendant and the interested party

48. The response of both parties, written and oral, addressed the same issues. Each of the responses were of considerable assistance to the Court. I have combined reference to the responses in order to avoid duplication.

49. The reality of this challenge is a thinly disguised attack upon the grant of planning permission to which the claimant objects. It is of note that of the specific grounds now relied upon by the claimant, Grounds 1 and 2 were not points taken by KALM in either of their objections, no suggestion was made that an EIA was needed. Ground 3, the need for an appropriate assessment, was not raised in KALM's objections. Ground 4 focuses on Policy DES(1)(g) of the UDP. KALM did not quote from it, nor did it expressly refer to the policy in its objections. Ground 5 is devoid of merit.

50. The grant of planning permission followed detailed consultations with statutory consultees and others which included oral representations from objectors to the development including KALM. The Councillors and Officers of the Council know the site and Abergavenny and were well placed to judge the proposals.

51. Of the many responses, reliance is placed on the following:

    i) Abergavenny Town Council, who recommended approval if the traffic issues could be resolved. In their further response it was stated:

    ".. they believe that a majority of people in the town wish to see the development take place."

    ii) Cadw, the Welsh Government's historic environment service, had no further concerns following changes to the scheme which resolved their concern (lighting) relating to Bailey Park.

    iii) The CCW, the Government's statutory advisor on sustaining natural beauty and wildlife, did not object to the application subject to planning conditions which were imposed.

52. It is clear from the first section of the officer's report that a judgment was reached by the Head of Planning Place and Enterprise at the Council that the new retail and community facilities accorded with the relevant policies and were beneficial to Abergavenny. This is unsurprising as the Council had previously granted permission for the redevelopment of the cattle market for mixed use including a food store and community building.

Grounds 1 and 2

53. Screening is in the nature of a preliminary assessment often done upon the basis of less than complete information . The Council does not have to set out all of the considerations of which account was taken and of necessity undertaken quickly in that the screening must be completed within three weeks (Regulation 5(4) of the EIA Regulations).

54. The Council has provided a statement of detailed reasons for the screening opinion. It is accepted by all parties that the Court should consider those fuller reasons in relation

to the challenge made, *Mellor* (above). The reasons demonstrate that the EIA Regulations have been understood and correctly applied. The test for a Schedule 2 development, namely "whether the development would have significant effects on the environment by virtue of factors such as its size, nature or location" has been applied. The reasons provide a detailed analysis of all of the relevant factors identified in Schedule 3 of the EIA Regulations. The reasons are conspicuously fuller than in *R. (Berky) v Newport City Council* [2012] EWCA Civ 378 or *R (Wye Valley Action Association Limited) v Hertfordshire Council* [2011] P.T.S.R 1011 where the Court of Appeal dismissed reasons challenges.

55. The reasons properly took account of the national circular guidance on screening opinions contained in Welsh Office Circular 11/99. The guidance requires consideration of whether the effects would be of more than local importance, whether the location is environmentally sensitive or vulnerable and whether the development has unusually complex or hazardous effects. The Court of Appeal in *Loader* affirmed that it is appropriate to have regard to guidance such as that in the Circular in assessing whether a proposal is likely to have significant effects.

56. The reasons explain that careful consideration was given to take account of the screening request and consultation responses from the Assembly Government, the Environment Agency, the CCW, Cadw, the Glamorgan Gwent Archaeological Trust and the Council's Highways, Environmental Health and Biodiversity Officers and that the Council agreed with the reasons put forward for not requiring an EIA in this case.

57. The eight pages of detailed reasons give consideration to a number of issues including: the context, the size of the development, the cumulation with other developments, the use of natural resources, the production of waste, pollution and nuisances, the extent of any impacts, ecological impacts, flood risk, historic and cultural impacts and socio-economic impacts.

58. Thus, the Council applied the right test, took account of all the responses and provided detailed reasons upon all the issues required by the Regulations. The grounds of challenge focus on particularly forensic criticisms. The Courts have sought to ensure that there is not too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment.

