Appeal Decisions

Inquiry opened on 24 June 2008

by

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Decision date:
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20 Appeals against 2 sets of enforcement notices relating to Land known as Former Conoco (Thameside Terminal) Site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are against various enforcement notices issued by The Medway Council.

The first set of 9 appeals against (the original enforcement notice) Notice A served on 10 parties, all of whom have made an appeal - for full details see Annex A

Appeal 1: APP/A2280/C/07/2052356

- The appeal is made by Britannia Assets (UK) Ltd.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 2: APP/A2280/C/07/2052358

- The appeal is made by AIB Group Ltd.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 3: APP/A2280/C/07/2052359

- The appeal is made by All Cabin Services Ltd.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 4: APP/A2280/C/07/2052361

- The appeal is made by B&T Plant Hire.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 5: APP/A2280/C/07/2052362

- The appeal is made by H&M Plant (Rochester) Ltd.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 6: APP/A2280/C/07/2052363

- The appeal is made by Milbank Trucks Ltd.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 7: APP/A2280/C/07/2052365

- The appeal is made by KKB3R Ltd.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 8: APP/A2280/C/07/2052366
- The appeal is made by The Roe Group.

Summary of Decision: I direct that the enforcement notice be quashed.

Appeal 9: APP/A2280/C/07/2052064
- The appeal is made by Fitzpatrick Construction Ltd

Summary of Decision: I direct that the enforcement notice be quashed.

The second set of 11 appeals are all made by Britannia Assets (UK) Ltd against the second set of Notices (i.e. Notices B-L) issued by The Medway Council – for full details see Annex A.

Appeal 10: APP/A2280/C/08/2091561 is against enforcement **Notice B.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 11: APP/A2280/C/08/2091566 is against enforcement **Notice C**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 12: APP/A2280/C/08/2091572 is against enforcement **Notice D.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 13: APP/A2280/C/08/2091576 is against enforcement **Notice E.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 14: APP/A2280/C/08/2091578 is against enforcement **Notice F.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 15: APP/A2280/C/08/2091584 is against enforcement **Notice G.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 16: APP/A2280/C/08/2091586 is against enforcement **Notice H.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 17: APP/A2280/C/08/2091589 is against enforcement **Notice I.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 18: APP/A2280/C/08/2091592 is against enforcement **Notice J.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 19: APP/A2280/C/08/2091596 is against enforcement **Notice K.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal 20: APP/A2280/C/08/2091601 is against enforcement **Notice L.**
Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Application for costs

1. At the Inquiry 2 applications for costs were made. The first was made by the Appellant (Britannia Assets (UK) Ltd and others) against Medway Council. The second was made by Medway Borough Council against the Appellant (Britannia Assets (UK) Ltd and others). These applications are the subject of a separate Decision.

Decision

Procedural matters

2. The Inquiry was originally opened on 24 June 2008 by Inspector Rod Evans and me (Inspector Jane V Stiles) and sat for 4 consecutive days. It was then adjourned and reconvened on 26 January 2010.

3. During the long adjournment, Inspector Rod Evans drafted a preliminary ruling, which was agreed by me, that Notice A was not a nullity. The parties were informed of this by a letter from the Planning Inspectorate dated 16 July 2008[1].

4. That ruling was challenged by the Appellant by an application for judicial review. Permission to make that application was refused. I therefore consider the matter closed.

5. In the interim, the Council issued a further set of enforcement notices (i.e. Notices B-L) in part because there was a possibility that the challenge could be successful, and in part because, by that time, the Council considered that further operational development had taken place at the Site since the original Notice A was issued. That set of notices (B-L) was appealed and the second set of appeals were conjoined with the first set of appeals (against Notice A).

6. Prior to the resumption of the Inquiry, 3 appeals made by Mr Richard Miller (Plot 1) Refs: APP/A2280/C/07/2051758, and APP/A2280/C/08 2091903 & 2091904 were withdrawn.

7. When the Inquiry resumed, Inspector Rod Evans, owing to pressing family circumstances became unavailable to continue with the Inquiry. The Inquiry was completed by me (Inspector Jane V Stiles) as sole Inspector.

8. The Inquiry sat for 19 days on: 24, 25, 26 and 27 June 2008 and on 26, 27, 28 and 29 January, and on 2, 3, 4, 5, 9,10,11,12, 16, 17, and 25 February 2010. I made accompanied site visits on 23 June 2008 and 1 February 2010.

[1] Reproduced as Annex B to this Decision.

9. The circumstances of the various occupiers of Plots 4, 5, 7 and 8 changed during the course of the adjournment as follows:

   - Plot 4 is now occupied by Thameside Commercials whereas it was formerly occupied by H & M Plant (Rochester) Ltd;
   - Plot 5 is now occupied by David Watson Transport whereas it was formerly occupied by Milbank Trucks Ltd;
   - Plot 7 is now occupied by KKB Regeneration Ltd whereas it was formerly occupied by KKB3R LTD;
   - Plot 8 was formerly occupied by The Roe Group (now vacated)

10. As a consequence of these changes, it may be that some of these companies may now have no right of appeal. Clarification was sought from the Appellants' team, including the relevant "change of name" documents, but not all of that information was forthcoming. For the avoidance of doubt, I shall determine all of the appeals, since the background changes have no effect upon my decisions.

11. Although initially raised as issues by the Council, the parties agree that the matters of flooding, contamination, and health and safety (having regard to the former use and location within a Safeguarding Zone of a licensed explosive site) could be overcome by the imposition of conditions.

Authority to issue the enforcement notices

12. The Appellant queried the authority to issue the enforcement notices. I shall deal with it for the sake of completeness.

13. The Council's scheme of delegation gives particular officers the power to authorise the taking of enforcement action. Furthermore, under that scheme of delegation, on 5 July 2007, the case officer and the development control officer authorised the service of Notice A. On 3 November 2008, a consultant working for the Council presented a report to the officers of the Council who then authorised the service of Notices B to L.

14. The issue of whether or not it was expedient to issue the notices was considered in the reports presented to the officer who authorised the decision to take enforcement action. As such, the notices were issued in accordance with the requirements of section 172 of the Act and with the relevant authority.

Land ownership

15. On day 13 of the Inquiry, the Council handed in some Land Registry documents which appear to indicate that RSPB own the western part of the Thameside Terminal (TT) site (the subject of enforcement notices A,B,C and D) which includes the entrance into the TT site and part of the access road. This is evident on both the RSPB's Land Registry document and Britannia Assets (UK) Ltd's own Land Registry document. Any dispute as to ownership of that land is outside my jurisdiction. However, it appears unlikely that Britannia Assets (UK) Ltd (BA) or their predecessor in title have gained title by adverse possession because in 1995 (and probably thereafter) the land appears to have been let to

the former owner of the appeal site, Conoco, by Blue Circle (RSPB's predecessor in title).

16. Nevertheless, if the parcel of land forming the western part of Thameside Terminal (TT) belongs to RSPB, then the Council should have served Notices A, B, C and D on RSPB, as owners of the land. As such, there was potential for a ground (e) appeal on the basis "*that copies of the enforcement notice were not served as required by section 172*".

17. Section 176(5) provides: "*Where it would otherwise be a ground for determining an appeal under section 174 in favour of the Appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the Appellant nor that person has been substantially prejudiced by the failure to serve him*".

18. The purpose of section 174(2)(e) is to protect the rights of an owner who was not served with the notice. But, in this case, the relevant owner is RSPB, which has suffered no prejudice in that they support the enforcement action. Indeed, RSPB acted as biodiversity witness for the Council. And, RSPB has confirmed in writing that it does not object to the requirements set out in the relevant notices.

19. No other Appellant has suffered prejudice as a result of the failure to serve the relevant notices on RSPB. In particular, BA (the owner of the site) was served with a copy of each of the notices and it has appealed all of them. Furthermore, when filling out each of the appeal forms, BA indicated that it was the owner of the land despite what its own Land Registry document says.

20. Consequently, I find no reason not to exercise my power to disregard the failure to serve the notices on RSPB.

The notices and the plans attached to them

21. Whilst a ruling has already been given on nullity in respect of Notice A, it falls to me to decide whether one or more of the enforcement notices (A-L) contains any defects, and if there are any defects whether they are capable of being corrected under my powers in s176(1)(a); or whether they are too fundamental to be corrected without causing injustice and lead to the notice being quashed.

22. There is no suggestion that notices B-L are a nullity. Nevertheless, I have scrutinised these notices and I am satisfied that they are sufficiently clear and unambiguous to be enforcement notices under the Act. Therefore, none of them is a nullity. However, there are various defects which I look at below under the grounds of appeal.

23. In correcting and varying the notice(s) I shall use the powers available to me under s176(1) to provide an accurate description of the alleged breach(es) as a basis for considering the deemed planning application(s). Furthermore, the parties were in full agreement that the Appellant should submit an agreed plan (Re-revised APP9)[2] so as to get the deemed applications in order. The only area of dispute concerns the extent of existing roadway. It is agreed that

[2] Re-revised APP9 may be found in the Appellant's documents at APP9, as well as at Annex B to this Decision

Section "A" (on Re-revised APP9) is an existing and lawful roadway and that section "C" is new. But, there is dispute as to whether section "B" comprises new roadway or not. I shall consider, as a matter of fact, the extent of existing roadway under the ground (b) appeal.

24. In the light of the agreement reached between the main parties over buildings, lightstandards, length of roadway A, and hardstandings that are lawful, the Notices require correction.

Notice A

25. I have considered the comprehensive set of proposed corrections/variations to Notice A put forward by the Council together with the plan put in by the Appellant (Re-revised APP9).

26. Whilst numerous changes are put forward, in essence they specify the breach of planning control more precisely but they do not change the case that the Appellant has to meet. As a result, I am satisfied that those changes could be made without causing injustice to the Appellant or to the Council.

Notices B-L

27. The Appellant has sought to develop a Trading Estate with infrastructure to serve 8 individually fenced and independent Plots. Although the Council has served Notices A and B on the whole site, it has also served 10 individual Notices (C-L) in respect of the 8 plots, the roadway and the 2 parking areas adjacent to Plot 1. The Appellant has sought to have Notices E-L (in respect of Plots 1-8) amended to reflect the fact that the individual elements are *part of the overall use of the Thameside Terminal site as a business/industrial estate.*

28. Thus, it is the Appellant's case that the site is in mixed use as a Trading Estate. Circular 10/97 at paragraph 2.10 states that in mixed use cases the allegation must be corrected to reflect the actual situation as it was when the notice was issued if it does not already do so. In this case, each individual notice (if corrected/varied) would make clear how the respective piece of land is being used and what operational development has taken place. So, for consistency, the whole site notice should be corrected/varied, as necessary, to reflects this.

29. A portacabin is generally considered to be a building or a structure, and it would be correct to describe the stationing of it as operational development. Even if it were not considered to be a building or structure but its stationing to be incidental to the change of use of land, its removal could be required in conjunction with cessation of the use[3].

30. In this case, the plans attached to the respective notices make clear the distinction between portable structures which are coloured green and buildings which are coloured pink and mobile home/caravans which are coloured yellow. I shall therefore correct the allegations and vary the requirements accordingly.

31. To the extent that there are inconsistencies between the requirements in Notice B (the whole site) and the individual site notices (C to L), I shall remove

[3] Somak Travel Ltd v Secretary of State for the Environment and Brent LB (1988) 55 P. & C.R. 250;[1987] J.P.L. 630, QBD

those inconsistencies. Furthermore, some typographical errors need to be corrected.

The planning units and the Notices

32. The Council has described the breaches of planning control in different ways in the notices:

- Notice A (as proposed to be varied) alleges a change of use by subdividing the site into 8 plots and using it for the purposes set out;
- Notice B alleges a change of use to a business/industrial estate
- Notices C-L allege changes of use on individual plots.

33. Setting aside any deficiencies in the drafting of the notices, I am satisfied that Notice A (as proposed to be varied) relates to the same breach of planning control within the meaning of section 171B(4)(b) as the 2008 Notices (B-L).

34. Notices A and B relate to the whole TT Site, while the Notices C-L relate to specific parts of the TT site. I need to consider whether the Council, when taking enforcement action, is entitled to serve a notice relating to the whole site as well as to individual parts of that whole site.

35. The Council has described the whole site as an industrial/ business estate while the Appellant has described it as a "Trading Estate". The whole site has been divided into 8 separately fenced Plots (i.e. Plots 1 to 8) served by a common access road and with 2 areas of parking to the west of Plot 1, which are not ancillary to the use on Plot 1.

36. The concept of a "planning unit" is a convenient tool which can be used, in particular, when determining whether there has been a material change of use[4]. There is no requirement that an enforcement notice can relate only to a single planning unit; an enforcement notice could relate to a number of planning units, or to part of a planning unit.

37. In this case, TT is one large unit in the ownership of, and controlled by, one landlord (i.e. BA). As stated, it is served by a central access roadway and it has been subdivided to provide 2 areas of parking, and 8 separately fenced Plots each of which was occupied by separate tenants/businesses at the time the notices were served.

38. I need to consider, as a matter of fact and degree, whether there is one planning unit (comprising the larger unit controlled by the landlord) or a number of smaller planning units (each let out to a tenant or an occupier). It is possible for me to come to the conclusion that there is one large planning unit (comprising the whole of the TT site) or a series of smaller planning units (comprising each plot or unit let out to individual occupiers). Either conclusion would be legitimate in law[5].

39. In this case, the allegations in the Notices have to be considered. Notices A and B allege changes in use and operational development on the whole TT site. It is therefore necessary for me to consider whether there has been a material

[4] Encyclopaedia of Planning Law and Practice Vol 2 page 2-3180 paragraph P55.44
[5] Church Commissioners v Secretary of State (1996) 71 P&CR 73 at page 88

change of use of the whole site which is the subject of those enforcement notices. At the Inquiry, the Appellant acknowledged that there had been a change of use of the whole site to a "Trading Estate". That matter is therefore not in dispute.

40. However, the term "Trading Estate" has no meaning in the Act or in the Use Classes Order. Moreover, whilst it implies a site in mixed use, it is not specific as to what comprises that mix. In terms of the ground (a) appeals and the deemed applications, I am able only to grant planning permission for what existed on the ground on the day the respective notice was issued. It is therefore important to be specific as to what each of the individual plots was in use for at the time the notice was served.

41. **Notices C-L** relate to individual plots and specific parts of the TT site. Applying the useful working rule identified in Burdle[6] it is convenient to consider the unit of occupation when considering the planning unit. Each Plot is a well defined unit of occupation, let to the individual occupiers (some with a lease, some not). In each case, I need to determine whether the use taking place on that Plot amounts to a material change of use when compared to the pre-existing use.

42. As I conclude below when considering the ground (b) appeals, in the case of each notice, the respective development which is alleged in each of the individual Notices (both operational development and changes of use) has as a matter of fact occurred. Consequently, all of the notices have the potential to be upheld.

43. **Notice E** relates to Plot 1. It alleges a material change of use (MCU) to use as plant hire depot, and change of use to offices for a steel cage manufacturing business (on the ground floor). The steel cage manufacturing business referred to (i.e. Roe Engineering) had itself originally occupied Plot 8. However, there is no reason why a notice cannot relate to more than one planning unit.

44. In this case, Plot 1 had 2 separate occupiers and therefore might be considered to be 2 planning units. However, I am in no doubt that the changes of use which are alleged have occurred (see ground (b) appeals below). In any event, I could exclude the ground floor of the office building from the ambit of Notice E and then uphold it against the use by Panther Platforms, which occupied Plot 1. But, since Notice E was served on the owner of the site (BA) as well as both of the occupants (Panther Platforms and Roe Engineering), I could correct it to refer to Plot 1 as being in use as part of the overall use of the TT site as a Trading Estate, without causing injustice to the Appellant or to the Council.

45. This case is by no means clear cut. Given that there is common infrastructure including access road with footways and lighting, it is difficult to decide on the correct planning unit and whether it is a single planning unit (Trading Estate) in mixed use, or several planning units in different uses. However, it seems to me that by serving each of the individual occupiers with an individual Notice, they could not be prosecuted for what occurred on another Plot if the notice was upheld, and under the ground (a) appeals I am able to consider the circumstances peculiar to the occupier (or occupiers) of each individual plot[7],

[6] Burdle v Secretary of State for the Environment [1972] 3 All E.R. 240,244
[7] Rawlins v SSE [1989] JPL 439

for example, the need for some of the occupiers to attend to emergency call out during night time hours.

46. Since the arguments are well balanced, and there are no clear cut reasons to justify one or other alternative, then there is no legal reason, having regard to the Rawlins and Church Commissioners judgements, why both the whole site notice (Notice B) and the individual notices (Notices C-L) could not be upheld provided there is no material inconsistency between their requirements.

47. However, nothing would be achieved by upholding Notice A, even if corrected/varied which would not be achieved by upholding Notices B-L. As such, I consider it to be a duplicate, which I shall quash.

48. In all of the Notices E-L inclusive, the Appellant considers that they should refer to the use in the allegation as "*part of the overall use of the TT site as a business/industrial estate*". I agree, save for the fact that the reference should be to: *"use of the TT site as a "Trading Estate"*. Furthermore, I consider that Notices C and D should be similarly corrected since the roadway and the parking areas are also part of the overall use of the TT site as a Trading Estate. I shall therefore correct the respective Notices accordingly.

Reasons

Planning History

49. At the start of the twentieth century, the site was used as a chalk quarry and cement works, with excavations taking place. A plan dated 1908, indicates that the site was occupied by large buildings, along with a series of kilns and tramway sidings.

50. A plan dated 1939 indicates that the tramway sidings and kilns had been removed, but the buildings remained. Further, it is annotated 'old quarry'.

51. The site lay derelict for some time but was then developed and used as a fuel storage and distribution depot, for which planning permission was granted in 1961. An aerial photograph dated 1967 shows the fuel depot with 8 fuel tanks, along with buildings and hardstandings, while aerial photographs dated 1985, 1990 and 1999 show 9 fuel tanks, buildings, structures, and hardsurfacing.

52. The depot received petrochemicals from ship via pipeline and the use of the storage tanks on site facilitated the handling of such products, mainly petrol and diesel fuels, via road tanker to other parts of the distribution network i.e. filling stations and other depots.

53. The fuel depot use ceased operating from the site in about 1999. Conoco, the then owners of the site, subsequently maintained the site. The Appellant understands that security personnel attended the site constantly until it was sold in February 2003.

54. The sale to Elvridge & Jones involved what was understood to be the purchase of the site intact with 9 fuel storage tanks, hardstandings, site access[8] and ancillary buildings as confirmed in the description of the site in 2003 by the then agents King Sturge. The sale to Britannia Assets (UK) Ltd occurred on the

[8] As stated above, it now appears that the access is in the ownership of RSPB.

same day on a back-to-back basis with the Conoco/Elvridge & Jones transaction.

55. The fuel tanks were removed by the Appellant in 2003.

Background to the Appellant's case

56. Mr Andrews on behalf of BA claims to have acted on advice throughout, albeit that advice has proved to be wrong. His vendor told him that historically the site had been used for storage and haulage and therefore would be classified as B8. Following his purchase, Mr Andrews took advice from a consultant (Mr Ward), who contacted the Council. It led him to believe that he could proceed with demolition and commencement of a mixed use for haulage and B8 uses. But, be that as it may, the case must be considered on its merits, in any event.

57. Whilst I have no reason to doubt Mr Andrews's honesty, I heard no evidence from the vendor, Mr Ward or the Council officer with whom Mr Ward liaised. Accordingly, I cannot be certain that either Mr Andrews's understanding, or recollection, of events is correct. Furthermore, there is no hard evidence before me as to what negotiations took place on behalf of the Appellant, or what alternative courses of action, if any, were offered.

58. It was open to BA and all of the various occupiers of TT to make either an application for an alternative scheme or to make a retrospective planning application but no such action was taken, other than by Panther Platforms on Plot 1 (which prior to the resumption, made an application for planning permission that was refused).

Ground (b): that those matters stated in the notice have not occurred

59. S174(2) states that an appeal may be brought on any of the following grounds-

(a) that in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted…;

(b) that those matters have not occurred; … (my underlining).

60. Accordingly, ground (b) requires a determination of fact rather than law. It is not necessary under ground (b) to establish whether a material change in use (MCU) has taken place, but rather to establish whether the use alleged to be taking place on the site was, as a matter of fact, occurring at the time the notice was issued. The allegation in the notice may include a reference to MCU, but that is a matter to be dealt with under ground (c). Similarly, in respect of operational development, the breach of control is not applicable to ground (b).