Claimant's points (a) to (e):
Conservation
Point (a)

59. The Urban Design Framework 2004 is not a planning policy document. It was commissioned by the Council as landowner. It has never been adopted by the Council as local planning authority nor achieved any supplementary planning guidance status. This non-policy design framework was not referred to by the claimant's solicitor when writing to the Welsh Ministers explaining why it should issue a screening direction.

60. The underlying issue to which this document related was whether the loss of the non-listed slaughterhouse buildings had significant effects on the environment such as to

put it in the small proportion of Schedule 2 cases where there was a need for an EIA. The statement of reasons expressly dealt with this underlying issue where it stated:

> "Only part of the site is covered by buildings and their demolition was not considered likely to give rise to a significant environmental impact."

61. As a matter of law, the screening reasons do not have to refer to every consultant study that is done by landowners, the Council had no duty to consider the Design Framework 2004 which had no policy status. The reasons did deal with the loss of the buildings in a clear and cogent way, albeit briefly. It is a logical and sensible to conclude that the loss of unlisted buildings will not have a significant effect on the environment. It cannot be characterised as irrational.

62. It is unnecessary to look outside the statement of reasons to reject this challenge. However, *Mellor* at [60] stated that reasons can be provided by relevant documents being made available. At the time the screening reasons were given to the claimant they had the officer report which expressly referred to the Urban Design Framework. It stated that there were numerous competing design considerations and constraints and reported that:

> "The retention of the old stone slaughterhouse buildings alongside the northern boundary wall was thoroughly investigated by the applicant given the historic importance of the Cattle Market but their retention was found not to be feasible given the location of the access, the operator's need for a large coherent floor area, and the other constraints identified above."

63. This issue was further explored by the officer in the evaluation section of the report dealing with the Historic Environment as follows:

> "It is unfortunate that the scheme cannot also incorporate the historic (but unlisted) slaughterhouse buildings along Park Road but as their retention would effectively prevent the implementation of a viable scheme, planning officers are of the view that the balance of advantage lies with their removal. The stone is to be re-used on site and the public art to be installed at the site can reflect the former use of the site as a livestock market with slaughterhouse. The foodstore elevation facing Park Road includes an interpretation of the slaughterhouse buildings."

Thus, the loss of the unlisted slaughterhouse buildings was considered in the officer report, inclusion of the detail of this consideration was unnecessary in a screening opinion.

Point (b)

64. The recommendation made by consultants to extend the conservation area had not been approved by officers or members of the Council. It had no status in planning

law. It was a matter of detail which the screening opinion was not required to recite. The screening opinion had regard to the impact of the proposed development upon the adjoining conservation area, it was also considered at length in the officer report. Further, in the officer report, the following is recorded:

> " … the site is beyond the conservation area boundary … The Conservation Area Appraisal, commissioned by the Council, has not been finalised but the consultant's view is that the conservation area should be extended to include the cattle market."

Point (c)

65. The screening reasons did consider the listed buildings and found that the impact of the proposed development was not likely to be significant. The fact that a proposed development is located near to listed buildings cannot mean, without more, that such a proposal is likely to have a significant effect upon the environment. In *Wye Valley Action Association* above the Court of Appeal upheld a negative screening opinion in circumstances where there were a number of listed buildings and a listed garden within the application site. Further, the officer report dealt, at some length, with the protection of the listed buildings.