61. In this case, the following elements need to be established: first, whether section "B" of the roadway has been constructed, or whether the works merely constituted repairs to an existing one; and whether or not it followed the same line through the site; secondly, which areas of hardstanding are actually alleged to have been laid as part of the appeal development, and whether they were new areas or merely repairs and improvements to existing ones; thirdly, which buildings or structures are development for which no planning permission exists; and the date when each of those buildings was erected (so that lawfulness can be assessed later).

NOTICE B

Affixing of static portacabins

62. The plans TT02-TT07 attached to Notice B clearly distinguish between the portable structures which are coloured green and the buildings which are coloured pink. I will correct the Notice(s) as necessary to refer to those shaded green as a 'use' and those shaded pink as an 'operational development', and vary the requirements as necessary.

Uses

63. The Appellant does not seek to argue that the changes of use as described in the notice have not occurred, albeit the Appellant seeks a variation in the description of some of those uses. The ground (b) appeal on this aspect is not supported by evidence called by the Appellant. As such, this element of the ground (b) appeal fails.

64. The Appellant's argument that some of the uses on the individual plots are no different to what existed before are a matter for ground (c).

Operational development

65. At the Inquiry, the main parties helpfully reached agreement as to the extent of lawful development on the site which is illustrated in the Appellant's plan Re-revised APP9. This comprises the roadway marked 'A'; the 4 buildings on Plot 1 (not including the security building); the post lighting on Plot 1 and the building lights on Plot 1; all of the hardstanding on Plot 1; the hardstanding on the western side of Plot 2; and the hardstanding on the south side of Plot 8. The parties agree that the length of roadway marked 'C' is new (and is therefore not lawful).

66. To the left of the main entrance is a sewage plant which has not been enforced against but which would appear to have been in existence for a very long time. I take this no further.

67. The only matter remaining in dispute, is the section of roadway marked B1 and B2 on APP9 Re-Revised. The 2003 aerial photograph shows the condition of the site prior to, or at the time of, acquisition by BA. The western part of the west-east alignment of the roadway did not exist at that time. Instead the land upon which it is constructed formed part of a large concrete hardstanding area. The Council's case is that the hardstanding was in the location of B1 and B2 on the Appellant's plan (Re-revised APP9), whereas the Appellant's case is that it was only in the location of B2. At the Inquiry, Mr Andrews's evidence was that it was a hardstanding not a separate road.

68. After January 2005, the Appellant engaged contractors to construct the roadway. Information as to the condition of the site in January 2005, can be derived from the JC White survey plan put in by the Appellant. It is clear to me from that plan that the road as constructed now runs through the area formerly occupied by the weighbridge office, which itself sat within the former large concrete hardstanding. The road also runs through an area formerly occupied by oil storage tanks (section C on Re-revised APP9).

69. The Appellant accepts that the construction of kerbs and footways amount to operational development. Whilst the Appellant accepted that re-surfacing would amount to operational development, the Appellant's case is that in most circumstances no action would be taken by a planning authority. But, the Appellant agreed that those matters had occurred as a matter of fact.

70. Taking account of all of the foregoing, as a matter of fact, there was no roadway in the locations marked B1 or B2 (or C) on the Appellant's plan, albeit lorries may well have driven over the former concrete hardstanding in the vicinity of B1. Furthermore, if any of the former concrete hardstanding remains beneath the new road, it now forms a substrate to the new road. As a matter of fact, therefore, the matters alleged to have occurred in Notice B (and Notice C) in respect of Sections B and C of the roadway, have occurred.

The hardstandings

71. Prior to 2003, as can be seen from the photographic evidence, and the Appellant's plan 1703.WD.23A, the area of concrete hardstanding was confined to the area now occupied by Plot 1, part of Plot 2 and Plot 8. The 2005 survey drawing shows that only the land now occupied by Plots 1 and 8 was surfaced in concrete. The oral evidence of Mr Andrews confirmed that the existing areas of concrete at the time he acquired the site are shown on drawing 1703.WD.24.

72. Post 2003, and since the 2005 survey, Plots other than 1 and 8 have been re-surfaced. Mr Andrews's oral evidence was that the first stage in that process was to install a membrane. By comparing the 'before' and 'after' photographs put in by the Council, the land adjacent to Plot 1 has been re-surfaced. To the west of the access road, a grass bank, a raised area, and building have been removed, the area has been re-surfaced with what appears to be hard core, and block paved parking areas have been provided. The area to the east of the access road has also been re-surfaced and a footway constructed.

73. **Plot 2**: the survey plan shows the extent to which the site was hard surfaced in January 2005 and the oral evidence of Mr Miller is that Mr Andrews carried out resurfacing.

74. **Plot 3**: the oral evidence of Mr O'Brien is that O'Halloran and O'Brien laid concrete on the north western quadrant of the site and tarmac on the remainder of the plot.

75. **Plot 4**: the oral evidence of Mr Morris is that when he came to the site he brought it up to level with road planings. He said that he employed a contractor to level and prepare the site; 500 tonnes of crushed concrete and road planings were used. In addition, he installed water, electricity and a septic tank.

76. **Plot 5**: the oral evidence of Mr Watson is that after March 2006 (when Millbank moved in) his business incurred expenditure of £100,000 and it installed a 12m strip of concrete along the entire "left hand side" of the site. A workshop building has been erected in the south western part of the site. Three portacabins are stationed in the north western part of the site.

77. **Plot 6**: the oral evidence of Mr Yates is that the asphalt was put in place by Fitzpatrick to provide a parking area for their staff. The concrete slabs (the

bunker to store kerbs and slabs) were placed on the site by Fitzpatrick and they installed the concrete pad.

78. **Plot 7**: the oral evidence of Mr Bhanot is that road planings were laid down over the whole site in June and July 2006. He said that concrete was laid down under the building shown coloured in pink on the plan attached to Notice K [TT07], and on an area in front of the portable buildings (marked green on the plan) and at the entrance to Plot 7.

79. In summary, the only hardstandings which were still in place after the oil storage tanks had been demolished which can still be seen today, and as confirmed by the oral evidence of the respective occupiers of Plots 1-8, are those on Plots 1, 2 and 8. Although, the areas on Plots 2 and 8 were shown cross hatched on plans TT02 and TT08 (attached to the Notices), the parties agreed at the Inquiry that the areas shown were incorrect. The areas which the parties agree to be correct are confirmed on the Appellant's plan (Re-revised APP9). Consequently, the allegations set out in the notice in relation to [new] hardstandings have occurred as a matter of fact, albeit the Plans need to be corrected as to extent.

80. In terms of allegation (h), the Appellant has argued that the new hardstandings were laid over the top of a membrane which itself was laid on top of pre-existing course tarmac which remained from the OSD. I shall deal with this matter under ground (d).

Buildings and structures

81. The 2003 aerial photograph shows the buildings on the site at that time. Mr Andrews demolished all of the buildings save for those which remain on Plot 1. The Appellant accepts that all of the other buildings have been erected as a matter of fact and so the Appellant does not seek to pursue the ground (b) appeal in relation to those buildings. But, the Appellant considers that, on the evidence, the portacabins have not been fixed to such a degree as to result in them ceasing to be moveable structures. I shall therefore correct the allegations and vary the requirements of the Notices as necessary to refer to the use of the respective portacabins for their respective uses.

82. For the sake of clarity, the buildings and portable structures are as follows:

- **Plot 1** no additional buildings have been sited on Plot 1
- **Plot 2** no additional buildings have been sited on Plot 2 but the oral evidence of Mr Miller is that a septic tank has been installed.
- **Plot 3** the oral evidence of Mr O'Brien is that a workshop has been erected and portacabins have been placed on the site and his company has installed a cesspit and a shipping container.
- **Plot 4** the oral evidence of Mr Morris is that the building on the site was erected by his company – it had come from Carlisle as a kit. He had introduced the portable buildings which are sited on concrete pads and there is a caravan/mobile home on site. The building coloured green on Plan TT04 at the rear of the site is a septic tank.
- **Plot 5** the oral evidence of Mr Watson is that he has erected the workshop.

- **Plot 6** the oral evidence of Mr Yates is that Volker (or Fitzpatrick as they were at the time) built the salt barn and the other buildings on site. They also installed the portacabins and a cesspit.
- **Plot 7** the oral evidence of Mr Bhanot is that KKBR erected the workshop building and the portable buildings, and a cesspit has been installed.
- **Plot 8** at the time the enforcement notices were issued there is little or no dispute that there were buildings on Plot 8 which had been erected by Roe Engineering in the positions shown on the enforcement notice plans. However, these have subsequently been removed when Roe Engineering vacated the site. The requirements of Notices B and L, in respect of those buildings, has therefore been fulfilled. As such, the notices do not require amendment.

Fencing

83. The Appellant accepts that the fences have been installed as a matter of fact. The Appellant does not seek to pursue the ground (b) appeal in relation to the fences.

Conclusion on Notice B ground (b)

84. In the light of the foregoing, the ground (b) appeal on Notice B fails.

NOTICES C-L

85. **Notice C** involves the roadway. The Appellant has conceded that Notice C should be upheld, but it considers this should be subject to varying the compliance requirement so as not to apply to any pre-existing hard surfacing under the line of sections B and C. However, as I have concluded under Notice B (paragraphs 65-70), as a matter of fact, the matters alleged to have occurred in Notice C in respect of Sections B1, B2 and C of the roadway, have occurred. The appeal on ground (b) fails.

86. **Notice D** involves the land adjacent to Plot 1. There is no dispute that the area adjacent to the Panther building has been resurfaced and laid out for parking but in the light of the agreed plan on the areas of hardstanding, the requirements of the notice should be amended. The requirement to remove the hardstanding east of the access road should be varied (but the footway should be included in the requirements).

87. The aerial photographs demonstrate the fact that operational development has taken place. A raised area to the west of the access road and a building have been replaced with a level parking area. Accordingly, the **operational development** has been carried out as a matter of fact. The Appellant accepts that the ground (b) appeal fails.

88. The Appellant says that the **use** of the 2 areas of parking do not form part of any specific planning unit represented by any of the 8 individual Plots. As such, it does not contest that the parking is a separate primary use of the 2 units of land. The appeal on ground (b) fails.

89. **Notice E**-**Plot 1**. There is no allegation that operational development has been carried out.

90. There is no dispute that at the time Notice E was served, Plot 1 was in use as "*a plant hire depot including training centre, telephone sales, plant repair and maintenance*" by Panther Platforms. Furthermore, there is no dispute that the ground floor of the building on Plot 1 was in use as "*offices in connection with steel cage manufacturing business*" in connection with Roe Engineering on Plot 8. The appeal on ground (b) fails.

91. **Notice F - Plot 2**. There is no dispute that a static portacabin has been placed on the land, that a septic tank has been constructed and that a hardstanding has been laid.

92. The Appellant has disputed the description of the use in the allegation: ***for portable building (portacabins) refurbishment and for the sale and storage of portable buildings (portacabins*)** since the Appellant considers that is a description of a mixed use. The Appellant contends that the use is primarily for the storage of portacabins pending their sale and consequent distribution elsewhere. The Appellant says the repair use is ancillary to that primary use since it is not the principal purpose of the use and is only undertaken (using hand tools only), if required, in relation to a specific portacabin albeit the majority give rise to that requirement. As such, the Appellant considers the wording should be amended to say: ***use for the storage and distribution of portable buildings as part of the overall use of the TT site as a business/industrial estate***.

93. However, from the evidence, the occupant of Plot 2 primarily refurbishes portacabins in order to add value to them before re-sale; or he adapts them for a particular use, for example, by installing a W.C. He does not primarily deal in new, or nearly new portacabins. The occupant does not have a workshop because he does works of repair/refurbishment to the outside of the portacabins when the weather is fine, and he does work to the insides when it is not. As a matter of fact and degree I consider the description in the allegation to be correct. Save for correcting the allegation, the appeal on ground (b) fails.

94. **Notice G – Plot 3** from the oral evidence of Mr O'Brien the use should be described as: ***a mixed use as a plant hire depot and civil engineering contractor's storage***. I shall therefore correct the allegation and vary the requirements of the notice accordingly. As a matter of fact a shipping container has been placed on the site to facilitate its use therefore to be precise, the allegation should be corrected and the requirements varied to require the removal of the shipping container. Save for these corrections/variations to the Notice, the appeal on grounds (b) fails.

95. **Notice H – Plot 4** from the oral evidence of Mr Morris the use should be described as: ***a mixed use as a haulage yard and storage of plant***. I shall therefore correct the allegation and vary the requirements of the notice accordingly.

96. In relation to the buildings coloured green on the plan TT04 attached to Notice H, those at the front of the site are portable and the one at the rear is a septic tank. To be precise, the allegation should be corrected and the requirements should be varied to require the removal of the septic tank which has been put

in place to facilitate the use. Save for those corrections, the appeal on ground (b) fails.

97. **Notice I – Plot 5** the use is described as: ***plant hire depot and a haulage depot***. From the evidence the plot is used for a mixed use of haulage and storage but the storage is by a separate and unrelated company to the haulage company, albeit the haulage company's work is to haul the generators stored by the storage company. In addition, some servicing and repair of generators takes place on the site I shall therefore correct the allegation to say: ***a mixed use of haulage depot and storage of generators including the servicing and repair of generators***.

98. The allegation requires correction such that the structures coloured green on the Plan should be referred to under Use not operational development, since the evidence is that they are portacabins resting on the ground. Save for the foregoing corrections, the appeal on ground (b) fails.

99. **Notice J – Plot 6** From the evidence, Volker Fitzpatrick use Plot 6 for the storage and distribution of materials and plant for highway maintenance, in particular for a contract for Medway Council. As a matter of fact and degree, I consider the use to be a highway maintenance depot as described in the allegation.

100. The allegation requires correction such that it should refer to the structures coloured green on the Plan as "Use" not "operational development", since the evidence is that they are portacabins which are freestanding. Save for the foregoing corrections, the appeal on ground (b) fails.

101. **Notice K – Plot 7** From the oral evidence of Mr Bhanot the use should be described as: ***mixed use as plant hire and remediation contractor's yard***. I shall therefore correct the notice accordingly.

102. From the oral evidence of Mr Bhanot the larger building coloured green on Plan TT07 attached to the notice is portable and the smaller one coloured green is no longer on site, neither is the caravan coloured yellow on the plan TT07 but a cesspit has been installed. For precision, I shall correct the allegation and vary the requirements in the notice in respect of the portable buildings and to include the cesspit put in to facilitate the use, but in so far as items have already been removed, it simply means those particular requirements have already been complied with. Save for the foregoing corrections/variations, the appeal on ground (b) fails.

103. **Notice L – Plot 8** From the evidence, in addition to the use of Plot 8 by Roe Engineering for ***the manufacture of steel cages and for the storage of steel*** the site is also used for the separate ***storage of railway sleepers belonging to BA***. But, since the notice was served on both parties I am able to correct it for precision without causing injustice, and I shall vary the requirements accordingly. Save for the foregoing corrections/variations, the appeal on ground (b) fails.

Conclusion on Notices C-L ground (b)

104. From the foregoing, it follows that all of the ground (b) appeals on **Notices B to L** must fail.

Ground (c): whether the matters which have occurred constitute breaches of planning control

105. The main issue in the ground (c) appeals is whether the matters which have occurred constitute a breach (or breaches) of planning control. I shall deal with use and operational development separately as different considerations apply.

106. The Appellant's case as set out in its statements of case and in its written evidence is that (what it describes as) the former Oil Storage Depot (OSD) use fell within Use Class B8, and that the use of the land for other uses falling within Class B8 should not therefore be taken to involve the development of land. Nevertheless, this approach was not pursued in the Appellant's planning proof in respect of Plots 6 and 8.

107. Furthermore, at the Inquiry, the Appellant accepted that the use of the site had changed from an Oil Storage Depot (OSD), which it says was B8 to a Trading Estate (TE) involving a mix of uses. As such, the ground (c) appeals in respect of uses are no longer supported by the planning evidence called by the Appellant. However, various matters argued by the Appellant form the basis of its ground (a) appeals, so I shall make a determination on them.

108. The Appellant does not consider that the OSD use was **abandoned**. Its case is that initially Mr Andrews used different parts of the site at different times for his haulage business – he never used the whole site, nor could he have done, since a large part of it still had storage tanks on it. The Appellant claims that use was the commencement of a 'mixed use' and that the use of part of the site by Lee Demolition for its depot is consistent with that.

109. Nevertheless, the Appellant does acknowledge that instituting the mixed use and demolishing the OSD tanks so that the mixed use could occupy the whole site did **extinguish** both the OSD use and what the Appellant alleges is the former independent lorry parking use, by replacing them with a different use. Thus the Appellant says that the last lawful use prior to the current mixed use was the OSD use together with independent lorry parking use. Consequently, the Appellant's case is that, even if the Notices are upheld, there will be a right to revert to a B8 use and to a vehicle parking use.

Whether there has been a MCU

110. The site has a complex planning history. So, for the avoidance of doubt, I shall consider and make a determination as to what use the OSD comprised; whether that use was abandoned or extinguished (or both); and if it was, whether there was an intervening use before those uses taking place on the site at the time the notices were served, as these matters form the starting point for my determination of the ground (a) appeals. I shall also consider the individual uses on the plots and the mixed use as a Trading Estate before establishing whether a MCU has taken place.

Conoco Use prior to 2003 (OSD)

111. First I shall consider the lawful use to which the land was put by Conoco prior to the Site being sold to the Appellant in 2003. The description of development permitted by permission 61/443 was: "*The erection of storage tanks for petroleum products with ancillary equipment to receive by water, store and distribute by road."* I shall refer to this as the Oil Storage Depot (OSD) (the description used by the main parties). That permission authorised the erection of storage tanks and the pipeline from Cliffe Jetty to the site.

112. From the evidence, the OSD involved a waterway/road interchange for the trans-shipment of fuel. It was a specialist use for fuel storage which depended upon a particular means of bringing a product to the site, namely from a boat and then via a pipeline from the wharf. The structures, infrastructure (i.e. pipework etc) and method of working were governed by the nature of the products they were handling, namely flammable liquids. Those liquids were kept in bulk in large purpose designed and built tanks.

113. In addition, the OSD included a substantial workshop for the maintenance of vehicles and equipment, a laboratory for testing and analysis of petroleum and allied products, offices and areas of lorry parking. The evidence of a former Conoco employee, who worked in the vehicle repair workshop, was that engineering activities were extensive, including servicing of road tankers, installing substantial new parts such as clutches and gear boxes and stripping down engines.

114. Although Box 6 of the 1961 application form stated that *"no processing was to be carried on", e*vidence given to the Inquiry by former Conoco employees confirmed that processing activities took place on the site namely: injection of lead into petrol; adding red dye to diesel, albeit latterly the diesel was received with the dye in place; and the blending of fuels, some of which was as a result of the testing undertaken in the laboratory. The latter process was necessary to ensure that no fuel remaining in the pipeline following a delivery, was wasted. This involved the use of a smaller fuel tank to store fuel in before it was blended.

115. The Appellant has argued that in so far as subsequent processing of any kind (by addition of lead or dye) took place, it was either ancillary or fell outside the permitted use. And, in any event, that it had ceased by the time that the use ceased and therefore the use had reverted to that permitted originally. However, the evidence of one of the former employees was that blending continued until the time of closure, which he said was in 1997 (not 1999). Given that all of the fuels appeared to be delivered via the same pipe from the jetty, it seems to me that the need for blending, to make use of the fuel in the smaller tank, did not cease.

116. Clearly, for the greater part of its duration, the OSD Use involved industrial processes. To the extent that one or more of those processes did in fact cease (which on the evidence is doubtful), the cessation of the process of adding lead or of blending, or of adding dye to diesel, was not such as to alter the nature or character of the use.

117. To my mind, this character of use is a long way from the usual Class B8 storage use where items are kept, or stacked on land or housed in general

purpose buildings. The use which involved the storage of petroleum and products that arrived by ship via a pipeline arguably extended the planning unit beyond the current appeal site (TT) to include the pipeline and jetty (albeit these might not have been shown on the application plan). The liquids were then stored in specialist containers with particular requirements in relation to Health and Safety legislation; and for distribution, had to be loaded into the delivery vehicles in a controlled and specialist way. The use involved hazardous substances requiring additional consent and a safeguarding zone was established. Furthermore, the tanks are unlikely to have been capable of re-use for any other purpose.

118. The physical impact of the use is wholly different from most, if not all, other forms of storage and distribution where, whether stored in the open or within a building, goods and products do not generally require specialist arrangements for transportation; products/items may actually be visible; and the storage facilities are flexible to allow a variety of different materials and products to be stored. Furthermore, the OSD could have generated fumes and odours.

119. To my mind, there is a stark contrast between the bulk storage of petroleum products and the storage of large amounts of (similar) products in individual containers. The latter implies a more general character to the storage using pallets and housing the products in buildings.

120. Both main parties have referred me to the Use Classes Gazetteer. According to the frontispiece of that document, it represents the opinion of the author and it expresses a view as to whether particular uses do, or do not, fall within a particular Use Class. Whilst that may be an experienced and well-founded opinion, it has no statutory authority nor does it cite any case law in support of the views in relation to petroleum depots or petroleum products depots. Accordingly, I attach limited weight to it.

121. Various historical applications refer to petroleum and its products, hydrocarbon oils and various types of fuel. There is no reference to petrochemicals.

122. I accept that a primary use of open land for the reception, storage and onward transmission of goods falls within Use Class B8. But, bulk storage of large quantities (e.g. in boxes or pallets) of small containers (e.g. 1 litre containers), is very different from bulk storage of fuel in vast storage tanks. In any event, storage and distribution of minerals is excluded by virtue of Article 3(6)(g). Given that oil qualifies as a mineral, oil storage tanks do not fall within any use class. Therefore, if the Appellant has categorised the Conoco use correctly as an OSD, it would have been sui generis, in any event.

123. The Appellant contends that the area now covered by Plot 8 had the benefit of a separate permission as a lorry park. However, having inspected both the application documents and the planning permission itself (TH/6/72/21) it is clear to me that the lorry park to be extended formed part of the Thameside Terminal. The lorry park and the OSD were all occupied by the same occupier and formed part of a single planning unit. The use of that unit being for an OSD. The extension to the lorry park was situated on a piece of land which itself was located towards the centre of the Thameside Terminal site. It is clear to me that it was, as a matter of fact, for an extension to an existing lorry

park. As such, the permission for the extension to the lorry park adds nothing to the Appellant's case.

124. In my conclusion, as a matter of fact and degree, the OSD was a **sui generis** use (and not B8). I shall now consider whether or not that use was abandoned or extinguished.

Abandonment

125. First, the site ceased to be used as an OSD in the late 1990s (either 1997 or 1999), albeit Conoco provided site security and continued to maintain the site between 1999 and 2003. Whilst the OSD could arguably have been dormant[9] for that period of time, there is no evidence of any interest in the site as an OSD at the time. Some 4 years or so later, BA (Mr Andrews) purchased the site in 2003. Indeed, Mr Andrews's evidence suggests that the site had been marketed for 2-3 years before he became involved.

126. Secondly, when the site was purchased by BA, Mr Andrews says he had no intention of using it as an OSD. Instead, it was cleared of the oil storage tanks and associated pipework and the site was levelled, which involved removing the mounds and bunding from around the 9 storage tanks. The storage tanks were neither repaired nor replaced. Thus, from that point in time, the site could not be re-used as an OSD without rebuilding those key elements upon which that use relied i.e. the storage tanks, and for which a fresh planning permission would be required. As such, the OSD use, which was sui generis, was abandoned. Whilst the Appellant may well have removed the tanks and infrastructure on the basis that he understood that that use was B8, it cannot alter the facts. Consequently, the land must from that time have a **nil use** in terms of its lawful use.

Extinguishment

127. Mr Andrews's oral evidence confirmed that first, following the purchase of the site by BA, it was solely occupied by D. Andrews Haulage Ltd tipper hire business operating a maximum of 12 lorries and utilising the existing workshop and office building[10] . Secondly, his use (i.e. D. Andrews Haulage Ltd's use) was spread over the whole site. Thirdly, his vehicle operator's licence specified the appeal site as an operating centre for 30 vehicles as from December 2003. In evidence, Mr Andrews described the business he conducts as being that of a haulage contractor, or as a haulage business. His vehicles both arrive and depart empty. That use is, therefore, not storage and distribution, but rather a haulage depot. Paragraph 8.21 of C10/97 states that a haulage yard can be considered as **sui generis**.

128. Even if, as the Appellant argues, this was the first step in the transition to a Trading Estate (in mixed use), I do not consider that the current Trading Estate is a mixed use in the sense of a composite use as described in Burdle[11]. In the present case, the whole site (TT) is in one ownership (by BA), each of the current occupiers' plots is fenced off, and the component activities of the Trading Estate do not fluctuate from time to time (albeit there may be some

[9] Panton & Farmer v Secretary of State for ythe Environment, Transport and the Regions (1999)
[10] May 2007 Design and Access Statement produced on behalf of the Appellant by Ward and Associates
[11] Burdle v Secretary of State at page 179: APP 7

fluctuation within Plot 3). The use of the site as a haulage yard was not a necessary step, or indeed a relevant step, in the creation of the current Trading Estate. The fact that the site was not used to full capacity does not undermine or alter the fact that it was one planning unit put to one use.

129. D. Andrews Haulage Ltd made use of the land which became Plots 1, 6 and 8 and Lee Demolition used a small area around the former weighbridge area for a period of 2 years as a compound for its demolition equipment which can be seen on an aerial photograph taken on 14 March 2005. However, it is self-evident from that photograph that the site was not, at that time, subdivided in the way that it was at the time the notices were issued. Furthermore, even if I were to accept that the site was in mixed use at that time, it comprised only 2 occupiers with 2 respective uses as distinct from the situation at the time the Notices were issued which involved at least 8 occupiers. In the light of the Beach[12] judgement, I shall consider below whether that change was a material change.

130. As a matter of fact and degree, the former use as an OSD was abandoned and then extinguished by subsequent uses of the appeal site as a haulage depot by D. Andrews Haulage Ltd and use (of part of the site) as a demolition contractor's yard by Lee Demolition, neither of which had the benefit of planning permission.

131. That initial use to which the site was put by the Appellant as a haulage depot, was **sui generis**. As a result, any ability to revert to a previous use as OSD (whether sui generis or B8) was lost. Since the OSD use was in any event extinguished, it follows that the issues of whether the current uses fall within the same use class as the OSD; or whether the current uses amount to a MCU, do not arise.

132. Nevertheless, in the event that I am wrong in those conclusions, I shall also consider:

a. Whether the current uses of the site fall within Class B8; and

b. If the previous and current uses do not fall within the same use class, whether the change from one use to the other is material.

The current Uses on the site

Notices C to L

133. Given that there are ground (c) appeals in respect of Notices C to L, I have considered each of those parts of the TT site individually. In particular, I have considered the use to which the respective area of land was put when it was used as an OSD (before) and the use to which it was put at the time that the enforcement notices were issued (after). I shall refer to these as the 'before' and 'after' uses.

134. **Notice C** (the roadway): part of the current roadway passes through an area formerly occupied by hardsurfacing for tanker parking, and part of it runs through an area formerly occupied by oil storage tanks. Thus, the 'before' use was for tanker parking and for distribution pipework and walkways associated

[12] Beach v SSETR and Runnymede BC

with OSD tanks. And, the 'after' use is as a road serving a Trading Estate in mixed use. As a matter of fact and degree, a material change of use has occurred and the ground (c) appeal fails.

135. **Notice D** (the land adjacent to Plot 1): the ' before' use was as a parking area and access surface for an oil storage depot which the appellant has acknowledged was a parking use ancillary to the OSD. The 'after' use is for what the Council has described as: ***parking for haulage contractor and parking associated with offices in use by a plant hire depot and a B2 use***. The appellant correctly states that it should be described simply as "*parking and storage of vehicles"* and the appellant accepts that the 2 areas do not form part of any specific planning unit represented by any of the 8 individual plots. On this basis, the Appellant accepts that the ground (c) appeal fails.

136. **Notice E** (Plot 1): the 'before' use was as offices, laboratory, yard and workshop in connection with the OSD. The 'after' use has been for the stationing of equipment which is hired out to customers, with about 425 pieces of equipment operating from the site. The first floor of the office building has been used for offices, meetings, training of people who wish to hire equipment (including members of the public), training staff, and telephone sales call centre. The workshop has been used for carrying out repairs to plant including: repair of electrical leads, changing batteries, replacing guard rails. Repairs are carried out on site whenever possible and spare parts are kept on site.

137. As a matter of fact and degree, the use of Plot 1 by Panther Platforms is a sui generis use (not a B8 use). In particular the elements of repair, training which includes visits by customers, and telephone sales take the use outside of Class B8. The appeal on ground (c) fails.

138. **Notice F** – Plot 2: the 'before' use formed part of the OSD. The 'after' use of Plot 2 has been for a business which buys, sells and refurbishes second hand portacabins, the majority of which are refurbished. Refurbishment takes place on the site using hand tools and involves plasterboarding and re-roofing. Sometimes kitchens and W.C.s are fitted (e.g. for school use). The portacabins on site are either awaiting refurbishment or sale following refurbishment.

139. As a matter of fact and degree, the activity carried on is not storage or distribution, and is not therefore B8. It is the refurbishment of portacabins. As such it does not clearly fit into either a B1 or B2 Use. I therefore consider it to be sui generis use. The appeal on ground (c) fails.

140. **Notice G** –(Plot 3): the 'before' use of the site formed part of the OSD. The 'after' use of the site by B&T has been as a plant hire depot. Additionally, it has been used by O'Halloran and O'Brien to store formwork used in the course of its civil engineering contractor's business. Plot 3 itself is not divided by a physical barrier and the extent of use by each of the 2 businesses fluctuates. The plant is repaired and maintained in the workshop building which is fitted out with workbenches and other equipment. And, customers often collect their own plant.

141. Thus the plant hire use exhibits 2 of the characteristics that would take it out of Class B8, namely repairs and maintenance, and visits by customers. As a matter of fact and degree, Plot 3 is in mixed use as a plant hire depot and civil

engineering contractor's storage, which I consider to be sui generis. The appeal on ground (c) fails.

142. **Notice H** – Plot 4 : the 'before' use of the site formed part of the OSD. The 'after' use of the site is as a haulage yard for H&M Plant (Rochester) Ltd and it is also used for some storage of customer's plant. Since a haulage yard does not fall within Class B8, the appeal on ground (c) fails.

143. **Notice I** – Plot 5: the 'before' use of the site formed part of an OSD. At the time the enforcement notice was served the site was used by Millbank Trucks Ltd. At the time of the Inquiry there had been a management buy out and the new company is known as David Watson Transport Ltd. Nevertheless, at the time the notice was issued, and subsequently, the site has been used as a haulage depot or transport yard. Three people left Aggreko to set up a business on their own (as Optimum Power Services) to service and repair generators. They use the workshop building situated on the south western corner of the site. As a matter of fact, neither a haulage yard nor the repair and servicing of generators can be described as a B8 use. The appeal on ground (c) fails.

144. **Notice J** – Plot 6: the 'before' use of the site formed part of the OSD. There is no dispute that there has been a change of use to a highways maintenance depot, albeit the Appellant says that description is too narrow because generically it is a contractor's yard. The functions performed are to park highway maintenance vehicles, carry out work to highway infrastructure including cutting slabs and repairing pedestrian barriers, and storing materials needed to perform highway maintenance functions.

145. As a matter of fact and degree, the use is not a distribution use. Materials are stored merely for use in carrying out the highway maintenance contract, they are not stored or distributed. As such, I consider the use to be sui generis. The appeal on ground (c) fails.

146. **Notice K -** Plot 7: 'before' the site formed part of an OSD. The site is currently in use as a remediation contractor's yard and for plant hire. As a matter of fact and degree the use cannot be described as a B8 use. The appeal on ground (c) fails.

147. **Notice L** – Plot 8: 'before' the site formed part of an OSD. The Appellant accepts that the use at the time the notice was served (now ceased) by Roe Engineering was a mixed B2/B8 use. The nature of the use for fabrication of metal cages clearly falls within B2. If metal was stored for use in fabrication, or if the cages themselves were stored after fabrication, any storage element can be considered to be ancillary to the B2 use. Even if there was independent storage of steel, which could be considered to be more than de minimis, and separate storage of railway sleepers by BA, it would be a mixed B2/B8 use. The appeal on ground (c) fails.

148. **Notice B** – the whole site: it follows from the foregoing that the following current uses of the Plots which together comprise the Trading Estate do not themselves fall within Class B8:

- **Plot 1**: plant hire depot: sui generis
- **Plot 2**: refurbishing portacabins with ancillary storage: sui generis

- **Plot 3**: mixed use as plant hire depot and civil engineering contractor's yard/storage area: sui generis
- **Plot 4**: mixed use as haulage yard and some storage of plant: sui generis
- **Plot 5**: Haulage yard (and repair and servicing of generators) : sui generis
- **Plot 6**: highway maintenance depot: sui generis
- **Plot 7**: remediation contractor's yard and plant hire: sui generis
- **Plot 8**: B2 with ancillary storage and the separate storage of railway sleepers B8.

149. Furthermore, this collection of sui generis uses is materially different from the mixed use of the site by D. Andrews Haulage Ltd and Lee Demolition. In the light of the Beach judgement, if a material change of use is involved, it is a new use which comprises both the old and new uses, whether they are separate uses or mixed uses within one planning unit. The right to revert to the former OSD use was therefore lost.

Conclusions on the argument that 'before' an 'after' uses fall within Class B8

150. In my conclusion, first, the former OSD was not a B8 use, but a sui generis use. Secondly, even if it was a B8 use, that use was abandoned, and so the site now has no lawful use. Thirdly, if I were wrong in that conclusion, the OSD was extinguished, as acknowledged by the Appellant, when the Appellant initially used the site as a haulage depot which itself was sui generis. Finally, the Appellant then developed the current Trading Estate which comprises a mix of mostly sui generis uses, and is therefore itself a sui generis use.

151. At the close of the Inquiry, the Appellant accepted that there has been a MCU from an OSD to a Trading Estate. The Appellant accepts that such uses do not fall within the same Use Class (and are therefore not permitted by section 55(2) (f) of the Town and Country Planning Act 1990); that there has been a MCU and that such a change of use is not permitted development.

152. For all of these reasons, the change from OSD via the haulage depot to the current use as a Trading Estate amounts to a material change of use. Therefore all of the ground (c) appeals on use must fail.

Operational development

153. First, the Appellant accepts that the erection of buildings (other than the 4 buildings on Plot 1) amounts to a breach of planning control. Secondly, the Appellant accepts it is not entitled to rely upon permitted development rights. Thirdly, the Appellant accepts that the laying of concrete hardstandings on individual plots by the current occupiers amounts to a breach of planning control.

154. In so far as the Appellant has argued that the roadway and hardstanding existed before 2003, those arguments amount to a ground (b) appeal. To come within ground (c), the Appellant would have to contend that the development had in fact occurred but that it was not a breach of planning control. But the

Appellant does not so contend. Accordingly, the ground (c) appeals relating to operational development must fail.

Ground (d): whether the uses subsisting on the site, at the time the enforcement notices were issued, were immune from enforcement action through the passage of time

155. The Appellant contends that the security building and some part of the hardstanding had been substantially completed 4 years or more before the first enforcement notice was served in July 2007. The onus of proof is on the Appellant on the balance of probability.

The security building

156. The evidence on behalf of the Appellant was that Mr Andrews had erected the security building although the witness was not able to say when it had been erected. However, the security building does not appear on the Appellant's January 2005 survey, or on the Council's March 2005 photograph.

157. Accordingly, the Appellant has failed to establish that the security building was substantially completed 4 years or more before enforcement Notice A was issued in July 2007; or more than 4 years before Notice B was issued in November 2008. Therefore, that element of the ground (d) appeal must fail.

158. In order to make out its case on the hardstandings, the Appellant would have to:

a. Identify the hardstandings the subject of this ground of appeal; and

b. Demonstrate that those hardstandings had been substantially completed more than 4 years before the service of the notices.

159. The Appellant's view of the "lawful" i.e. permitted hardstanding" is set out on a drawing submitted by the Appellant to the Inquiry in June 2008. It does not extend beyond Plots 1, 2, and 8. However, the case advanced by the Appellant in the written Proof and oral evidence of its planning witness is not consistent with that drawing.

160. The Re-revised APP9 drawing shows the extent of the hardstandings said by the Appellant to have formed part of the OSD. Those hardstandings being limited to Plot 1, part of Plot 2 and Plot 8, none of which are in dispute. Indeed, the Notices do not allege that the creation of those hardstandings amount to a breach of planning control.

161. The oil storage tanks were removed over a period of 9 months from August 2003 (i.e. through to April 2004). Any creation of hardstandings using crushed concrete therefore took place less than 4 years prior to the service of Notice A.

162. The laying of hardstandings could not have been substantially completed until all the plots were laid out, which from the photographic evidence, had not been done by March 2005. The evidence from the site occupiers indicates that the hardstandings were laid less than 4 years before the service of Notice A and less than 4 years before the service of Notices B-L.

163. When comparing the photographs taken (before) in 2003 with the photographs taken (after) in March 2005 and in May 2007 it is apparent that the land adjacent to Plot 1 had been surfaced in the 4 year period ending with the service of the enforcement notices. On the land to the west of the access road, a grass bank, a raised area and building have been removed, the area has been resurfaced with what appears to be tarmac and parking areas provided. The area to the east of the access road has also been resurfaced, and a footway constructed.

164. As to **Plot 2**: the Appellant's January 2005 survey plan shows the extent to which the site was hard surfaced at that time. Mr Miller said in evidence that Mr Andrews carried out re-surfacing. On the balance of probability, therefore, the hardstanding was laid less than 4 years before the service of the notices.

165. **Plot 3**: the March 2005 photograph clearly shows the state of the site and the absence of hardstanding. Mr O'Brien said B&T Plant Hire and O'Halloran and O'Brien started to occupy the site in January 2007. Works of preparation were carried out in 2006 which included laying concrete on the north western quadrant of Plot 3; and tarmac on that part of the plot not covered in concrete. On the balance of probability, therefore, the hardstanding was laid less than 4 years before the service of the notice.

166. **Plot 4**: the March 2005 photograph shows the absence of any hardstanding. Furthermore, Mr Morris said that when he came to the site in February 2006, he brought it up to level with road planings. He said that he employed a contractor to level and prepare the site, and that about 500 tonnes of crushed concrete and road planings were used. On the balance of probability, therefore, the hardstanding was laid less than 4 years before the service of the notices.

167. **Plot 5**: the March 2005 photograph shows the absence of any hardstanding. The oral evidence of Mr Watson was that after March 2006 (when Millbank moved in) his business incurred expenditure of £100,000 and installed 12 m strip of concrete along the entire "left hand side" of the site. Accordingly, I am in no doubt that the hardstanding was laid less than 4 years before the service of the notices.

168. **Plot 6**: the March 2005 photograph shows the absence of any hardstanding. Fitzpatrick came to the site in June 2007. The asphalt was put in place by Fitzpatrick to provide a parking area for their staff. The concrete slabs and the concrete pad were installed by them. On the balance of probability, therefore, the hardstanding was laid less than 4 years before the service of the notices.

169. **Plot 7**: the March 2005 photograph shows the absence of any hardstanding. Mr Bhanot in his oral evidence said that road planings were laid down over the whole site in June and July 2006. He said that concrete was laid under the building shown in pink on the plan attached to Notice K, and on an area in front of the portable buildings (marked in green on the plan TT07) and at the entrance to Plot 7. On the balance of probability, therefore, the hardstanding was laid less than 4 years before the service of the notices.

170. During the course of the Inquiry, the Appellant claimed that a membrane was laid over the top of the existing hardstandings prior to the laying of the new hardstandings. I have been referred to a plan dated March 2003 of the former OSD. This shows the area surrounding the 9 storage tanks shaded

brown. The key says that the shaded area "*is an area bunded to edge with the surrounding roadway to contain any leakage. The tanks sat on a mound equal to the diameter of the tank plus approx. 2m all round and at same height as the perimeter bund. The hollow areas between the tanks contained masses of distribution pipework with open grid walkways above giving access to each tank mound. The whole area was laid over a very course and porous tarmac which was overgrown with weed and grass between the tank mounds".*

171. However, first, whatever remains of any OSD tarmac, it is buried. And there are no photographs of the site immediately prior to the laying of the membrane and no trial pits have been dug. Secondly, it was a large and irregular shape, the boundaries of which are unrelated to any physical features on the ground today. Thirdly, the area of tarmac always was discontinuous by virtue of the 9 mounds upon which the tanks sat. As such, it was an irregular area punctuated by 9 very large circular tanks. Fourthly, it is impossible to know the extent to which the tarmac was disturbed when the OSD was removed and the site was levelled. Consequently, it is impossible to know with any precision what remnant areas of course tarmac remain hidden under the new hardstandings. Therefore, the appellant has not proved its case on the balance of probability.