Watercourses

Point (d)

66. The claimant accepts that the issue was considered in the reasons for the screening opinion. The claimant contends that it was not considered "properly" and mitigation measures lacked specificity. The following submissions are made in response:

    i) The claimant recognises that it is lawful in EIA screening to have regard to proposed mitigation;

    ii) The screening opinion gave careful consideration to this issue and had regard to the views of the relevant statutory consultee, the CCW which signed off on the view reached on this matter by the Council. In addition to the "Pollution Opinion" identified in paragraph 28 above, the screening reasons included the following:

    > "1(e) pollution and nuisances
    >
    > Comment: the main risk of pollution is the potential for uncontrolled surface water discharges to adjoining watercourses and the risk of releasing contaminants already in situ in association with the operation of the livestock market. In practice these risks were considered to be manageable and low given the established practices of managing in-situ pollution where this is shown to be present, the introduction of a managed surface water discharge system including the oil interceptors, and the Council's ability to require appropriate

environmental management procedures during the construction phase …

2(c): the absorption capacity of the natural environment

Comment: … There are no designated sites that would be directly affected by the proposal although there is potential for a designated site (River Usk Special Area of Conservation and Site of Special Scientific Interest) to be indirectly affected in that surface water from the site would drain to the River Gavenny and thence to the River Usk. Comment has already been made on the consideration of the likely impact on local watercourses in 1(e) above. The Countryside Council for Wales was satisfied that appropriate safeguards could be put in place during construction and operation and that an EIA was not required …

67. These matters were fully considered in the officer report about which no complaint is made. The report records the position taken on these issues by Welsh Water, the CCW and the Environment Agency. It recommended the following conditions:

"10. DRA01 - No development shall commence until a scheme of … surface water drainage has been submitted to, and approved by, the Local Planning Authority and the approved scheme shall be completed before the first of the buildings is occupied.

Reason - To ensure satisfactory facilities are available for disposal of … surface water

…

32. NAT – No development shall commence until a Construction Environmental Management Plan (CEMP) has been submitted to and approved in writing by the Local Planning Authority. The CEMP shall include details of:

(i) a drainage strategy setting out controls of contamination during construction, including controls to surface water run-off, water pumping, storage of fuels and hazardous materials, spill response plans and pollution control measures;

(ii) pollution prevention and contingency measures. Construction works shall be implemented in accordance with the approved CEMP.

Reason - In the interest of safeguarding the River Usk SAC and SSSI.

33. NAT - All Surface water runoff from external hard paved areas (car parks, access roads and service yards) shall be passed

through Class 1 Bypass Separators prior to discharge to the culverted watercourse to prevent oils and silt entering the watercourses and shall be regularly maintained by the end user.

Reason - In the interest of safeguarding the River Usk SAC and SSSI."

These conditions, described in submissions as standard conditions, hence the abbreviations (DRA01, NAT) were included in the issued permission: conditions 10, 32, 33.

68. The drainage situation was well understood, as was the best way to deal with it. The proposed conditions are well established, uncontroversial and commonly imposed. No one questioned whether such conditions could prevent environmental harm occurring or the effectiveness of the conditions to deal with the drainage issues. All agreed that proposal would be an improvement upon the existing position. Any impact upon the River Usk SAC was fully and properly considered.

Socio-economic impact

Point (e)

69. The screening reasons deal with the socio-economic impact of the development, including the relocation of the livestock market to Raglan, at "Opinion … 8. Socio-economic impacts", paragraph 28 above. The reasons deal fully and properly with the impact of the development, they identify the need and advantages of putting retail development in Abergavenny town centre and the policies and studies which underline such a proposition. The effects of the replacement market are considered and identify the fact that the Raglan (Bryngwyn) proposal "evidences that the market can be relocated and its importance to the rural community will not be lost." It considers that the Brynwgywn site is more central to Monmouthshire's farming areas, it is not proposed to have any commercial development around it. Therefore, in socio-economic terms the related trade should be directed to Abergavenny.

70. The claimant may disagree with the analysis in the reasons but it cannot be said: (i) that the socio-economic impacts were left out of account; or (ii) that the view taken on this issue is *Wednesbury* unreasonable. The officer report contained an even fuller analysis of these issues.

71. Further, it is said, that the claimant's written submissions now attempt to "recast the argument" as one based upon cumulative effects by reference to the Raglan market relocation. It is clear that in considering the socio-economic effects, regard was had to the relocation of Raglan.

72. In short, the submissions are that Grounds 1 and 2 lack any merit. No serious case is advanced to support any allegation that the screening opinion is erroneous in law. What the grounds amount to are misplaced forensic criticisms of the screening reasons, against a background of legal authority which indicates that only the essence of the reasoning is required.

Ground 3

73. Regulation 61 of the Habitats Regulations includes a screening stage. The Council was required to and did carry out a screening assessment. The assessment was performed by the Council's Biodiversity and Ecology Officer.

74. This assessment included consideration of the relationship between the proposed development and the SAC, the list of interest features in the SAC, any potential impacts upon the interest features and an overall assessment of whether the proposed development was likely to have significant effects on the SAC. Consideration was also given to possible in-combination effects. The material parts of the assessment are:

> "10 **Is the potential scale or magnitude of any effect likely to be significant? Alone? No, the potential scale or magnitude of any effect will not be significant.**
>
> **Construction phase:**
>
> Contractor to ensure the culverted watercourses is not polluted in accordance with the Environment Agency Guidelines. To be written into the "preliminaries" with the contractor. (Confirmed via email from Peter Tattersfield of Penny Anderson Associates 21/3/2011 – see attached).
>
> A planning condition will be used to secure a Construction Environmental Management Plan (CEMP) which will require details relating to construction site drainage and implementation of pollution protection measures and emergency measures should the spillages occur.
>
> **Implementation phase:**
>
> All surface water runoff from external hard paved areas (car parks, access roads and service yards) will be passed through a Class I Bypass Separators prior to discharged to the culverted watercourse to prevent oils and silt entering the watercourses and will be regularly maintained by the end user. (Confirmed via email from Peter Tattersfield of Penny Anderson Associates 21/03/2011 – see attached).
>
> A plan has been submitted as part of the planning application Proposed Drainage and Levels QL1017-D2[P1].
>
> The adoption of these avoidance measures will protect the River Usk SAC.
>
> …
>
> **11. Conclusion Is the proposal likely to have a significant effect "alone or in combination" on a European site?**

> **There will not be a significant effect on the Interest features of the River Usk SAC. Therefore an Appropriate Assessment will not be needed".**

The screening assessment records the view reached that with the necessary conditions the proposed development was not likely to have significant effects on the environment if the necessary conditions were imposed.

75. The CCW is the designated nature conservation body for the purposes of Regulation 5(1) of the Habitats Regulations. Regulation 61(3) provides "[t]he competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body …". A competent authority is entitled to give the views of such a body great weight in determining whether a project is likely to have a significant effect on a European Site: *Hart* (above) [49]. In *(Akester)* (above) [112] it was stated that "there had to be cogent and compelling reasons for departing from" the views of the appropriate nature conservation body.

76. The CCW advised (officer report) that it had no objection to the grant of planning permission for the proposed development "subject to a condition requiring the submission of a strict Method Construction Statement in order to minimise risk to the River Usk SAC from drainage from the construction and operation of the proposed development". The screening assessment was "signed off" by the CCW who commented:

> "CCW concur with the conclusion of this assessment provided that the safeguards relating to drainage from the proposed site (both during construction and implementation phase) as outlined in section 10 above are implemented as part of this scheme. These comments may be taken as CCW's formal response under regulation 61(3) of the [Habitats Regulations 2010]".

77. In this case, the clear view was that by suitable conditions on drainage there would be no adverse Habitats effects. There is no suggestion that the conditions are different from those contemplated by the Council's officers and the CCW in the screening assessment. Nor it is suggested that these conditions are likely to fail to meet the objectives for which they were imposed. It is asserted by the claimant that the proposed mitigation is "uncertain" but no substantive case is advanced in this regard. It is pertinent to consider what was said by the Court of Appeal in *R (Boggis) and another v Natural England* [2010] P.T.S.R. 725 at [37]:

> "In my judgment a breach of article 6(3) of the Habitats Directive is not established merely because, some time after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned". Whether a breach of article 6(3) is alleged in infraction proceedings before the ECJ

> by the European Commission (see **Commission of the European Communities v Italian Republic** (Case C-179/06) [2007] ECR I-8131 , para 39), or in domestic proceedings before the courts in member states, a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered"

78. During the planning process, no one suggested that the proposed conditions might not work. Further, the claimant has adduced no evidence that with the identified conditions there is any real, rather than hypothetical, risk to the River Usk SAC.