172. In my conclusion, on the facts before me the Appellant has failed to discharge the onus of proof which rests on it in respect of the new hardstandings and any remnant hardstandings beneath the current hardstandings. Therefore the ground (d) appeals must fail.

Ground (a)

173. The Appellant has made ground (a) appeals against the individual Notices C-L as well as Notice B which covers the whole site. It therefore falls on me to determine each of those ground (a) appeals separately. However, the Appellant made it clear at the close of the Inquiry that what it has sought to develop and retain is a Trading Estate in mixed use on the whole TT site, and that to this end it has also sought to have each of the Notices E-L corrected so that it is clear that the use of each plot should not be taken in isolation, but that it should be considered as part of the overall use of the TT site as a Trading Estate. I shall therefore determine the ground (a) appeals accordingly.

Background factors

The right to revert to a previous lawful use

174. Section 57(4) states that:

Where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of the Act) it could lawfully have been used if that development had not been carried out.

175. However, s57(4) does not permit reversion to the immediately preceding use if that use was unlawful. In those circumstances, it does not permit reversion to the last lawful use[13]. In this case, I have concluded that the immediately

[13] Young v. Secretary of State [1983] 2AC 662

preceding use was as a haulage yard. Since that use was an unlawful use, there is no right to revert to that use or any preceding lawful use.

176. But, even if I am wrong in that conclusion, the right to revert would be to revert to an OSD use. But, such a use cannot now be carried out as the tanks which are essential to such a use have been removed. As a result, even if I were to accept the Appellant's argument, there is no lawful use to which the Appellant is entitled to revert.

The fall back position

Oil storage depot

177. In order to be taken into account as a fall back, a use must be capable of implementation without the need for a further express planning permission and there must be a likelihood that the use would be implemented and brought into effect. In this case, as stated, the tanks have been removed and so planning permission would be required to reinstate the OSD use. Therefore, there is no prospect of the site returning to use as an oil storage depot.

Open storage use

178. As I have already concluded under ground (c), first, the OSD was not a B8 use. Secondly, the OSD use was abandoned. Thirdly, even if the OSD use was not abandoned, its use was extinguished by an intervening use as a haulage yard and so the right to revert has therefore been lost. Accordingly, the Appellant is not able to use the site for an open storage use without the benefit of an express planning permission.

179. Consequently, in my conclusion, there is no fall back position to be taken into account. Indeed, the site has a nil use.

Lawful development

180. Nevertheless, I accept that the buildings on Plot 1 are lawful together with Section A of the roadway, the hardstandings on Plot 1 and part of Plot 2, the hardstanding to the front of Plot 8, the original light standards and the sewage treatment building to the west of the entrance. I shall refer to these elements as the 'lawful development'.

Policy background and Main issues

181. The development plan for the area is comprised of the South East Plan (SEP) and the saved policies of the Medway Local Plan (MLP).

182. The South Thames Estuary Site of Special Scientific Interest (SSSI), the Thames Estuary and Marshes Special Protection Area (SPA and the Thames Estuary and Marshes Ramsar Site, all have similar but not identical boundaries. They occupy a relatively linear swathe of land alongside the Thames Estuary with the SPA extending to about 4,839 ha, the Ramsar site to about 5,588 ha, and the SSSI to about 5,449 ha. The TT site adjoins the boundary of the designated sites towards the south western end of the swathe of land.

183. Historically the area surrounding the appeal site has been used for clay and chalk extraction. Consequently what remains is a damaged landscape which

the LP Policies seek to repair or restore. At the south western end of the designated sites, The MLP has overlapping local designations of Areas of Local Landscape Importance (ALLI) and land proposed for Cliffe Conservation Park (CCP). The appeal site lies within the ALLI (MLP BNE34) but not the CCP, while the RSPB Cliffe Pools Nature Reserve (the Reserve), which extends to about 237 ha, lies within both local designations and the majority of it also falls within the SPA, Ramsar and SSSI designations. There are specific policies relating to the SSSI, SPA and Ramsar Sites (MLP BNE35); and to the Cliffe Conservation Park (MLP BNE 40).

184. In policy terms, the TT site lies outside any settlement or location identified in the Local Plan for development. It therefore comprises development in the countryside (MLP BNE 25) although it is referred to under the heading 'Other employment sites' in the reasoned justification of MLP ED3.

The main issues

185. The main issues in the ground (a) appeals and the deemed applications are:

i. The effect of the appeal development on the adjacent sites of nature conservation interest and in particular whether the current use of the site is likely to significantly affect a European site (see below).

ii. The effect of the appeal development on the character and appearance of the area having regard to the development of the Cliffe Pools Nature Reserve (the Reserve) and Cliffe Conservation Park and the landscape of the ALLI.

iii. The effect of the appeal development on the living conditions of local residents having regard to noise.

iv. The effect of the appeal development on highway safety and the free flow of traffic.

v. Whether the appeal development lies in a sustainable location.

Issue i: The effect of the appeal development on nature conservation

186. I need to consider the effect of the appeal development on the adjacent sites of nature conservation interest, and in particular:

a. The Thames Estuary and Marshes Special Protection Area (SPA) (Classified on 31 March 2000) (European site)

b. The Thames Estuary and Marshes Ramsar Site (Classified on 31 March 2000) (international site)

c. The South Thames Estuary Site of Special Scientific Interest (SSSI) (Notified in 1984 under Wildlife and Countryside Act 1981) (national site).

187. It falls on me as the competent authority to determine whether the plan or project is likely to have a significant effect on a Natura 2000 site (which includes SPAs designated under the Birds Directive) - in this case, The Thames Estuary and Marshes Special Protection Area (TEM SPA) - either alone or in combination with other plans and projects that have been approved or are likely to take place.

188. Furthermore, as a matter of policy set out in paragraph 5 of Circular 06/05, the procedures applicable to a European site apply to the Thames Estuary and Marshes Ramsar site (TEMRS) (which is an international site, not a European site).

189. I also need to consider the duty imposed by section 28G(2) of the Wildlife and Countryside Act 1981 and the consequent duty on the Secretary of State to give notice to Natural England; and the duty to have regard to the purpose of conserving biodiversity (section 40(1) of the Natural Environment and Rural Communities Act 2006).

Habitats Regulations Assessment (HR Assessment)

190. The legislation makes no provision for development to be carried out in the absence of planning permission or in advance of an HR Assessment. Therefore, the circumstances of this case are unusual. Nevertheless, The Habitats Regulations Assessment involves 7 steps as set out in Circular 06/2005:

Step 1 Is the proposal directly connected with or necessary to the management of a protected site? *(If the answer is yes, then PP can be granted, providing no other harm is identified).*

Step 2 Is the proposal likely to have a significant effect on the interest features of a Natura 2000 site, alone or in combination? *(If the answer is no, PP can be granted subject to the same caveat as above).*

Step 3 If it is, or such a risk cannot be excluded on the basis of objective information, an *appropriate assessment* (AA) must be undertaken to determine whether or not the development will have an adverse affect on the integrity of the site. *(If the AA result is that there are no risks of adverse effects, PP can be granted as above).*

Step 4 If any adverse effects are identified, can they be mitigated or overcome by conditions or other restrictions such as s106 agreement or undertaking? *(If adverse effects can be sufficiently reduced or overcome through mitigation measures, such that the integrity of the site is not adversely affected, then PP may be granted subject to the necessary conditions being attached and/or the requisite s106 being signed and sealed).*

Step 5 If not, are there alternative solutions that would have a lesser effect on the integrity of the site? *(If the answer is yes, then the appeal must be dismissed).*

If there are no alternative solutions that would have either no effect, or a lesser effect on the integrity of the site, then the next step is dependent on whether or not a priority habitat or species would be adversely affected.

Step 6a If a priority habitat or species would not be affected, are there imperative overriding reasons of public interest (which could be of a social or economic nature) sufficient to override the harm to the site? *(If the answer is no, the appeal must be dismissed).*

Step 6b If a priority habitat or species would not be affected, are there imperative overriding reasons of public interest relating to human health, public

safety or benefits of primary importance to the environment? *(Again, if the answer is no, the appeal must be dismissed).*

Step 7 If there are imperative reasons of overriding public interest can it be determined that compensatory measures necessary to ensure the overall coherence of the Natura 2000 network have been undertaken or at least secured?

STAGE ONE: THE SCREENING STAGE

Step 1

191. There is no dispute that the deemed applications for planning permission are not for plans or projects directly connected with or necessary to the management of the site.

Step 2

192. I must carry out this stage of the HR assessment on a precautionary basis. The question is whether there is a probability or a risk that the plan or project will have a significant effect on the site. It is not necessary to identify that it would have at this stage, merely whether there is a risk that it might. In line with the judgement in *Waddenzee*[14] it can only be concluded that a proposal would be unlikely to have a significant effect if such a risk can be excluded on the basis of objective information. According to the judgement in Hart[15], any proposed avoidance or mitigation measures, which form part of the proposal, should normally be taken into account in considering this step. However, in this case, since the development has already taken place, any mitigation measures now proposed come after the fact, and should only be considered at the AA stage.

193. I shall make my determination not only on the basis of the effect of the proposal alone but in combination with any other plans or projects that have been approved or are likely to take place.

The appeal project or plan

194. The appeal development involves the change of use from an OSD to first an unlawful haulage depot and then to the current Trading Estate which has already taken place on a site of approximately 6.3 ha. The physical changes which have been involved include the decommissioning and removal of the OSD tanks and associated bases and pipework; the levelling of the site; the de-contamination of the site; the crushing of former concrete bases; the alteration an existing roadway to provide footways; the formation of a length of new roadway; the laying of crushed concrete over a membrane; the laying of new hardstandings using road planings and concrete; the fencing of the site into 8 distinct plots and the erection/stationing of various portable buildings. This development took place between 2003 and 2007. The boundary of the site is about 50m distance from the Natura 2000 site.

[14] Landelijke Vereniging tot Behoud van de Waddenzee and Nederlands Verening tot Berscherminh van Vogels v Stattssectretaris van Landbouw (ECJ case C-127/02)
[15] Hart District Council v. Secretary of State for Communities & Local Government, Luckmore Homes Ltd and Barrat Homes Limited [2008] EWHC 1204

195. I have already concluded that there is no fall back position to be taken into account and that the TT site has a nil use. Nevertheless, the Council has acknowledged that the use of the existing buildings on Plot 1 for small scale businesses which did not generate heavy goods vehicle movements might be capable of complying with the relevant planning policies. However, given that a Habitats Regulations assessment of such a proposal would need to be made, I take no account of it in the present case.

Other projects and plans

RSPB's proposals and the background to them

196. From the late 19th century until about 1971, Cliffe was a major centre for cement production. This led to the creation of a series of pools, which have been used from the 1960s onwards as a site for depositing river dredgings. Since this time, the area has attracted an increasing number of birds, particularly wintering waterfowl.

197. Initially, dredging material was used to completely infill some of the northern clay pits resulting in 60 hectares of grassland. Subsequent understanding of the ornithological value of the remaining flooded clay pits has led to more environmentally beneficial restoration. Pits have subsequently been only partially infilled resulting in the creation of 27 hectares of shallow brackish pools in the northern part of the Reserve and approximately 30 hectares of more shallow saline lagoons in the central part of the Reserve in a way that has been of benefit for nature conservation.

198. In addition to the statutory nature conservation designations, saline lagoons are a priority habitat under the UK Biodiversity Action Plan (BAP) to maintain and improve, as necessary, the quality of coastal saline lagoons as measured by the retention of lagoonal specialist BAP Priority and Red Data Book species where these occur. The Reserve holds 7.5% of the English resource of this habitat. As such, the Reserve has a significant part to play in meeting the objectives of the UK BAP for saline lagoons.

199. Since the RSPB acquired the Reserve site in October 2001, it has worked with Westminster Dredging Plc to create the shallow lagoons of the Reserve by infilling with mud, sand and gravel washings from commercial dredging and mineral extraction activities providing a range of habitats for birds. Visitor numbers to the Reserve have been projected to increase from 7,000 to 10,000 per year over the period 2008-2010. Following the grant of planning permission, RSPB constructed a car park (between March and August 2009) which is located between Elf Pools that occupy the southern part of the Reserve and TT to the west, alongside the access road. The car park will support 40,000 visits per year. Mitigation will be put in place to minimise disturbance to birds and to avoid water quality impacts on the adjacent pools.

200. It is anticipated that a further planning application will be submitted by RSPB for a visitor centre with toilets, catering facilities and shop. Although the location is currently unknown, it is anticipated to be in close proximity to the car park and within 100m of the TT site. It is further anticipated that there will be limited infilling of Elf Pools with the intention of attracting a wider range of birds, such as wading birds, which would be visible from the proposed visitor centre. However, the impact of the proposed RSPB Visitor Centre cannot be

fully assessed as the location and design have not been confirmed or submitted for approval to the LPA. Neither can the proposals for infilling Elf Pools be fully assessed as the proposals have not been confirmed.

201. The Medway Local Plan has also identified land to the west and north-west of Cliffe (which includes the RSPB Reserve) as a proposed conservation park (the Cliffe Conservation Park) with the potential to become a "flagship" quality scheme within Thames Gateway.

Brett's applications

202. Brett's, which is located off Salt Lane on the approach to TT, has made 3 applications to respectively vary a condition on 3 previous planning permissions (MC2009/0367 to MC2009/0369). But, all 3 applications were refused on 24 September 2009.

The receiving environment

203. The appeal site lies adjacent to the designated sites (SPA, Ramsar Site and SSSI). The South Thames Estuary and Marshes consists of an extensive area of grazing marsh, saltmarsh, mudflats and shingle characteristic of the north Kent marshes. The site supports outstanding numbers of waterfowl with over 20,000 birds regularly being recorded. Many of the birds are present in nationally or internationally important numbers. The site also supports a wide range of rare plants and invertebrates.

204. The Thames Estuary and Marshes qualify as a SPA under Articles 4.1 and 4.2 of the EC Birds Directive for the following reasons:

- Article 4.1 – the site is regularly used by 1% or more of the Great Britain populations of avocet and hen harrier;
- Article 4.2 – the site is regularly used by 1% or more of the biogeographical populations of ringed plover, grey plover, dunlin, knot, black-tailed godwit and redshank. The site further qualifies under Article 4.2 by regularly supporting over 20,000 waterfowl in any one season.

205. In 2001, the Joint Nature Conservation Committee (JNCC) carried out a review of the UK SPA network. The TEM SPA Review provided a more accurate figure for the assemblage of wintering water birds (33,433 individual waterfowl). The assemblage for any site covers the total number of all species at the site. All migratory and Annex 1 water birds within an assemblage are qualifying species and species are listed if they form at least 1% of a national population. In this case, Lapwing are amongst the species listed in the Review.

206. The Thames Estuary and Marshes qualifies as a Ramsar site by supporting these birds and in addition qualifies under criterion 2 of the Ramsar Convention by supporting a number of nationally rare and scarce plants along with vulnerable and rare invertebrates. I shall hereafter refer to the SPA, Ramsar, and SSSI designations together as the 'designated site', except where the legislation or policy applying to only one of these designations is referred to.

207. The Secretary of State for Communities and Local Government regards Natural England (NE) as its scientific adviser on this subject. In this case, whilst its original evidence was not tested, NE originally commented that: "*whilst the*

appeal site does not form part of the designated site, its close proximity to the designated site means that there is the potential for impacts upon the site from the works currently being undertaken at the Thameside Terminal (TT). Birds are particularly sensitive to very loud, intermittent noises and works carried out on the appeal site have the potential to disturb birds within the designated site. Similarly, it is possible that the water quality of the designated site has been affected from contaminated run-off from the site. In addition, it is possible that increased dust deposition from TT may impact upon the interest features of the designated site".

208. NE went on to say that "*unfortunately it had received only brief particulars of the alleged breaches of planning legislation and it had received no details of the development that had taken place, the potential impacts on the designated site or measures which may have been implemented to ensure that there is no likely significant effect on the SPA or Ramsar site, either alone or in combination with other developments. In the absence of such information, NE was unable to assess the potential impact of the alleged breach of planning legislation on the SSSI, SPA, and Ramsar Sites. As such, it recommended the precautionary principle under The Conservation (Natural Habitats &c) Regulations 1994 (as amended) is applied"*.

209. When the Inquiry opened, such a risk could not be excluded on the basis of clear objective scientific information which contradicted it. Furthermore, whilst not tested at that time, the Council was concerned that water discharged from the TT site could have a negative impact on the designated RAMSAR and SSSI sites as well as entering water courses generally. Any dust released from the site could smother plants and enter water courses. The number of lorry movements could give rise to environmental impacts and the security lighting at TT could have an effect on roosting birds.

210. In the interests of natural justice, the Inquiry was adjourned to enable the gathering and assessment of information to inform me on the need for and the carrying out of an AA.

211. Following that adjournment, the Council along with NE and the RSPB met with the Appellant's agents and ecological consultants on 26 August 2008 to discuss and confirm the extent of the survey works required to inform the HR Assessment. The Council confirmed what was agreed in a document entitled Thameside Terminal Bird Survey Scoping Document. The Appellant then undertook both an over wintering bird survey and a breeding bird survey and produced an Environmental Statement dated September 2009 accompanied by a Biodiversity Report dated August 2009.

212. As acknowledged in the Appellant's Environmental Statement, there are a number of factors that have the potential to cause disturbance to birds on the RSPB Cliffe Pools Nature Reserve. The current operations on the TT site, the Brett's site and the current usage of the Reserve by the public may have potential impacts upon the birds in the Reserve including:

- noise disturbance which may cause stress and prevent birds using the pools
- visual disturbance by vehicles, visitors etc which may cause stress and prevent birds using the pools

- lighting which may cause stress and prevent birds using the pools
- dust contamination of the pools, which may reduce the quality and attractiveness of the pools
- chemical contamination, which may reduce the quality and attractiveness of the pools
- predators

213. Previous activities at TT have resulted in the possibility of discharge of contaminants such as petrol into Elf Pools. However, the Appellant's investigations have shown that the ground water below TT site flows to the east and away from the Reserve. Current operations within TT site are dissimilar to those previously undertaken and are not expected to produce notable levels of contaminants. With appropriate precautions, I am satisfied that the current activities will not increase the risk of discharge into the pools.

214. However, the Wetland Bird Survey (WeBS) counts suggest that the numbers of birds on Elf Pools has declined during the period of time that the Trading Estate has developed on the TT site.

215. On the basis of the evidence before me and as set out above, I cannot therefore exclude the possibility that the Trading Estate has had, or will have, a significant effect on the designated site. I must therefore undertake an appropriate assessment (AA).

THE APPROPRIATE ASSESSMENT

Step 3

216. In undertaking the AA I have considered the impact of the appeal development on the protected site in the light of the site's conservation objectives. The ultimate test is whether the proposal would adversely affect the integrity of the site. In considering this test, the protected site should be looked at as a whole and not just the part which is nearest to the appeal site.

217. Neither the Directive nor the Regulations define what is meant by *the* integrity *of the site*. However, *Managing Natura 2000 Sites – Office for Official Publications of the European Communities, 2000* regards the connotation or meaning of 'integrity' as "*a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation".* It says that it has been usefully defined as "*the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats, and/or the levels of populations of the species for which it was classified"* (now paragraph 20 of C 06/05). Then it goes on to say that "*a site can be described as having a high degree of integrity where the inherent potential for meeting the site's conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required".*

218. The integrity of a site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site's conservation objectives.[16]

219. Article 1(e) of The Habitats Directive states that "*The conservation status of a natural habitat will be taken as 'favourable' when its natural range and areas it covers within that range are stable or increasing, and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and the conservation status of its typical species is favourable as defined in (i);…"*

220. Article 1(i) of The Habitats Directive goes on to state that: "*conservation status of species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2; the conservation status will be taken as 'favourable' when: population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;.."*

221. Thus, I need to consider the impact of the appeal development on the SPA and Ramsar site in the light of the conservation objectives for the protected site. The specific conservation objectives for Elf Pools are set out in the conservation objectives for the protected site which can be found within the document entitled *The Thames Estuary and Marshes Special Protection Area (SPA) Conservation Objectives.* That document specifically states that those conservation objectives were produced by English Nature in 2000 and were related to the SPA features **at the time**. So, I am bound to conclude that the **baseline** for my assessment is the habitat type provided by Elf Pools at that time and at present i.e. deep and steep sided pools as opposed to the proposals by RSPB to create shallow pools by infilling the current pools with dredging material.