79. Thus, the Council has complied with its duties under the Habitat Regulations. It has carried out a full screening exercise and concluded that these will not be a significant effect upon the SAC. The Council has relied upon and imposed conditions which were endorsed by CCW. It is entitled to take account of the mitigation provided by these conditions in respect of which no real risk to the River Usk SAC has been demonstrated. Accordingly, the Council acted lawfully.

80. As to the argument developed during the hearing, identified at paragraph 44 above, only Condition 32 (the construction phase) has the "flaw" of which Mr Steel QC complains. Condition 33, (the operational phase) does not require submission and approval of any scheme, it also contains detail.

81. If remedial measures are "plainly and easily achievable" or "plainly established and plainly uncontroversial" a decision maker is able to conclude that there will be no likely significant effect as a result of proposed conditions containing such remedial measures, *Gillespie v First Secretary of State* [2003] Env. L.R. 30 [37]; [46] and [49], *R (Catt) v Brighton and Hove City Council* [2007] Env. L. R. 32. Even where there are uncertainties regarding the remedial measures, a view can still properly be reached that there will not, as a result of such measures, be a likely significant effect. It is a question of fact and degree, each case will turn on its own particular facts, *Gillespie* [35] and [41], *Catt* [26]. [27] and [34].

82. A condition requiring the submission and approval post planning permission of the details of the mitigation is something that allows a decision maker to conclude that there is no likelihood of significant effect, *Gillespie* [35], *Zeb* [27] and *Hargreaves v Secretary of State for Communities and Local Government* [2012] Env L.R. 9. These are all matters of planning judgment for the decision maker, any review of the court is subject to *Wednesbury* principles. In *Hargreaves*, the condition was similar to Condition 32, the arguments were essentially the same and were rejected.

83. The conditions imposed were suggested by the Council's Biodiversity Officer. All the relevant bodies, the Environment Agency, Welsh Water, CCW, and the Council were agreed that the conditions in the exact form eventually imposed would mean that there was not likely to be any significant effects from surface water run off. There is no evidence that the conditions will not work.

Ground 4

84. Development Plan policies such as the policy in issue are material considerations (Section 70(2) of the TCPA 1990). While regard must be had to such policies, there is no need to mention all of them. A failure to mention a specific policy will not be fatal if its underlying principles have been taken into account, *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P. & C.R. 83.

85. A planning decision maker is entitled to reach a decision contrary to its Development Plan policy, *R (Cala Homes (South Ltd)) v Secretary of State for Communities and Local Government* [2011] 1 P. & C.R. 22. Development Plan policies can pull in different directions. Where this occurs it is a matter for the judgment of the decision maker to decide whether overall there can be said to be compliance with the development plan, *R (Cummins) v Camden LBC* [2011] EWHC Admin 1116 [162-165]. The claimant accepts this proposition.

86. In the context of this case, the position is as follows:

    i) Policy DES1 was specifically cited and referred to in the officer report;

    ii) Policy DES1 is a policy with which the Planning Committee are very familiar, it being an overarching policy relevant to all applications. It is one of only two Development Plan policies set out in the terms of the Constitution of the Committee, it is also referred to in the planning permission itself;

    iii) This was a case where the Development Plan could be said to pull in different directions. The officer report concluded that retail and local services policy supported the proposed development. Officers regarded what was proposed as compliant with a number of design policies in DES1(5.2.3, 5.2.4). The officer report recognised that the loss of the historic slaughterhouses was "unfortunate" but concluded that their retention would prevent implementation of a viable scheme that would bring with it the significant planning policy benefits identified in the report. The view was reached that "the balance of advantage lies with their removal". Thus, the assessment of whether overall there could be said to be compliance with the Development Plan and whether permission should be granted was wholly a matter of judgment for the decision maker.

87. Policy DES1 was considered, as was its underlying principles. The retention of the slaughterhouses had been thoroughly investigated by the officer but was not deemed possible because of the constraints which would result. In short, it was not considered appropriate to incorporate this historical feature. There is no basis for alleging that the decision was unlawful. Further, in their representations to the Planning Committee, it was not suggested by KALM that there was a defect in the officer report upon this issue.

Ground 5

88. The Council in determining whether to grant planning permission, was required to consider the planning merits. The fact that even following the grant of permission, the development could not take place until the Abergavenny Acts were partially

repealed is irrelevant for those purposes, *British Railways Board v Secretary of State for the Environment* [1993] 3 P.L.R. 125 at 133g.

89. The approach of the Council was entirely in accord with the authority, Ground 5 is legally untenable.

Conclusion

90. The grant of planning permission followed detailed consultation with statutory consultees and others, which included KALM. A detailed officer report was prepared for the Planning Committee. KALM took no point upon the need for an EIA nor an appropriate assessment within the meaning of the Habitats Regulations at the time of their written and oral objections.

Grounds 1 and 2

91. On 22 December 2010, the Council produced a negative screening opinion. It was not until 10 months later that the claimant's solicitors requested a copy. Screening is in the nature of a preliminary assessment performed under stipulated constraints of time. The reasons for the screening opinion provided by the Council dated 17 November 2011, are detailed. The eight pages of reasons clearly demonstrate that the requirements of Schedule 3 of the EIA Regulations have been understood and addressed.

Claimant's points (a) to (e)

Conservation

Point (a)

92. Urban Design Framework 2004 is not a planning policy document, it was commissioned by the Council as landowner. As to the underlying issue to which this document related, namely the effects resulting from the loss of the non-listed slaughterhouse buildings, this was addressed in the screening reasons, and at some length, in the officer report. The retention of the buildings was considered by the officer to effectively prevent the implementation of the development, regarded as a "viable scheme". The issue was considered, the decision made cannot be described as irrational.

Point (b)

93. The recommendation to extend the Conservation Area made by consultants has not been approved by the Council. The officer report did include reference to it. The screening opinion did have regard to the impact of the proposed development upon the adjoining Conservation Area. Within the reasons, there was no requirement to refer to an unapproved recommendation which had no planning policy status.

Point (c)

94. The presence of listed buildings was considered in the screening reasons. A finding was made that the impact of the proposed development was not likely to be significant. The listed buildings were not within the development site. The finding in

the reasons is succinct, its essence is clear. More detail as to the protection of listed buildings is contained in the officer report:

> "5.4.3 There are listed buildings in the vicinity, in Lion Street. This was a significant consideration in appraising the suitability of the submitted layout and the objections suggesting that the building be moved towards or alongside Lion Street. It is considered that the proposed open aspect from Lion Street not only reflects the historic layout of the Cattle Market Site but also protects the listed and unlisted buildings in that street and their contribution to the historic townscape. The Council's Conservation Manager who regrets the loss of the slaughterhouse buildings nonetheless shares the views of planning officers that siting the foodstore on Lion Street would harm the Lion Street scene … It is the view of planning officers that having regard for the constraints associated with the site, the application proposals respect the listed buildings in Lion Street and the Conservation Area and its setting. "

95. The point is taken by the claimant in respect of the slaughterhouses, conservation area and listed buildings that the officer's report dealt only with the planning merits which are different from environmental effects. I do not believe this to be a fair criticism of the report. The detail of the report, even its headings e.g. "Historical Environment" clearly encompasses issues which were relevant to the environment.

Point (d)

96. The screening opinion gave detailed consideration to this issue (paragraphs 28 and 66 above) and had regard to the views of the statutory consultees, the CCW. The CCW approved the view of the Council and Officers of the Council. Welsh Water and the Environment Agency were also consulted. No one took issue with the proposed conditions or their effectiveness. No party advised that an EIA was required. This is not a case of "hiving off" concerns. Appropriate conditions were identified in order to properly address mitigation. All of this was done with the knowledge and approval of informed consultees.