222. The conservation objectives for the European interest features of the STEM SSSI are, subject to natural change, to maintain in favourable condition the habitats of the populations of Annex 1 species (i.e. avocet and hen harrier) and the migratory species that contribute to internationally important levels of the TEM SPA and the habitats of the waterfowl that contribute to the waterfowl assemblage of TEM SPA with particular reference to, amongst other things, saline lagoons (which include Elf Pools). The document notes that the term maintenance implies restoration if the feature is not currently in favourable condition.

223. The document goes on to say that "*The Favourable Condition Table will be used by English Nature…to determine if the site is in favourable condition and that favourable condition is achieved when certain stated targets are met"*. It notes that the determination of **favourable condition** is separate from the judgement of effect upon **integrity**. For example, there may be a time-lag

[16] Assessment of plans and projects significantly affecting Natura 2000 sites published by Office for Official Publications of the European Communities, November 2001

between a plan or project being initiated and a consequent adverse effect upon integrity becoming manifest in the condition assessment. In such cases, a plan or project may have an adverse effect upon integrity even though the site remains in favourable condition.

224. Saline lagoons are listed as an operational feature within the Favourable Condition Table. The target is "*no significant reduction in numbers or displacement of wintering birds attributable to disturbance, subject to natural change.* The Table comments that *significant disturbance attributable to human activities can result in reduced food intake and/or increased energy expenditure. Five year peak mean information on populations will be used as the basis for assessing whether disturbance is damaging".*

225. In considering the effect on the integrity of the designated site, the appeal development has the potential to disrupt those factors which help to maintain the favourable condition of the site and to interfere with the balance, distribution and density of key species that are indicators of the favourable condition of the site.

226. The intention of the Habitats Directive and Regulations is to ensure that assessment is carried out before development takes place, and so they have been drafted accordingly. Thus, the guidance in *Assessment of plans and projects significantly affecting Natura 2000* sites assumes that the relevant stages of the Habitats Regulations Assessment will be completed in advance of any application for project or plan authorisation. Since this case involves development which has already been carried out, it is necessary for me to consider the baseline conditions without the appeal development in order to consider the effects of the development.

227. The information provided by the Appellant (in Technical Appendix 6 to the Environmental Statement) purports to provide the information necessary for me to carry out an AA. However, in the main, it relates to surveys carried out after the development had taken place. Consequently, save for the inclusion of WeBS counts data, there is no information as to conditions before the development was carried out.

228. The Reserve (237ha) forms less than 5% of the area of the SPA (4,839ha). I shall undertake my assessment in respect of the whole of the Cliffe Pools Reserve – in order to determine the impacts upon all waders and wildfowl, with particular reference to the over-wintering waders listed under the citation of the SPA; and in respect of the Elf Pools (A, B, C and D) which lie within the wider Reserve. Elf Pools known as A and D are within close proximity of TT and are therefore most likely to be impacted upon by the associated operations. These pools are also closest to the access road to TT, the Brett's works, the RSPB car park and the proposed visitor centre.

229. The WeBS involves volunteers counting water birds once a month around high tide throughout the winter. The Reserve is divided up into several different WeBS count sectors including Elf Pools. The 5 year peak mean (2002-2007) count for the Reserve compared with that for the SPA shows that the Reserve holds 27% of the total SPA population. Given that the Reserve forms less than 5% of the area of the SPA, I consider that it holds very significant numbers of wintering water birds. The Reserve is particularly important in the context of

the SPA as a high tide roost site. Water birds feed on the mud flats of the SPA at low tide and then move onto the Reserve to roost in safety when the mudflats are covered by water at high tide.

230. The importance attached to SSSIs is recognised in the adoption by Defra of the Public Service Agreement for SSSIs that 95% by area should be in 'favourable' or unfavourable recovering' condition by 2010. The special interest feature of an SSSI is deemed to be in 'favourable condition' when all the conservation objectives for that feature are being met. 'Unfavourable recovering condition' applies when the conservation objectives for the feature are not being met following damage, but the feature has begun (or is continuing to show) a trend towards favourable condition and all necessary measures are in place to enable the feature to achieve favourable condition.

231. In this case, in June 2002, shortly after the RSPB acquired the Nature Reserve, Natural England assessed the SSSI as being in **unfavourable** condition. There was a significant problem with fly-tipping and dumping of cars, with several burnt out cars (within the SSSI). The area within and adjacent to the SSSI was being used for motorbike scrambling and as a race track for stolen or MOT-failed cars before they were burnt out. These activities were causing disturbance to birds using the site and were considered to hamper effective site management (the WeBS counts for Elf Pools were 104 for 2001/02 and 90 for 2002/03).

232. In December 2003, English Nature (NE) noted that the RSPB had been progressing its plans for the site and that its action on the ground had significantly reduced the disturbance and fly-tipping problems on the site. Good numbers of wintering birds were present during NE's site visit. The site was recorded as being in **unfavourable recovering** condition. But, by February 2009, following the implementation of measures agreed with NE to address illegal activities within the SSSI, Elf Pools were re-assessed as being in **favourable** condition and by November 2009, 97.6% of the STE&M SSSI was in 'favourable' or 'unfavourable recovering' condition. As such, Elf Pools currently meets the Defra target. (the WeBS counts for Elf Pools were 447 for 2004/05, 210 for 2005/06 and 197 for 2006/07).

233. NE has confirmed that its conservation objectives for the SSSI are based on the habitat type **at the time the SSSI was notified** and use this as the **baseline** habitat against which the current condition is assessed (i.e. for Elf Pools - deep and steep sided pools). This does not reflect RSPB's own future proposals to fill these pools with dredging material to make them shallow pools so that they potentially become a fully functioning habitat for the SPA and Ramsar species and in particular to make them potentially attractive to waders. NE also confirmed by e-mail dated 18 November 2009, that it had assessed the recent condition on the state of the current habitat and against those issues reported in the past for unfavourable condition i.e. antisocial behaviour.

234. In terms of the current SPA status, Elf Pools have no potential or significance for the species listed in Annex 1 as the pools currently lack suitable habitat for use in the winter by more than occasional individual birds. However, they currently contribute to the SPA Article 4.2 qualification, Ramsar site and SSSI through the wintering water bird assemblage they support. The species found in largest numbers on Elf Pools are Lapwing (which roost on the causeways

between the pools), Little Grebe and Tufted Duck (which both dive for food), Coot (which both dives and dabbles in shallow water) and mallard (which dabbles for food in shallow water).

235. Thus, for the purposes of the AA, the **baseline for Elf Pools** is the habitat type at the time the SPA was classified (31.03.2000) and at the time the SSSI was notified (1984) i.e. deep, steep sided saline lagoons. Similarly, the **baseline condition for the appeal site** is the situation in 2000 i.e. prior to ownership of the appeal site by BA and prior to the removal of the OSD tanks and the introduction of the current appeal activities.

236. In that context, I consider it is something of a misnomer to refer to the RSPB proposals as a 'restoration' project. Elf Pools are currently about 15m deep. The intention of the RSPB is not to restore Elf Pools to 'favourable status' as deep, steep sided pools which primarily attract divers. The intention is to create a new saline habitat for waders by filling the pools with dredging material so that they become shallow pools of about a metre in depth and to create islands and shallow margins for nesting and roosting birds in order to potentially increase numbers of breeding, wintering and passage water-birds. The RSPB also intend to introduce sluices and to control the salinity. The proposals are intended to increase the numbers of wintering water birds overall (including continuing to support diving birds) and individual species for which the SPA and Ramsar site were designated. So that the Elf Pools will potentially make a similar contribution to the SPA and Ramsar site as the rest of the Reserve.

237. In short, at no time in the history of the SPA have these pools been shallow. So, whilst they might potentially attract more of the Annex 1 birds, if the project were to be implemented, the proposed habitat is not an integral part of the SPA as designated. Consequently, whilst the project could arguably be described as an enhancement project which could artificially assist the site to evolve in ways which might be favourable to conservation, I do not consider that the RSPB is bound by any legal requirement under the Habitats Directive to carry out these proposals.

238. To my mind, for the purposes of AA, the RSPB proposals are 'another plan or project'. In this context, I note that the Local Plan identifies Cliffe Pools and Pits as a distinctive, complex landscape of man-made lagoons and chalk pits where Policy BNE33 seeks to inhibit further destruction of the landscape and encourages further positive efforts to restore the landscape. As such, the RSPB proposals may well be considered to be a 'restoration' project for the purposes of this policy. Whilst the RSPB proposals have been longstanding, and its Management Plans for Cliffe Pools dated March 2004 and April 2006 were submitted to NE, neither was approved a s a whole document, although NE has by letter of 9 November 2009 given its consent to the proposals made in the Cliffe Pools Management Plan 2008-2013 under section 28H of the Wildlife and Countryside Act (as amended). However, I consider the works undertaken by RSPB to remove the illegal activities from the site to be 'management works' which have been implemented to restore the site to 'favourable condition'.

239. The appellant says that the WeBS counts are intended to provide a much larger scale assessment of bird numbers and that they should be used with

caution when considering a relatively small site. However, in the present case, it is the only 'before' and 'after' data before me.

WeBS data - Table of Peak winter counts (i.e. Oct-Mar inclusive) of total water birds (excluding gulls or terns) and the month in which the peak count was recorded

Year	Elf Pools	Cliffe Pools	Thames SPA
1996/97	344 (Nov)		
1997/98	43 (Dec)	5,720 (Dec)	22,968 (Nov)
1998/99	69 (Dec)	3,522 (Nov)	39,562 (Dec)
1999/00	53 (Nov)	5,409 (Nov)	33,234 (Feb)
2000/01	62 (Feb)	3,727 (Nov)	54,897 (Jan)
2001/02	104 (Oct)	Not counted	28,040 (Dec)
2002/03	90 (Oct)	10,218 (Jan)	47,194 (Jan)
2003/04	Not counted	7,750 (Nov)	31,998 (Jan)
2004/05	447 (Dec)	7,664 (Dec)	30,912 (Jan)
2005/06	210 (Nov)	11,176 (Dec)	37,802 (Dec)
2006/07	197 (Oct)	11,136 (Nov)	26,756 (Dec)
2007/08	Data not available	Data not available	20,573 (Dec)
2008/09	181 (Jan)		
2008/09 Reaction	175 (Jan)		

240. From the WeBS data (see table above), looking at the SPA as a whole, the numbers of birds within the SPA has fluctuated over the 11 year period 1997/98-2007/08 with the average number of birds being about 33,994, which is little different from the numbers given in the JNCC 2001 Review (33,433). The numbers appear to have been at their lowest in December 2007, but even then there were over 20,000 individual waterfowl consistent with the citation.

241. From this data, the numbers have fluctuated considerably across the SPA as a whole, within Cliffe Pools and on Elf Pools. However, when numbers peaked on the SPA they were relatively low on Elf Pools, but when they peaked on Elf Pools they were below average on the SPA.

242. Numbers on Elf Pools were high (344) in 1996 when OSD was still operating; numbers were at their lowest (43-104) in the years 1999-2003 when OSD had ceased to operate but at a time when there were illegal activities on the RSPB site. Numbers were at their highest (447) in 2004 after RSPB started to manage the Reserve and after the Appellant's activities had commenced on TT site, but they have subsequently declined from 447 down to 175 with some fluctuation in between in the years 2004 to 2009.

243. Comparison of past and current WeBS counts does not necessarily provide meaningful statistical analysis due to the high number of variables including weather, vandalism, foot and mouth, and changes to the management of the Reserve. However, what is significant is the more detailed analysis provided by WeBS of the 5-year winter peak counts of the species present on Elf Pools. For Goldeneye, there were 3 in Dec 2002, 5 in December 2004, and 13 in January 2006. For Lapwing there were 55 in November 2002, 323 in December 2004, and 163 in November 2005.

244. From the historic WeBS data, Lapwing regularly used Elf Pools during the winters until 2005/06. But, the 2006/07 counts recorded no Lapwing using Elf Pools. During the Appellant's 2008/09 survey, Lapwing occurred briefly with 2 birds roosting on Pool C on 12 November 2008. The Appellant notes that Lapwing roost on islands within the pools on the Reserve and speculates that a change in the habitat, reduced water level and increased vegetation within Elf pools may have contributed to reduced numbers. I have considered very carefully, therefore, whether the numbers or displacement of these wintering birds have been subject to natural change. But, I have insufficient objective scientific data to support such a conclusion.

245. WeBS counts indicate that Dunlin (listed in SPA citation) have not regularly used the Elf Pools as a roost site. However, the records include peak counts of Dunlin using the pools in December 2004. As the Appellant points out, this count coincides with a notably high count of Lapwing, and so it is likely that Dunlin visited the pools in association with the large Lapwing flock present at the time. Accordingly, any effect on the numbers of Lapwing is likely to affect the numbers of Dunlin.

246. In the winter of 2004/05, the peak count for waterbirds on Elf Pools was 447. Those waterbirds included 323 Lapwing (a wader) and 5 Goldeneye (a diving duck). At that time, the current activities on TT had not started. Mr Miller **Plot 2** may have been in occupation (late 2004/early 2005) and Mr Andrews may have been making use of part of the site as a haulage yard.

247. In the winter of 2005/06 the peak winter count for waterbirds on Elf Pools was 210. The counts included 163 Lapwing and 13 Goldeneye. Most of the current uses and activities on the TT site had not started by November 2005 (the peak count for Lapwing) or January 2006 (the peak count for Goldeneye). Roe Engineering had started to occupy Plot 8 in early to mid 2005. The Appellant's reaction survey indicates that Elf Pools are currently used by small numbers of birds comprising mainly Coot, Little Grebe and Tufted Duck, all of which hunt for food by diving. Small numbers of other species were also regularly present including Little Egret, Moorhen and Pochard. Occasionally present were Mallard, Gadwall and Teal, all of which are dabbling duck.

248. During the Appellant's surveys there were no regular flights in or out of the pools as a result of noises or visual activity at TT site, the Brett's works or as a result of RSPB development works. The most obvious disturbance noted was the movement of birds associated with passing pedestrians, walkers, dog walkers and bird watchers. The Appellant's survey visits included weekends when activity at TT is much reduced. However, the Appellant says this did not indicate any change in bird populations associated with the pools that might be attributed to lower levels of potential disturbance.

249. Nevertheless, I share the Council's concern that the Appellant's survey observations were of non-sensitive (or less sensitive) birds, possibly because any sensitive birds had already been displaced from the site. Indeed, the oral evidence of the Appellant's witness was that that he could not say whether different species would have acted differently. Notably, neither Goldeneye nor Lapwing has been observed at Elf Pools since the winter of 2005/06. From the evidence on the effects of disturbance on birds, active high level disturbance such as industry with high outside exposure to people (as occurs at the TT site) causes significant levels of disturbance to birds. Goldeneye are known to be sensitive to disturbance, for example, by water recreation, while Tufted Duck, Poachard, Mallard and Coot are known to be tolerant of activities such as water recreation, and Coot are known to be most tolerant of human disturbance.

250. Thus there is no objective scientific evidence for me to rule out the possibility that Goldeneye and Lapwing have been displaced from Elf Pools because of the activity on the appeal site. In particular, the Appellant's reaction survey was able only to capture the reaction of birds known to be tolerant of disturbance. Given that Lapwing is amongst the birds cited under the Article 4.2 Assemblage Qualification in the JNCC Review, and the WeBS data for 2001/02-2006/07 indicate the site supports Nationally important winter levels of Goldeneye (2%) and Nationally important autumn and winter levels of Lapwing (1%), and International important autumn and winter levels of Lapwing (1%), I cannot be certain that the activity on the TT site has not had, or is not likely to continue to have, an adverse impact on the contribution made by Elf Pools to the SPA as a whole to sustain the levels of populations for which it was classified. If Dunlin have visited the pools in association with Lapwing, this would further exacerbate the likely adverse effect on the SPA.

251. The written evidence of Natural England, following the submission of the Appellant's Environmental Statement dated September 2009 accompanied by a Biodiversity Report dated August 2009, is that NE is "*satisfied that the information at present provided does not disclose that the unauthorised development subject to the appeals has had a significant effect on the adjacent designated sites"*. However, NE did not attend the Inquiry.

252. In the light of the document *The Thames Estuary and Marshes Special Protection Area (SPA) Conservation Objectives* it seems to me that NE assessed Elf Pools as being in 'favourable condition' in November 2009 because RSPB had addressed the issues in relation to antisocial behaviour which had been noted in NE's June 2002 assessment. However, in the light of the evidence before me, which was tested at the Inquiry, the detailed WeBS counts species data indicates that, since the current uses and activities have taken place on the appeal site (TT) there has been a significant reduction in numbers and displacement of wintering birds (in the main Lapwing) on the saline lagoons. Consequently, in my judgement, the data indicates the manifestation of an adverse effect on the integrity of the SPA, albeit the habitat of Elf Pools has been assessed as being in favourable condition.

253. As I have already concluded, the data indicates that the birds more sensitive to disturbance have not used the Elf Pools since the winter of 2005/2006. The birds which no longer use Elf Pools include Lapwing, a species which forms part of the Internationally important assemblage of waterfowl identified in the SPA

data form, and specifically referred to in the SPA review document under the "assemblage qualification".

254. On the basis of that evidence, it cannot be excluded on the basis of objective information, that the continued use of the TT site for the development which has already been carried out will have an adverse effect on the integrity of the designated site either individually or in combination with other plans or projects.

Step 4

255. There are no s106 agreements or undertakings before me in these appeals. So, I must now consider whether the adverse impacts that I have identified could be mitigated or overcome by conditions. However, first, even if I were to accept that a scheme of mitigation could be provided in the form of a bund on the land to the west of the access road, the Land Registry documents would appear to suggest that this land is owned by RSPB. Furthermore, on the basis of the evidence that I heard, RSPB would be unlikely to make the land available for such a purpose. In these circumstances, I cannot impose a negative (Grampian) style condition.

256. Secondly, whilst the Appellant submitted a sketch indicating the extent to which a landscaping scheme could be implemented on its own land, there is insufficient evidence before me as to how such a scheme would overcome my concerns in relation to the disturbance of birds since the winter of 2005/06.

Step 5

257. No alternative solutions have been put forward by the Appellant. However, I conclude elsewhere that there are likely to be suitable and available sites where the existing occupants could be accommodated in locations where they would have no effect on the integrity of the designated site. Therefore, planning permission cannot be granted in accordance with the Habitats Regulations and all of the appeals must be refused. Steps 6 and 7 do not fall to be considered.

258. As a consequence of my conclusions on the AA, planning permission should be refused on this ground alone. I have also had regard to the duty imposed in s28G of the Wildlife and Countryside Act 1981 and to paragraph 61 of C 06/05, but given my conclusions in respect of the SPA/Ramsar site a decision to grant planning permission would not avoid adverse effects on the SSSI. Furthermore, it would not conserve biodiversity (section 40(1) Natural Environment and Rural Communities Act 2006).

Issue ii: The impact of the current development on the character and appearance of the area

259. My starting position is that the site has a nil use and the baseline against which I shall consider the current development (Trading Estate) is a site which is cleared save for the agreed lawful development. In these circumstances, in the absence of an alternative planning permission, the remainder of the site would otherwise be likely to return to scrub.

260. Local Plan Policy BNE34 provides that within an ALLI development will only be permitted if it does not materially harm the landscape character and

function of the area. In this case, the reasoned justification says that the Cliffe Pools and Pits ALLI has a distinctive, complex landscape of man-made lagoons and chalk pits west of Cliffe. The area is gradually reverting to a more natural appearance with well vegetated margins, spits and islands. It goes on to say that the industrial activities remain but the role of the ALLI is to inhibit further destruction of the landscape, to protect the natural recovery that has occurred, and encourage further positive efforts to restore the landscape. In addition, its function is to complement the proposals for the Conservation Park within the area.

261. There are a number of landscape character assessments of the existing landscape which all follow a similar theme of repairing a damaged landscape. In the 2001 Medway Landscape and Urban Design Framework (LAUD) the appeal sites were included in the Cliffe, Ryestreet and West Street character area. The capacity for change was assessed as being low. But, on the basis that the character was weak and condition poor, the regeneration objective was identified as "reconstruct". The landscape guidelines include resisting any development in open countryside not in character with the existing settlement pattern.

262. In the landscape assessment of Kent, the appeal sites fall into the Hoo Peninsular landscape character area where the action recommended is "restore and create". The draft Medway Landscape Character Assessment (LCA) takes the same approach as the Kent Thames Gateway Landscape Assessment (KTGLA), in that the appeal site(s) and marshes fall within the same landscape character area. The industrial estate on the TT site is identified as a detracting feature.

263. It seems to me that policy BNE34 applies to all development (including previously developed land), not just that which is on previously undeveloped land. Furthermore, since TT is a worked out quarry, most of the description characterises The Reserve. On the evidence, save for some weed growth on the course tarmac surrounding the former OSD tanks, and some scrub growth to the margins of the TT site, little natural recovery had occurred on the TT site at the time the appellant acquired the land. Furthermore, the OSD would have contributed to the industrial activities referred to. Nevertheless, the function of the ALLI is, in part, to protect the natural recovery that has occurred and to encourage further positive efforts to restore the landscape.

264. In this case, the roadway which runs through the centre of the site is straight and wide and somewhat crude in its detailing. The site is further divided into 8 plots (of approximately 1 acre each) bounded by high steel palisade fencing within which there are buildings with a utilitarian and temporary appearance, portacabins, plant, parking, storage and other facilities. In so far as any natural recovery had taken place (which can be seen in the areas of vegetation on the aerial photographs of the OSD), these have been lost and the appeal development is devoid of any soft landscaping. As a consequence, the appeal development is of a poor standard of design, the detailing and layout of which neither responds to, nor reflects, the natural character and quality of the surrounding landscape. As such, the site has a harsh and alien character which fails to integrate with the surrounding natural environment. Consequently, the impact of the appeal development is wholly inconsistent with the objective of the LAUD guidelines as it does not restore or

reconstruct the damaged landscape. Furthermore, the development for which planning permission is now sought is new development in open countryside which conflicts with the landscape guidelines to resist such development and is wholly inconsistent with the function of the ALLI and materially harms both the character and function of the area in conflict with the local plan.

Landscape and visual impact assessment

265. I made 2 accompanied site visits, one in June 2008 and one in February 2010, of which the latter was a comprehensive site visit to TT and the adjoining Reserve. I also made 3 unaccompanied site visits in February 2010. In addition, I have had regard to the photographic evidence of both the Appellant and the Council which shows both summer and winter time views.

266. I agree with the Council's assessment that the main visual receptors are outdoor recreational users consisting principally of dog walkers, ramblers and bird watchers. Furthermore, the land surrounding the appeal site which forms part of the SPA, SSSI, ALLI and Conservation Park is itself a sensitive landscape receptor. Accordingly, this factor increases the sensitivity of the overall view.

267. There seems to be little or no dispute between the main parties that in so far as the appeal development can be seen, it has an adverse visual impact. The area of dispute centres on the extent and nature of the adverse impact.

268. I acknowledge that TT lies within a worked out quarry which is broadly horse-shoe shaped. Accordingly, it is in large part screened by remnant hillside from the east and south sides although the mouth of the quarry is visible from various local viewpoints from the west and north. I also acknowledge that the lawful buildings on Plot 1, to an extent, screen the interior of the site from some of the public viewpoints.

269. There are 3 near distance views of the appeal site. First, it can be seen from Public right of Way (PROW) RS80 to the north of the appeal site. From this view, I could see various portacabins and stored materials, a Nissen hut on Volker Fitzpatrick's yard (Plot 6) and the H&M workshop (Plot 4). From the photographic evidence it was possible to see cranes on the Roe Engineering site which appeared to rise well above the surrounding hillside such that they dominated the skyline.

270. Secondly, a clear panoramic view of the appeal site can be seen from the RSPB's Pinnacle viewing platform which is located near the top of a piece of remnant hillside. Whilst the TT site is divided into neatly fenced plots, it is dominated by utilitarian buildings, portacabins and open storage which appear as somewhat unsightly visual clutter.

271. Thirdly, the frontage of the appeal site can be seen from PROW RS80. Prominent in this view, are the lawful frontage buildings (which include the workshop and the office building), the brightly coloured scissor lifts belonging to Panther Platforms, and the lawful flood protection bund. From the photographic evidence, the cranes belonging to Roe Engineering were also dominant in the skyline.

272. Looking both east and north-east from PROW RS332, there are, what I would describe as, middle distance views of TT. The appeal site is visible as a band of built development (buildings and structures) on the quarry floor surrounded by the remnant hillside, much of which is covered in scrub vegetation. In addition to the lawful workshop building, what was most striking to me was the Panther Platform scissor lifts which rise above the frontage buildings and the B&T shed (Plot 3) which increases the depth of development on the site. That impression is further reinforced by the ability to see lights on the buildings including those on Plot 6. In addition, from the photographic evidence, the equipment/activities of Roe Engineering included cranes which rose above the remnant hillside and which were not only highly visible in the landscape but also which gave the site an industrial character.

273. In more distant views, for example from PROW RS331 (looking to the south east), the most prominent features were still the lawful workshop building and the B&T shed. But, from the photographic evidence, the cranes were also highly visible on the Roe Engineering plot.

274. Whilst I accept that Roe Engineering has already left the site, and whilst Panther Platforms were intending to leave the site at he time of the Inquiry, similar users could occupy those plots on the proposed Trading Estate if planning permission were to be granted.

275. Taking account of all of these factors, the appeal development has a materially adverse impact in views from the west. The introduction of visual detractors into views enjoyed by those pursuing outdoor recreation is likely to have a marked and unacceptable impact in conflict with LP Policy BNE34.

276. Whilst there is no comprehensive landscaping scheme before me, the Appellant considers that there is scope for landscape enhancements. However, it now appears that most of the land required for those enhancements is in the ownership of RSPB. And, from the evidence of the RSPB at the Inquiry, it would not permit the Appellant to implement a mitigation scheme on any land which is within RSPB ownership. Therefore, I am not able to impose any negative (Grampian conditions). In any event, I consider that the likely timescale for establishing any screen planting on the south slope of the Pinnacle renders it unacceptable in terms of mitigating the adverse visual impact of the appeal scheme.

277. A further plan was submitted to the Inquiry showing possible areas for additional mitigation/enhancement planting. However, whilst such planting might go some way towards helping to soften the overall appearance of the site, I consider that it would be insufficient to properly integrate the appeal scheme into its sensitive environment in accordance with Policy BNE6.

278. In my view, the appeal development has created a harsh environment, dominated by visually intrusive external storage. Furthermore, I consider it to be insensitive and alien in the context of the surrounding natural environment which the Council is seeking to repair or restore. And, as I conclude below, there are no economic and social benefits which are so important that they outweigh the local priority to conserve the area's landscape. Consequently, I find the appeal scheme to be in conflict with national and local policy for development in the countryside.

Issue iii: The effect of the appeal development on the living conditions of neighbouring residential occupiers by reason of the increase in noise levels.

279. There is no dispute that the occupiers of the residential properties that abut the highways which provide access to the appeal site are considered as sensitive receptors. The relevant properties are Concrete Cottages in Salt Lane and No. 1 Gladstone Cottages at the junction of Buckland Road and Rectory Road.

280. The main parties both carried out noise assessments, each based upon their own traffic assessments, and each using a different methodology. Nevertheless, there is no dispute that paragraph 19 of Annex 3 of PPG24 advises that general guidance on acceptable noise levels within buildings can be found in BS 8233. The design range for indoor ambient noise for reasonable resting/sleeping conditions in bedrooms is given as 30-35dB$L_{Aeq,T.}$ The World Health Organisation (WHO) also provides guideline values for community noise. For sleep disturbance effects, the guidelines are based upon a combination of 30dB $L_{Aeq,8hr}$ and 45 dB L_{Amax}. The Appellant adopted the 30-35 dB guideline while the Council considers that a 1 hour L_{Aeq} provides a more appropriate measure.

281. On the basis of the Appellant's 2008 traffic figures, the Appellant concluded that the difference to internal night time noise levels at Concrete Cottages when comparing the level of traffic with and without TT was +10dB on weekdays and +7dB at weekends. Applying the criteria identified by the Appellant those increases can be considered to be 'major' and 'substantial' respectively. The effect of the increase at the weekend is to cause the night time noise environment to change from a level within the BS 8233 range (32dB) to a level outside the range (39dB).

282. On the basis of the Appellant's 2009 traffic figures, the Appellant predicted that the internal noise levels at Concrete Cottages without TT traffic would fall within the range considered acceptable in WHO/BS 8233, whereas with the TT traffic internal noise levels increase by 11dB (major) on weekdays and 9dB (substantial) at weekends and exceed the WHO/BS 8233 criteria.

283. The Council, using its own traffic figures based its $L_{Aeq,1hr}$ calculations on predicted noise levels, concludes that the internal predicted night time noise levels, including the TT traffic, exceed the guidance levels at Concrete Cottages and at No. 1 Gladstone Cottages. Whereas if the TT traffic is excluded, the levels fall within the relevant guidance levels.

284. The Council's L_{Amax} single event levels show that internal levels will exceed 45 dB L_{Amax}. The extent to which a single noise level is exceeded is best demonstrated by considering the L_{Amax} for the 05.23-06.23 hours period (88.1). Even with the windows shut, and assuming a good seal, the internal level would be 60dB (applying the 28dB reduction referred to in PPG24).

285. Accordingly, I am in no doubt that the relevant guidelines are exceeded and there is no evidence to suggest that noise levels in excess of guidance levels can, in this case, be considered acceptable. Furthermore, the Council has referred me to the Design Manual for Roads and Bridges which suggests that 25% of people would be very annoyed with an internal level of 44 L_{Aeq}.

286. From the evidence at the Inquiry, there is no dispute that the increase in vehicle movements to and from the appeal site, particularly during the night, has a detrimental impact on the living conditions of the occupiers of Concrete Cottages and No. 1 Gladstone Cottages. The period before 07.00 hours is considered to be the night time when people can be expected to be asleep. And, in this case, HGV movements tend to occur in the period from 06.00-07.00 and some from 04.30 hours.

287. I have considered whether it would be possible to overcome my concerns relating to night time noise associated with the movement of HGVs by the imposition of a condition restricting the times at which vehicles could enter and leave the appeal site (i.e. between 07.00 and 23.00 hours). However, with the deemed applications, I have to consider the individual plot uses as carried out and such a condition would prevent certain of the existing businesses operating:

- H&M (**Plot 4**) have to be able to respond at an hour's notice. They currently have 2 people on site all night, ready to respond. Their witness says that they are called out approximately 4 times per week (twice in relation to road plant and twice in relation to rail plant). Regular movements go out at 06.00 hours.
- David Watson Transport currently occupying **Plot 5** has vehicles leaving the site at 05.00 hours.
- Volker Fitzpatrick (**Plot 6**) leave the site at any hour to respond to emergencies.

288. Clearly it would not be possible for those particular occupiers to run their respective businesses properly if a condition were to be imposed restricting the hours at which vehicles could enter and leave their sites. Therefore, in the light of the development which is the subject of the deemed applications (Notices B, H, I, and J) before me, such a condition would be unreasonable and so it would not meet the Tests in Circular 11/95. The Appellant has suggested that the condition could offer an exception clause for example relating to highway maintenance. However, first, I consider that this would make the condition both imprecise and difficult to enforce. Secondly, even if I am wrong in that conclusion, given the nature of the current occupants and the estimated frequency of their need to attend to emergencies, residents would still experience night time disturbance on several nights of the week.

289. Consequently, the only realistic means of protecting the living conditions of neighbouring residential occupiers is for me to refuse to grant planning permission.

Issue iv: The effect of the appeal development on highway safety and the free flow of traffic

290. As already stated, the appeal site (TT) lies within a rural area outside any settlement boundary. Salt Lane which provides access to the site is a country lane without footways, it is narrow and it has some bends in it.

291. Both main parties have produced traffic surveys. However, HGVs are defined by weight and automatic traffic counters do not measure the weight of

vehicles. So the Appellant used all vehicles of 3 or more axles as a proxy for HGVs. Thus the Appellant's figures exclude HGVs with 2 axles, for example road sweepers. By contrast, the Council's analysis includes all vehicles with 3 axles or more and all vehicles with axle spacing of more than 10 feet (3.2m). As a consequence, the Council's survey shows a higher number overall of vehicles visiting TT than the Appellant's survey.

292. However, the only technical evidence which relies upon the precise traffic counts is the noise evidence. But, as I have already concluded, although the parties relied upon their own respective traffic surveys (which are different), they come to the same conclusion in respect of noise.

293. Access to TT is provided by the B2000 and local unclassified roads, namely Rectory Road, Buckland Road and Salt Lane. None of those roads was designed to accommodate HGVs. Although Buckland Road and Salt Lane have a series of shallow bends, in my view, their alignment is not so different from that of the B2000. However, Salt Lane is of varying width and narrows to 4.1m in places. Given that a lorry is about 3m wide, I am concerned that the width of Salt Lane is insufficient to allow 2 lorries or other HGVs to pass. Furthermore, the traffic using TT involves a variety of HGVs including low loaders. From the evidence of H&M Plant (**Plot 4**), its vehicles include low loaders to transport plant. On occasions the plant overhangs the side of the trailer giving a maximum width of 2.9m.

294. During the period immediately before TE was brought into use there were no recorded personal injury accidents (PIAs) on Salt Lane, whereas since the TE began to operate, there have been 3 PIAs on Salt Lane, and there have been PIAs in Buckland Road. Of the 3 PIAs on Salt Lane, one involved an HGV that was struck by a vehicle travelling in the opposite direction. The second occurred when a vehicle slowing down was struck by a following motorcycle that failed to stop; and the third was at the Brett's access when a vehicle pulling out of the access struck a parked car.

295. Even if none of these accidents was directly attributable to vehicles travelling to and from TT, the width of the road and the presence of HGVs have been contributory factors. In these circumstances, the Trading Estate the subject of the deemed applications is likely to increase the risk to highway safety and the free flow of traffic for the users of the highways connecting the appeal site to the B2000. Given that there are no footways it would be particularly hazardous to pedestrians.

Issue v: Whether the site lies in a sustainable location

296. TT comprises previously developed land (pdl) on which there remains a not insignificant amount of useable development. Whilst Policy KTG1 of the South East Plan (SEP) seeks to encourage the full use of pdl, that policy has to be considered together with the 6 spatial planning principles and in particular 'urban focus', and with the policies which favour sustainable development (such as policy T1 and in particular T1(iv)). In this case, the TT site is not served by public transport; it is not easily accessible by pedestrians; and there is no safe access for cyclists. It follows, therefore, that all those visiting the TT site rely on private vehicles. Consequently, the appeal proposals are in conflict with the advice at paragraphs 6 and 40 of PPG13. Furthermore, whilst the appeal sites

are within relatively close proximity to the national trunk and motorway network, I have already concluded that the unclassified roads linking the site to the highway network are not best suited to HGVs.

297. In my conclusion, the disadvantages arising from location outweigh the advantages arising from the fact that the site consists of pdl.

Material considerations

Socio economic considerations

298. In both the ground (a) appeals and the ground (g) appeals it is a relevant material consideration for me to consider whether there is a potential supply of suitable sites to meet the potential demand for sites which would arise if the current occupiers were to be displaced from the Thameside Terminal.

Demand

299. At the time of the Inquiry, the following sizes of plots at TT were occupied:

Plot 1: about 0.41ha

Plot 2: about 0.42ha

Plot 3: about 0.43ha

Plot 4: about 0.43ha

Plot 5: about 0.46ha

Plot 6: about 0.92ha

Plot 7: about 0.5ha

300. None of the occupiers has an absolute requirement to operate from TT. The current occupier of Plot 1 (Panther Platforms) has already found an alternative site at Kingsnorth. The occupier of Plot 2 operated their business from Strood before moving to TT. The occupier of Plot 3 said that it was not essential that their business was located in Medway. Their area of search would extend west to Dartford and Erith and they would consider a site in Northfleet.

301. As to Plot 4, the evidence in respect of the current situation with H&M is unclear. The oral evidence was that part of the company's fleet of vehicles had been sold to R. Swain & Sons Ltd, a haulage company based in Strood. But, the Council points to details of their website which indicates that H&M Plant (Rochester) Ltd is a wholly owned division of R. Swain and that it operates from the Swain yard at Strood. But, in any event, they could operate from Kingsnorth, or any other site with links to the main road network. Furthermore, it seems that Plot 4 is under utilised at present. Therefore the uses that remain could be relocated to a smaller site.

302. The current occupier of Plot 5 (David Watson Transport Ltd) said that any alternative site would have to be in north Kent and that the business could go to Kingsnorth. KKB on Plot 7 are considering a site in Kingsnorth, and prior to moving to TT they considered sites from London to Sittingbourne, thereby demonstrating that they are not limited to Medway.

303. Volker Fitzpatrick (Plot 6) provide a highways maintenance function for Medway Council. When bidding for the contract they considered other sites at the Medway City Estate and at Cuxton. Their evidence suggests that it would have been possible to accommodate their uses on those sites. Furthermore, other bidders (for the Council's contract which was won by Volker Fitzpatrick) put forward alternative locations for depots. As such, it is clear that other sites exist from which the highway maintenance function could be performed. Plot 8 has already been vacated.

304. In summary the current requirement would be about 3.16ha if H&M is included and about 2.73ha if it is excluded.

Supply

305. Although there were differences between the evidence of the main parties, there were some areas of agreement. Both parties accept that the Ramac site at Kingsnorth Industrial Estate is suitable and available. The site extends to some 8.5 acres, albeit a one acre plot will be taken by Panther Platforms thereby leaving 7 acres (2.83ha). Therefore that site alone is capable of accommodating most of the remaining occupiers of the appeal plots.

306. The evidence suggests that the Elite site at Kingsnorth is available, albeit it may not be in the process of being actively marketed, at the moment. The location and other attributes are suitable, and it would provide about 3.64ha.

307. Further sites of about 10 acres are available at Grain and Chattenden. However, it seems that both sites would require an entrepreneur to take a lease of a 10 acre site and sub-let to different occupiers. Nevertheless, both sites have the potential to accommodate the current users of the appeal sites.

308. Land adjacent to Damhead Creek power station has been identified as being available for carbon capture storage (CCS), should such technology prove feasible. However, in the interim, it could provide a site for the uses located on the appeal sites.

309. Save for Volker Fitzpatrick (Plot 6), the current occupiers of TT do not have to locate their businesses in the Medway area. Therefore there are further sites available at Swanscombe, Church Manor Way, Erith and Manor Road Erith. Those sites are both available and suitable.

310. In my conclusion, all of the businesses which occupy sites at TT are likely to find suitable alternative sites to which they could relocate. Consequently, if the appeals are dismissed and the notices are upheld, it would not give rise to any material harm to the economy of the area.

RSPB proposals for Elf Pools

311. The RSPB proposals to modify the saline lagoons which form Elf Pools (in order to attract other species of waterfowl and in particular wading birds) are a material consideration in my overall assessment of the ground (a) appeals. Given that I have been unable to rule out the possibility that the appeal activities on TT have resulted in reduced numbers of certain species of birds on Elf Pools which are known to be sensitive, I am concerned that those activities have the potential to affect other species of birds which might be sensitive. However, I have insufficient information about the species of birds which RSPB

hopes to attract to the modified Elf Pools, the sensitivity of such birds, or the likelihood of success of attracting such birds to the modified pools in the absence of the TT development, in order to make a properly informed assessment. But, on the balance of probability, it is likely that the appeal development would adversely affect the RSPB's proposals. As such, the appeal development would be likely to preclude or damage the potential implementation of Cliffe Conservation Park in conflict with Policy BNE 40.

Overall conclusion on ground (a) appeals

312. I have concluded that the appeal site has a nil use. Even if the appeal development could be described as 'other type of employment use' I consider that it falls foul of LP Policy ED3 because it cannot be accommodated without detriment to residential amenity; it does not improve visual amenity; and relative to the baseline position of a nil use, it has increased traffic volumes. The original OSD was granted in early 1960s against a very different policy background and it is unlikely that it would be granted against current policy. It is not therefore material to my decision.

313. The Appellant has made it clear that TT has been developed as a Trading Estate, and that the development which the Appellant seeks to retain and which is the subject of all of the deemed applications is a Trading Estate. Accordingly, I shall correct all of the notices C-L inclusive to make clear that the development the subject of each of those notices (Plots 1 - Plot 8, plus the roadway, plus the parking areas) forms part of the overall use of TT as a Trading Estate. Nevertheless, I am bound to determine each of the ground (a) appeals/deemed applications relating to Notices C to L inclusive. However, the cumulative effect (of those elements of development taken individually) would be such as to lead to the refusal of each application, having been considered separately, since granting permission in any one case would make it difficult to refuse the others.

314. For the foregoing reasons, the development the subject of the deemed applications conflicts with the development plan. I have considered all other matters raised in these appeals including the effect of the development on the economy of the area. However, I have found nothing to outweigh that conflict. Therefore the ground (a) appeals fail. Accordingly, planning permission should be refused on all of the deemed applications.

Appeals on ground (f): whether the steps required to be taken by the notices exceed what is necessary to remedy the breach of planning control.