Point (e)

97. This matter was fully explored in the screening reasons (paragraph 28 above). The officer report also analysed these issues. A contention that there was a failure to grapple with these matters is not borne out by the evidence. The issue of the relocation to Raglan was clearly considered.

98. What is required in screening reasons is the essence of the reasoning. The Council provided that, and more. The claimant may disagree with the analysis contained within the reasons or in the documents which accompany them. The approach of the Courts is clear: what has to be shown is *Wednesbury* unreasonableness. I find that the claimant has not provided a sound evidential base for such a challenge.

Ground 3

99. The Council was required to and did carry out a screening assessment. The assessment focused upon and properly addressed the relevant issues. CCW concurred with the conclusion of the screening assessment provided that relevant safeguards relating to drainage were implemented. This was done by way of conditions. As was stated in *Akester* "there had to be cogent and compelling reasons" for the Council to depart from the views of the appropriate nature conservation body. There were none.

100. As to the point that the conditions lack specificity or may be ineffective in mitigating the risk, there is no good evidence to substantiate these points. The conditions were those contemplated by the Council's officers and the CCW. During the planning process, which involved consultations with the Environment Agency, Welsh Water and the CCW, no one questioned the effectiveness of the proposed conditions in preventing environmental harm. The claimant has produced no evidence to support the allegation of ineffectiveness.

101. In making a screening assessment the Council was entitled to take into account mitigation measures to reduce risk, it did so. The measures proposed were described by the defendant as established and uncontroversial, an assertion not challenged by the claimant. The measures were accepted by relevant consultees. The Council was able to properly conclude that there would be no likely significant effects as a result of proposed conditions containing such remedial measures.

Ground 4

102. Policy DES1 was not referred to by KALM in their objections. It was cited in the officer report. It is a policy found in the terms of the Constitution of the Planning Committee, it is referred to in the planning permission. The retention of the slaughterhouses was investigated by the officer, the reasons why such a course was not considered appropriate were identified.

103. It is said by the defendant that the Planning Committee are familiar with Policy DES1, it being an overarching policy relevant to all applications. The claimant does not challenge this assertion. A failure to mention the policy will not be fatal if its underlying principles are taken into account. A planning decision maker is entitled to reach a decision contrary to its Development Plan policy.

104. It is clear from the officer report that there were competing considerations flowing from the Development Plan. The report was placed before a Planning Committee knowledgeable as to the relevant policy, a decision was made which was quintessentially an exercise of judgment by the Planning Committee. It may well be that the claimant objects to the view formed by this Committee but it does not follow, nor is there any evidence to found a basis for stating, that the Committee failed to grapple with this issue or that the decision reached was irrational.

Ground 5

105. The claimant has failed in her challenge to the Order of the Welsh Ministers repealing section 28 of the Abergavenny Improvement Act 1854. Upon the claimant's case, such a finding renders Ground 5 unarguable. I will take the issue a stage further. I

find that the role of the Council in this case was to determine whether to grant planning permission. Whether such permission was dependent upon the repeal of the relevant statutory provisions was irrelevant for the purpose of the decision, *British Railways Board* above.

106. Having considered the evidence and the submissions, it is difficult to avoid the conclusion that this challenge is in reality an attack upon the planning merits of the decision of the Council in granting planning permission to the interested party. Misplaced forensic criticism has been levelled at decisions made (Grounds 1-3) when no issue was taken at the time objections were made. The actions of the Council upon Ground 4 were in accordance with the views of those properly consulted. No evidence has been adduced to identify any real risk to the River Usk as a result of the proposed remedial measures. Ground 5 is devoid of merit.

107. It follows that there are no grounds upon which this Court could find that the decision of Monmouthshire County Council granting planning permission to Optimisation Developments Ltd on 7 November 2011 was unlawful.