315. First, the Appellant does not dispute the requirements to remove all of the buildings on all of the plots other than Plot 1. Secondly, the Appellant does not dispute the requirement to remove all of the hardstandings and roadways in relation to which the enforcement notices are upheld.

316. Furthermore, there can be no legitimate complaint about the requirement to cease the uses, and to remove hardstandings, fences, lamp columns, buildings and other operational development which has taken place.

317. The matter at issue is whether the restoration requirements are excessive. In particular, whether the requirement in the various notices to spread top soil

and seed the land exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.

318. In this case, in order to remedy the injury to amenity, and in particular the harm to the landscape character, it is necessary to allow natural regeneration to take place.

319. The Appellant has argued that the new hardstandings were laid over the top of a membrane which itself was laid on top of pre-existing course tarmac which remained from the OSD and which the Appellant considers to be lawful. Accordingly, the Appellant does not consider it necessary to topsoil and seed the pre-existing areas of course tarmac.

320. However, the notice has to be clear on its face as to what the Appellant is required to do to remedy the breach. In the light of the Payne[17] judgement, the Notice has to be as precise as the circumstances permit. Furthermore, a notice may not require improvements to the previous condition of the site, and steps to be taken to remedy injury to amenity should not impose a more onerous requirement than that to restore the land to its condition before the breach took place[18].

321. In this case, as I have already concluded, whatever remains of the tarmac, it is buried and so it is impossible to know with any precision what areas of course tarmac remain hidden under the new hardstandings. Furthermore, the area cannot be identified on any of the plans attached to the notice, or on the plan (Re-revised APP9) provided by the Appellants. It is not therefore possible to amend the requirements in a way which would give clarity as to what the Appellant is required to do.

322. But, even if I were able to rely upon the Appellant's 2003 survey plan, the tarmac changed its purpose when the OSD Use was abandoned and the oil tanks were removed. Whatever remains of that tarmac, it became a substrate for the current hardstandings which are unlawful, as opposed to a hard surface in its own right. Furthermore, in the absence of the tarmac, there would arguably, have been more new substrate. It is therefore, part and parcel of the unlawful works to be removed.

323. However, the Council can only seek to remove the unlawful elements of the development and take the appeal site back to what it was before the unlawful use/development commenced. In that respect, I acknowledge that this is not a straightforward case. But, it is clear from the photographic evidence that the OSD had started to revert back to nature after the OSD use ceased. Whilst the vegetation that can be seen in those photographs, and which is noted on the Appellant's March 2003 plan (1703.WD.23A), has clearly been removed or eradicated by the Appellant, there is no evidence before me of 150mm of topsoil having being stripped from the whole site. The Notices cannot therefore require 150mm of topsoil to be laid over the Site. Such a requirement would, to my mind, amount to an enhancement.

[17] Payne v NAW & Caerphilly ACBC [2007] JPL 117
[18] Bath CC v SSE [1983] JPL937

324. Under the ground (a) appeal I have identified the causes of the injury to amenity. In order to remedy that injury to amenity, the notices should require the complete removal of the unlawful uses and operational development including any former hardstandings which form a substrate to the new hardstandings. What would then remain would be a site cleared of the former OSD and one which looked not dissimilar to the worked out quarry, save for the lawful buildings. Subject to any future planning permission being granted for a different development, natural regeneration could then take place.

325. As I have already concluded (under ground (a)), in the absence of an alternative planning permission, and save for the lawful buildings and hardstandings, the remainder of the site would otherwise be likely to return to scrub.

326. I shall therefore vary the requirements of the notice to exclude the topsoiling and seeding. To that limited extent, the appeal on ground (f) succeeds and I shall amend the notice accordingly.

Appeals on ground (g): whether the time given by the notices to remedy the breaches falls short of what should reasonably be allowed.

327. I shall consider first the circumstances of the individual occupiers. Mr Andrews operated his haulage business from a site in Charlton until 2000. That site is owned by Mr Andrews's wife. At that time, a 10 year lease of the Charlton site was granted which is due to expire in 2010. Furthermore, Mr Andrews has another site in Swanley. He has a vehicle operator's licence for 8 vehicles which use the Swanley site as an operating centre.

328. Panther Platforms did not sign a lease for Plot 1, as they realised that they might not be able to stay at the appeal site for long. When their witness gave evidence in June 2008, she said that given sufficient time, she was sure that they would find alternative premises. At that time, she thought it might take 6-8 months or perhaps longer. However, by the time the Inquiry resumed in January 2010, Panther had found an alternative site at Kingsnorth.

329. Mr Miller of All Cabin Services on Plot 2 came to TT from Gashouse Road, Strood. He said that despite the difficulties, all of the former occupiers of the plots at that site found alternative premises. It took him 9 months to find his current premises.

330. Mr O'Brien (Plot 3) said that ideally he would require one year plus. As already stated, the position as to whether H&M on Plot 4 require alternative premises is unclear. If the business has been acquired by R. Swain, and is now operating from Strood, no alternative premises would be required.

331. I have already concluded under ground (a) that it would be possible for all of the current occupiers to relocate. But, I accept that the evidence of both main parties was that a period between 12 to 18 months would be required for existing occupiers to relocate. And, if planning permission were required for any of the alternative sites, then 24 months would be appropriate. I acknowledge therefore that the current time for compliance might result in the individual businesses having to cease with consequent loss of jobs.

332. Taking account of all of these factors, I consider that the period of compliance should be extended to 24 months. To that extent, the appeals on ground (g) succeed.

Formal Decisions

Appeals 1-9 Refs: APP/A2280/C/07/2052356, 2052358, 2052359, 2052361, 2052362, 2052363, 2052365, 2052366, 2052064

333. I direct that the enforcement notice be quashed (i.e. Notice A).

Appeal 10 Ref: APP/A2280/C/08/2091561

334. I direct that the enforcement notice (Notice B) be corrected by:

1) removing the words from the allegation:

Without the benefit of planning permission, change of use of the Site to use as a business/industrial estate, including plant hire, highways maintenance depot and manufacturing uses. And, replacing them with the words:

Without the benefit of planning permission, change of use of the Site to use as a Trading Estate, including:

- ***plant hire depot including training centre, telephone sales, plant repair and maintenance together with offices in connection with steel cage manufacturing business on Plot 1***
- ***portable building (portacabin) refurbishment and for the sale and storage of portable buildings (portacabins) on Plot 2***
- ***a mixed use as a plant hire depot and civil engineering contractor's storage on Plot 3***
- ***a mixed use as a haulage yard and storage of plant including repair and maintenance of plant and equipment on Plot 4***
- ***plant hire depot and a haulage depot including the servicing and repair of generators on Plot 5***
- ***highways maintenance depot on Plot 6***
- ***mixed use as plant hire and remediation contractor's yard on Plot 7***
- ***use for the manufacture of steel cages and for both the storage of steel and railway sleepers on Plot 8;***

and including the stationing of static portacabins on the Site in the position shown coloured green on plans TT02, TT03. TT04, TT05, TT06 and TT07 attached hereto; and including the stationing of a shipping container on Plot 3.

2) inserting the reference **TT11** after the word "Plan" in sub-paragraph (b) of Article 3(ii)

3) by inserting the reference **TT11** after the word "Plan" in lines 2 and 4 of sub-paragraph (c) of Article 3(ii) and by inserting the word ***respectively*** after the word "being"

4) by deleting the words in sub-paragraph (d) of Article 3(ii) and replacing them with the words ***the installation of a cesspit on Plot 3***

5) by deleting the words in sub-paragraph (h) of Article 3(ii) ***shown crosshatched black on the plans TT02 and TT08 attached hereto*** and replacing them with the words ***shown crosshatched orange (on Plot 2) and shown crosshatched green (on Plot 8) on Re-revised APP9.***

6) by adding sub-paragraph (i) to Article 3(ii) with the words ***the installation of a septic tank on Plot 4***

7) by adding sub-paragraph (j) to Article 3(ii) with the words ***the installation of a cesspit on Plot 7***

8) By deleting the words in Article 5(i) and replacing them with the words: ***Cease using the Site as a Trading Estate including:***

- ***plant hire depot including training centre, telephone sales, plant repair and maintenance together with offices in connection with steel cage manufacturing business on Plot 1***
- ***portable building (portacabin) refurbishment and for the sale and storage of portable buildings (portacabins) on Plot 2***
- ***a mixed use as a plant hire depot and civil engineering contractor's storage on Plot 3***
- ***a mixed use as a haulage yard and storage of plant including repair and maintenance of plant and equipment on Plot 4***
- ***plant hire depot and a haulage depot including the servicing and repair of generators on Plot 5***
- ***highways maintenance depot on Plot 6***
- ***mixed use as plant hire and remediation contractor's yard on Plot 7***
- ***use for the manufacture of steel cages and for both the storage of steel and railway sleepers on Plot 8;***

9) Correcting the numbering of the requirements listed in Article 5 which contains two sub-paragraphs with the number (iv) – the second should be re-numbered (v), and the remainder re-numbered accordingly.

10) Delete the words ***paragraph 3(ii)(d)*** from sub-paragraph (v) of Article 5 (as numbered) which is to be corrected to sub-paragraph (vi), and replace them with the words ***paragraph 3(i)***.

11) Delete from Article 5(ix) (as numbered) which is to be re-numbered 5(x), the words ***shown cross-hatched black on plans TT02 and TT08*** and replace them with the words ***shown crosshatched orange (on Plot 2) and shown crosshatched green (on Plot 8) on Re-revised APP9.***

335. I direct that the enforcement notice (Notice B) be varied by:

- deleting the requirement to restore the site at Article 5, which if re-numbered would be sub-paragraph (xi), not (x) and replacing it with the words ***Remove the cesspit from Plot 3 and all materials used in its construction***.
- Inserting requirement (xii) at Article 5 with the words ***Remove septic tank from Plot 4 and all materials used in its construction***.
- Inserting requirement (xiii) at Article 5 with the words ***Remove septic tank from Plot 7 and all materials used in its construction***
- Inserting requirement (xiv) at Article 5 with the words ***Remove from the site the shipping container on Plot 3***.
- Deleting the words ***one month*** from paragraph (i) of Article 6 and replacing them with the words ***within 24 months***.
- Deleting the words in paragraph (ii) of Article 6 ***during the period July-October immediately following the date upon which this notice takes effect*** and replacing them with the words ***during the period July-October immediately following the date that the use ceases***.

336. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 11 Ref: APP/A2280/C/08/2091566

337. I direct that the enforcement notice (Notice C) be corrected by: deleting from Article 3 (i) and Article 5(i) the words: ***business or industrial estate*** and replacing them with the words: ***Trading Estate***.

338. I direct that the enforcement notice (Notice C) varied by:

- Deleting the all of the words in paragraph (i) of Article 6 and replacing them with the words ***The requirement in Article 5(i) must be complied with within 24 months of the date that this notice takes effect and the requirements in Article 5(ii) must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases***.

339. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 12 Ref: APP/A2280/C/08/2091572

340. I direct that the enforcement notice (Notice D) be corrected by deleting the words: ***in connection with a plant hire depot and with a haulage business*** from article 3(i) and Article 5(i) .

341. I direct that the enforcement notice (Notice D) be corrected by deleting the words in Article 3(ii) and replacing them with the words: ***Without the benefit of planning permission the laying of a hardstanding on the Site on the western side of the roadway together with footways on both sides of the road***.

342. I direct that the enforcement notice (Notice D) be corrected by deleting the words in Article 5(ii) and replacing them with the words: ***Remove from the Site the hardstanding on the western side of the roadway and the footways on both sides of the road and all materials used for the hardstanding and the footways.***

343. I direct that the enforcement notice (Notice D) varied by:

- Replacing the word ***requirement*** with the word ***requirements*** in Article 6(i).
- Deleting the words ***one month*** Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words: ***The requirements set out in Article 5(ii) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases***.

344. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 13 Ref: APP/A2280/C/08/2091576

345. I direct that the enforcement notice (Notice E) be corrected by inserting the words: ***as part of the overall use of the Thameside Terminal site as a Trading Estate*** at the end of Article 3 after the words: ***steel cage manufacturing business***.

346. I direct that the enforcement notice (Notice E) be varied by deleting the words ***one month*** Article 6(i) and replacing them with the words ***within 24 months*****.**

347. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 14 Ref: APP/A2280/C/08/2091578

348. I direct that the enforcement notice (Notice F) be corrected by:

- inserting the words: ***as part of the overall use of the Thameside Terminal site as a Trading Estate*** at the end of Article 3(i) after the words: ***storage of portable buildings(portacabins)***.
- inserting the words: ***TT02*** after the word "Plan" in Article 3(ii) (a).
- deleting the words in Article 3(ii)(c) and Article 5(iv): ***black on the Plan*** and replacing them with the words: ***orange (on Plot 2) on Re-revised APP9***

349. I direct that the enforcement notice (Notice F) be varied by:

- Deleting the requirement at Article 5(v)
- Deleting the words ***one month*** in Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words ***Each of the requirements set out in Article 5(ii), 5(iii), and 5(iv) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases.***

350. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 15 Ref: APP/A2280/C/08/2091584

351. I direct that the enforcement notice (Notice G) be corrected by:

- deleting all of the words in Article 3(i) and inserting the words ***Without the benefit of planning permission, the change of use of the Site to a mixed use as a plant hire depot including repair and maintenance of plant and equipment, and storage of civil engineering contractor's materials, and including the stationing of portacabins and a shipping container as part of the overall use of the Thameside Terminal site as a Trading Estate.***
- Adding sub-paragraph (d) to Article 3(ii) and the words ***The installation of a cesspit.***

352. I direct that the enforcement notice (Notice G) be varied by:

- Inserting at the end of Article 5(i) the words: ***and storage of civil engineering contractor's materials, and including the stationing of portacabins and a shipping container as part of the overall use of the Thameside Terminal site as a Trading Estate***.
- Inserting into Article 5(ii) the words: ***and shipping container*** after the word ***portacabins***
- Deleting the words in requirement 5(v) ***Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix*** and replacing them with the words ***Remove the cesspit and all materials used in its construction from the Site***.
- Deleting the words ***one month*** *in* Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words ***Each of the requirements set out in Article 5(ii), 5(iii), and 5(iv) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases.***

353. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 16 Ref: APP/A2280/C/08/2091586

354. I direct that the enforcement notice (Notice H) be corrected by:

- Deleting the words in sub paragraph (a) of Article 3(i) and in Article 5(i): ***use as plant hire depot*** and replacing them with the words: ***a mixed use as a haulage yard and storage of plant***
- inserting the words ***as part of the overall use of the Thameside Terminal site as a Trading Estate*** at the end of Article 3(i) after sub-paragraph (c).
- By inserting sub-paragraph (d) under Article 3(ii) with the words ***The installation of a septic tank****.*

355. I direct that the enforcement notice (Notice H) varied by:

- Deleting the words in requirement 5(vii) ***Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix*** and replacing them with the words ***Remove the septic tank and all materials used in its construction from the Site****.*
- Deleting the words ***one month*** *in* Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words ***Each of the requirements set out in Article 5(iv), 5(v), 5(vi) and 5(vii) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases.***

356. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 17 Ref: APP/A2280/C/08/2091589

357. I direct that the enforcement notice (Notice I) be corrected by:

- Deleting the words in sub-paragraph (a) of Article 3(i) and replacing them with the words ***mixed use of haulage depot and storage of generators including the servicing and repair of generators and including the stationing of portacabins***
- inserting the words ***as part of the overall use of the Thameside Terminal site as a Trading Estate*** at the end of Article 3(i) after sub-paragraph (b)
- deleting the words from Article 5(i): ***a plant hire depot and*** and inserting after the words "haulage depot" the words: ***and for the service and repair of generators***

358. I direct that the enforcement notice (Notice I) be varied by:

- Deleting the requirement at Article 5(vi).
- Deleting the words ***one month*** *in* Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words ***Each of the requirements set out in Article 5(iii), 5(iv), and 5(v) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases.***

359. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 18 Ref: APP/A2280/C/08/2091592

360. I direct that the enforcement notice (Notice J) be corrected by:

- inserting the words at the end of Article 3(i)(a): ***including the stationing of portacabins***
- inserting the words ***as part of the overall use of the Thameside Terminal site as a Trading Estate*** at the end of Article 3(i) after sub-paragraph (b).
- delete sub-paragraph (d) of Article 3(ii) and re-order sub-paragraph (e) such that it becomes (d).

361. I direct that the enforcement notice (Notice J) be varied by:

- Deleting the requirement at Article 5(vii).
- Deleting the words ***one month*** *in* Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words ***Each of the requirements set out in Article 5(iii), 5(iv), 5(v), and 5(vi) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases.***

362. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 19 Ref: APP/A2280/C/08/2091596

363. I direct that the enforcement notice (Notice K) be corrected by.

- Deleting all of the words in sub-paragraph (a) of Article 3(i) and inserting the words ***mixed use as plant hire and remediation contractor's yard***
- Inserting the words into Article 3(i)(b): ***the stationing of portacabins*** after the words "human habitation"
- inserting the words ***as part of the overall use of the Thameside Terminal site as a Trading Estate*** at the end of Article 3(i) after sub-paragraph (b).
- deleting all of the words at Article 3(ii)(b) and replacing them with the words :***the installation of a cesspit***
- deleting in Article 5(i) the words: ***as a plant hire and haulage depot*** and replace them with the words: ***as a mixed use as plant hire and remediation contractor's yard***

364. I direct that the enforcement notice (Notice K) be varied by:

- Deleting the requirement at Article 5(vi) and replacing it with the words ***Remove from the Site the cesspit and all materials used in its construction****.*
- Deleting the words ***one month*** *in* Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words ***Each of the requirements set out in Article 5(iii), 5(iv), 5(v) and 5(vi) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases.***

365. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal 20 Ref: APP/A2280/C/08/2091601

366. I direct that the enforcement notice (Notice L) be corrected by.

- At the end of Article 3(i) and Article 5(i) deleting the words ***storage of steel*** and replacing them with the words ***both the storage of steel and railway sleepers***
- inserting the words ***as part of the overall use of the Thameside Terminal site as a Trading Estate*** at the end of Article 3(i).
- deleting the words in Article 3(ii)(c) and Article 5(iv): ***black on the Plan*** and replacing them with the words: ***green on Re-revised APP9.***

367. I direct that the enforcement notice (Notice L) varied by:

- Deleting the words at Article 5(v) and replacing them with the words: ***remove all steel and railway sleepers stored on the site***.
- Deleting the words ***one month*** *in* Article 6(i) and replacing them with the words ***within 24 months***.
- Deleting all of the words in Article 6(ii) and replacing them with the words ***Each of the requirements set out in Article 5(ii), 5(iii) and 5(iv) above must be complied with during the period July-October immediately following the date that the use described in 5(i) ceases.***

368. Subject to these corrections and variations I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

JaneVStiles
INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Matthew Horton QC	Queen's Counsel instructed initially by Corn Mathias Gentle Solicitors & then by Britannia Assets (UK) Ltd
He called	
Daniel Thomas Andrews	Britannia Assets (UK) Ltd
Mr Clifford Leonard Dowsett	Former Conoco employee
Mr Clive Batchelor	Former Conoco employee
Joanne Soames	Panther Platforms – Plot 1
Keith John Miller	All Cabin Services Plot 2
Tom O'Brien	Plot 3 – Director of B&T Plant HIre
David Watson	Plot 5 - David Watson Transport Ltd
Sheldon Yates	Plot 6 – Volker Fitzpatrick
Del Bhanot	Plot 7 – KKB Regeneration Ltd
Kevin Morris	Plot 4 – H&M Plant (Rochester) Ltd
Ian Dix BSc(Hons) MSc MCIT MIHT	Director of Savell Bird & Axon
Mrs Rachel Grant	Senior Acoustic Consultant Pace Acoustic Consulting
N Tardivel MSc CEnv CMLI MIEEM	Lloyd Bore Ltd
Julian Bore MLI	Lloyd Bore Ltd
Sarah Raggett BSc(Hons) MRICS	Sibley Pares Chartered Surveyors
John Collins MBA MA(Hons) MRTPI	Dha Planning & Development Consultants

FOR THE LOCAL PLANNING AUTHORITY:

Neil Cameron QC	Queen's Counsel Landmark Chambers instructed by Angela Drum, Head of Legal Services, Medway Council, Gun Wharf, Dock Road, Chatham, ME4 4TR
He called	
Michael Carter BSc(Hons) CEng, MICE	Divisional Manager, Transport Planning Business Unit, Mouchel Group
Anthony E Charles MPhil	Technical Director (Acoustics) Enzygo Ltd
Christopher J Glover BSc(Hons)	Special Projects Manager, South east Region Royal Society for Protection of Birds
Brendan Doyle DipLD MALD CMLI	Senior Landscape & Urban Design Officer, Medway Council
Lee Prebble DipTP MRTPI DMS	Principal of Lee Prebble Planning Associates Ltd Town Planning and Management Consultants c/o Medway Council, Gun Wharf, Dock Road, Chatham, Kent
Denise Marie Ford BSc RICS	Managing Director, Michael Parkes Surveyors Ltd

INTERESTED PERSONS:

Cllr Tom Mason	Representing Strood Rural Ward which incorporates the appeal site (against appeals)
Cllr Les Wickes	P.C. + Medway Council Cliffe Woods (against appeals)
Chris Fribbins	Chairman of Planning Committee Cliffe and Cliffe Woods P.C. (against appeals) Dickens Court Preservation Society
Roger Brown	Resident of Cliffe Woods (against appeals)
Mrs Janet Keats	Resident of Cliffe

DOCUMENTS

1 Council's letter of notification of the opening of the Inquiry and list of persons notified
2 Council's letter of notification of the resumption of the Inquiry on 26 January 2010 and list of persons notified
3 Letters from interested persons
4 Additional letters from interested persons put into the resumed Inquiry
5 Bundle of representations from interested persons – re; Brett proposal
6 Letter dated 13 June 2008 from Goldkorn Mathias Gentle
7 Letter dated 25 January 2010 from dha Planning re: change of names of appellants
8 Council's Outline Submissions for resumption of Inquiry together with bundle of supporting documents.
9 Letter dated 9 February 2010 from RSPB in relation to Land Registry documents.

APPELLANT'S DOCUMENTS

APP1 Medway Road Safety Plan 2006-2011
APP2 Approximate timeline of development on site and significant planning history up to 2009
APP3 H&M Plant (Rochester) Limited company information
APP4 Location plan for 2007 Mouchel Traffic survey
APP5 Additional calculations for traffic flow 2009: Based on Savell Bird & Axon traffic flow data for Night time Noise Assessment (Tarmac only)
APP6 E-mail dated 19 March 2009 from Council to Klaire Lander
APP7 Burdle and Another v Secretary of State
APP8 RSPB Cliffe Pools proposed car park – Report to inform a Habitats Regulations Assessment.
APP9 Plan Re-revised APP9
APP10 March 2003 site plan
APP11 February 2010 topographical survey & section
APP12 Proposed mitigation planting

COUNCIL'S DOCUMENTS

LPA1 English Nature – Thames Estuary European Marine Site, issued 25 May 2001
LPA2 Thames Estuary and Marshes Special Protection Area (SPA) Conservation Objectives
LPA3 Managing Natura 2000 sites – The provisions of Article 6 of the Habitats directive 92/43 EEC
LPA4 Assessment of Plans and projects significantly affecting Natura 2000 sites
LPA5 Decision letter APP/P4605/C/04/1144321
LPA6 RSPB Cliffe Pools Management Plan 2008-2013
LPA7 Web site details of H & M Plant
LPA8 Extracts from South East Plan
LPA9 Extract from Design Manual for Roads and Bridges- Noise and Vibration
LPA10 Documents relating to land in ownership of RSPB & Britannia Assets
LPA11 Bundle of documents relating to enforcement action
LPA12 Cliffe Pools Planning Statement & Environmental Statement
LPA13 Legal Agreement dated 17 July 2000
LPA14 Cliffe Marshes Conservations Park Inception Report
LPA15 Enforcement Request from J Glover to Council dated 10 June 2005
LPA16 Development Control Committee Quarterly Report on Enforcement Proceedings dated 5 March 2008
LPA17 Aerial Photograph Burts Wharf
LPA18 Letter from RSPB dated 16 February 2010 with Management Plans for Cliffe Pools dated March 2004 and April 2006.
LPA19 Copies of correspondence between Council and Ward Associates including Design and Access Statement.
LPA20 Suggested amendments to Notice A (June 2008).
LPA20 Suggested amendments to Notice A (February 2010)

PHOTOGRAPHS

1 2 Photographs of lorries presented by Cllr Mason

Annex A: Schedule of Appeals

Appeals 1-9: APP/A2280/C/08/2052356…2052064
Land known as Former Conoco (Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- **Notice A** was issued on 13 July 2007.
- The breach of planning control as alleged in the notice is without planning permission undertaking the following operational development:

i. Construction of a roadway with hardstandings and lighting
ii. Erection of various buildings

and also without planning permission changing the use of the land formerly used as a fuel depot by subdividing it into nine plots enclosed by steel palisade fencing and using it for the following businesses:

iii. Plant and equipment hire, including mobile cranes and engineering machinery
iv. Storage
v. Transport and haulage
vi. Portacabin business.

- The requirements of the notice are:

i Cease all business and storage useage
ii Remove all plant, machinery and equipment which is currently being used or stored on the land
iii Demolish all buildings, fencing, lamp standards and other structures erected on the land in connection with the unauthorised uses and remove all materials used in their construction including foundations
iv Remove the roadway and any hardstandings and all materials used in the construction of these features from the land
v Restore the site by spreading a minimum of 150mm top soil over the whole of the site and seed the land with a wild grass seed mix.

- The period for compliance with the requirements is:

i. Within one month from the date the notice takes effect
ii. Within one month from the date the notice takes effect
iii. Within three months from the date the notice takes effect
iv. Within three months from the date the notice takes effect
v. Within four months from the date the notice takes effect

- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f), and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 10: APP/A2280/C/08/2091561
Land known as the former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice (**Notice B**) issued by The Medway Council.
- The Council's reference is **Notice B**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:

  (i) Material change of use

  Without the benefit of planning permission, change of use of the Site to use as a business/industrial estate, including plant hire, highways maintenance depot and manufacturing uses.

  (ii) Operational development

  Without the benefit of planning permission,

  a. The construction of a roadway, with block paved footways and lighting columns in the position shown hatched black on the Plan [TT11]
  b. The erection of palisade fencing in the positions indicated by thick black lines on The Plan [TT11]
  c. the erection of permanent buildings in the positions shown coloured pink on the Plan and on Plans TT03, TT04, TT05, TT06, TT07, TT08 attached to the notice being a security building for the Site in the position shown coloured pink on the Plan and a workshop building on Plot 3, a workshop building and an electricity substation on Plot 4, a workshop building, a washdown area and sewage treatment plant on Plot 5, a salt store and three other buildings on Plot 6, a workshop building on Plot 7 and two workshop buildings in Plot 8.
  d. The affixing of static portacabins on the Site in the position shown coloured green on plans TT02, TT03, TT04, TT05, TT06, and TT07 attached to the Notice.
  e. The construction of a septic tank on Plot 2 of the site (which plot is shown edged red on plan TT02 attached to the Notice)
  f. The construction of a cesspit on Plot 6 (which plot is shown edged red on plan TT06 attached to the Notice)
  g. The construction of storage bays on plot 6 in the position shown coloured blue on plan TT06 attached to the Notice)
  h. The laying of hardstanding on the Site other than in those areas shown crosshatched black on the plans TT02 and TT08 attached to the Notice.
- The requirements of the notice are:

i) Cease using the Site as a business/industrial estate, including plant hire, highways maintenance depot and manufacturing uses

ii) Remove all vehicles, plant and equipment used or sited on the Site in connection with its use as a business/industrial estate

iii) Remove from the Site the roadway, including the footways, and the street lighting and all materials used in the construction of the roadway and street lighting

iv) Demolish and remove from the Site all the fencing shown with thick black lines on the Plan and all materials used in its construction

iv) Demolish all of the buildings referred to in paragraph 3(ii)(c) of the notice and remove all materials used in their construction from the Site.

v) Remove from the Site all of the portacabins referred to in paragraph 3(ii)(d) of the notice affixed to or sited on the Site and all materials used in affixing them to the Site

vi) Remove the septic tank referred to in paragraph 3(ii)(e) of the notice from plot 2 of the Site

vii) Dismantle and remove the cesspit referred to in paragraph 3(ii)(f) of the notice and all materials used in its construction from plot 6 of the Site

viii) Remove the storage bays referred to in paragraph 3(ii)(g) of the notice and all materials used in its construction from plot 6 of the Site

ix) Remove from the Site the hardstanding on the Site other than that shown crosshatched black on plans TT02 and TT08 and all materials used for the hardstanding

x) Restore the Site (other than plot 1(shown edged red on plan TT01 attached to the notice) and those parts of plots 2 and 6 shown cross hatched black on plans TT02 and TT08 respectively and that part of the within the Site not shown hatched black on the Plan) by spreading a minimum of 150mm of topsoil over the whole of the Site and seeding it with a wild grass seed mix

- The period for compliance with the requirements is:

i. In respect of the requirements set out in paragraph 5(i) above and the requirement set out in paragraph (ii) above, one month from the date that the notice takes effect.

ii. Each of the requirements set out in paragraphs 5(iii), 5(iv), 5(v), 5(vi), 5(vii), 5(viii), 5(ix) and 5(x) above must be complied with during the period July-October immediately following the date upon which the notice takes effect

- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 11: APP/A2280/C/08/2091566
Land at the former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice C**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:

  (i) Material change of use

  Without the benefit of planning permission, the change of use of the Site to use as a road serving a business or industrial estate [as shown on Plan TT10].

  (ii) Operational development

  Without the benefit of planning permission the construction of a roadway on the Site with block paved footways and lighting columns [as shown on Plan TT10]
- The requirements of the notice are:

i. Cease using the Site as a road serving a business/industrial estate

ii. Remove from the Site the roadway, including the footways, and the street lighting and all materials used in the construction of the roadway and street lighting.

- The period for compliance is stated as: "Each of the requirements set out in i. and ii. above must be complied with during the period July-October immediately following the date upon which the notice takes effect".
- The appeal is proceeding on the grounds set out in section 174(2) of (a), (b), (c), (d), (f) and (g) the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 12: APP/A2280/C/08/2091572
Those plots of land at the western side of the former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice D**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:
  (i) Material Change of Use
  Without the benefit of planning permission, the change of use of the Site to use for the parking and storage of vehicles in connection with a plant hire depot and with a haulage business [as shown on Plan TT09].
  (ii) Operational Development
  Without the benefit of planning permission the laying of hardstanding on the Site [as shown on Plan TT09].
- The requirements of the notice are:

i. Cease using the Site for the parking and storage of vehicles in connection with a plant hire business and a haulage business and remove all vehicles parked and items stored on the Site
ii. Remove from the Site the hardstanding on the Site and all materials used for the hardstanding
iii. Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix

- The period for compliance with the requirements is:

i. In respect of the requirement set out in paragraph i. above, one month from the date that the notice takes effect.
ii. The requirements set out in ii. and iii. above must be complied with during the period July-October immediately following the date upon which the notice takes effect.

- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 13: APP/A2280/C/08/2091576
Land known as Plot 1, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice E**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:

Material Change of Use

Without the benefit of planning permission, the change of use of the Site to use as a plant hire depot including training centre, telephone sales, plant repair and maintenance, ancillary offices, together with offices in connection with steel cage manufacturing business.

- The requirements of the notice are:

i. Cease using the Site as a plant hire depot including training centre, telephone sales, plant repair and maintenance, ancillary offices and as offices in connection with steel cage manufacturing business

ii. Remove all vehicles, plant and equipment used or stored on the Site

- The period for compliance with the requirements set out in paragraph i. and ii. above, is one month from the date the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 14: APP/A2280/C/08/2091578
Land known as Plot 2, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice F**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:

(i) Materials Change of Use

Without the benefit of planning permission, the change of use of the Site to use for portable building (portacabin) refurbishment and for the sale and storage of portable buildings (portacabins).

(ii) Operational Development

Without the benefit of planning permission

a) The affixing of a static portacabin on the Site in the position shown coloured green on the Plan [TT02]
b) The construction of a septic tank on the Site
c) The laying of a hardstanding on the Site other than in the area shown crosshatched black on the Plan [TT02]

- The requirements of the notice are:
  - (i) Cease using the Site for portable building (portacabin) refurbishment and for the sale and storage of portable buildings (portacabins)
  - (ii) Remove from the Site all portable buildings (portacabins) affixed to or stored on the Site and all materials used in affixing any of them to the Site
  - (iii) Remove the septic tank from the Site
  - (iv) Remove from the Site the hardstanding on the Site other than in the area shown crosshatched black on the Plan and all materials used for the hardstanding
  - (v) Restore the Site, other than that part shown crosshatched black on the Plan, by spreading a minimum of 150mm topsoil over it and seeding it with wild grass seed mix
- The period for compliance with the requirements is:
  - (i) In respect of requirement set out in (i) above, one month from the date that this notice takes effect.
  - (ii) Each of the requirements set out in (i), (iii), (iv) and (v) above must be complied with during the period July-October immediately following the date upon which this notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 15: APP/A2280/C/08/2091584
Land known as Plot 3, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice G**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:
  (i) Material Change of Use
  Without the benefit of planning permission, the change of use of the Site to use as a plant hire depot, including repair and maintenance of plant and equipment
  (ii) Operational Development
  Without the benefit of planning permission
    a) The erection of a workshop building on the Site in the position shown coloured pink on the Plan [TT03] the affixing of static portacabins to the Site in the positions shown coloured green on the Plan [TT03] the laying of a hardstanding on the Site
- The requirements of the notice are:

i. Cease using the Site as a plant hire depot, including repair and maintenance of plant and equipment
ii. Remove from the Site all of the portacabins affixed to or sited on the Site and all materials used in affixing them to the site
iii. Demolish the workshop building on the Site and remove all materials used in its construction from the Site
iv. Remove from the Site the hardstanding on the Site and all materials used for the hardstanding
v. Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix.

- The period for compliance with the requirements is:
  (i) In respect of the requirement set out in i. above, one month from the date the notice takes effect.
  (ii) Each if the requirements set out in ii, iii, iv, and v above must be complied with during the period July-October immediately following the date upon which the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 16: APP/A2280/C/08/2091586
Land known as Plot 4, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice H**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:
  (i) Material Change of Use
  Without the benefit of planning permission, the change of use of the Site to
  a) Use as a plant hire depot, including repair and maintenance of plant, equipment and vehicles, for the parking of vehicles and for an electricity sub-station;
  b) Use for the siting of a mobile home/caravan in connection with the use of the Site as a plant hire depot in the position shown coloured yellow on the Plan [TT04]
  c) Use for the siting of fuel storage tanks in connection with the use of the Site as a plant hire depot
  (ii) Operational Development
  Without the benefit of planning permission,
  a) The erection of a workshop building and an electricity sub-station on the Site in the positions shown coloured pink on the Plan [TT04]
  b) The affixing of static portacabins on the Site in the positions shown coloured green on the Plan TT04
  c) The laying of a hardstanding on the Site
- The requirements of the notice are:
  (i) Cease using the Site as a plant hire depot, including repair and maintenance of plant, equipment, and vehicles, for the parking of vehicles, as an electricity sub-station and for the siting of a mobile home/caravan and fuel storage tanks in connection with such use
  (ii) Remove from the Site the mobile home/caravan sited on the Site
  (iii) Dismantle and remove the fuel storage tanks from the Site
  (iv) Remove from the Site all of the portacabins affixed to or sited on the Site and all materials used in affixing them to the Site
  (v) Demolish the workshop building and the electricity sub-station on the Site and remove all materials used in their construction from the Site
  (vi) Remove from the Site the hardstanding on the Site and all materials used for the hardstanding
  (vii) Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix
- The period for compliance with the requirements is:
  (i) Each of the requirements set out in paragraphs (i), (ii) and (iii) above must be complied with within one month from the date this notice takes effect
  (ii) Each of the requirements set out in paragraphs (iv), (v), (vi) and (vii) above must be complied with during the period July-October immediately following the date upon which this notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) of (a), (b), (c), (d), (f) and (g) the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal Ref: 17/A2280/C/08/2091589
Land known as Plot 5, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice I**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:
  (i) Material Change of Use
  Without the benefit of planning permission, the change of use of the Site to
  (a) use as a plant hire depot and haulage depot
  (b) use for the siting of fuel storage tanks in connection with the use as a plant hire depot and a haulage depot.
  (ii) Operational Development
  Without the benefit of planning permission
  (a) the erection of a workshop building and the construction of a washdown area and a sewage treatment plant on the Site in the positions shown coloured pink on the Plan [TT05]
  (b) the affixing of static portacabins to the Site in the positions shown coloured green on the Plan [TT05]
  (c) the laying of a hardstanding on the Site
- The requirements of the notice are:
  (i) Cease using the Site as a plant hire depot and a haulage depot and for the siting of fuel tanks in connection with such use
  (ii) Dismantle and remove the fuel storage tanks from the Site
  (iii) Remove from the Site all of the portacabins affixed to or sited on the Site and all material used in affixing them to the Site
  (iv) Demolish the workshop building, the washdown area and the sewage treatment plant on the Site and remove all materials used in their construction from the Site
  (v) Remove from the Site the hardstanding on the Site and all materials used for the hardstanding
  (vi) Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix
  - The period for compliance with the requirements is:
  (i) In respect of both the requirement set out in (i) above and the requirement set out in (ii) above, one month from the date the notice takes effect.
  (ii) Each of the requirements set out in (iii), (iv), (v) and (vi) above must be complied with during the period July-October immediately following the date upon which this notice takes effect.
  - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 18: APP/A2280/C/08/2091592
Land known as Plot 6, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice J**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:

(i) Material Change of Use

Without the benefit of planning permission, the change of use of the Site to

(a) use as a highway maintenance depot

(b) use for the siting of a fuel storage tank in connection with the use as a highway maintenance depot

(ii) Operational Development

Without the benefit of planning permission

(a) the erection of a salt store and three other buildings on the Site in the positions shown coloured pink on the Plan [TT06]

(b) The installation of a cesspit on the Site

(c) The construction of storage bays in the position coloured blue on the Plan [TT06]

(d) The affixing of static portacabins on the Site in the positions shown coloured green on the Plan [TT06]

(e) The laying of hardstanding on the Site

- The requirements of the notice are:
  - (i) Cease using the Site as a highways maintenance depot and for the siting of a fuel tank in connection with such use
  - (ii) Dismantle and remove the fuel storage tank from the Site
  - (iii) Remove from the Site all of the portacabins affixed to or sited on the Site and all materials used in affixing them to the Site
  - (iv) Demolish the salt store, the three other buildings on the Site and the storage bays and remove all materials used in their construction from the Site
  - (v) Dismantle and remove the cesspit and all materials used in its construction from the Site
  - (vi) Remove from the Site the hardstanding on the Site and all materials used for the hardstanding
  - (vii) Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix
- The period for compliance with the requirements is:

(i) In respect of both the requirement set out in (i) above and the requirement set out in (ii) above, one month from the date the notice takes effect.

(ii) Each of the requirements set out in (iii), (iv), (v), (vi) and (vii) above must be complied with during the period July-October immediately following the date upon which the notice takes effect.

- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 19: APP/A2280/C/08/2091596
Land known as Plot 7, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice K**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:

(i) Material Change of Use

Without the benefit of planning permission, the change of use of the Site to

(a) use as a plant hire and haulage depot;

(b) use for the siting of a mobile home/caravan for human habitation in connection with the use of the Site as a plant hire and haulage depot, in the position shown coloured yellow on the Plan [TT07]

(ii) Operational Development

Without the benefit of planning permission

(a) the erection of a workshop building on the Site in the position shown coloured pink on the Plan [TT07]

(b) the affixing of static portacabins on the Site in the position shown coloured green on the Plan [TT07]

(c) the laying of the hardstanding on the Site

- The requirements of the notice are:

(i) Cease using the Site as a plant hire and haulage depot and for the siting of a mobile home/caravan for human habitation in connection with such use

(ii) Remove from the Site the mobile home/caravan sited on the Site

(iii) Remove from the Site all of the portacabins affixed to or sited on the Site and all materials used in affixing them to the Site

(iv) Demolish the workshop building on the Site and remove all materials used in its construction from the Site

(v) Remove from the Site the hardstanding on the Site and all materials used for the hardstanding

(vi) Restore the Site by spreading a minimum of 150mm topsoil over the whole of the Site and seeding it with a wild grass seed mix

- The period for compliance with the requirements is:

(i) In respect of both the requirement set out in (i) above and the requirement set out in (ii) above, one month from the date the notice takes effect.

(ii) Each of the requirements set out in (iii), (iv), (v) and (vi) above must be complied with during the period July-October immediately following the date upon which this notice takes effect.

- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Appeal 20: APP/A2280/C/08/2091601
Land known as Plot 8, former Conoco (also known as Thameside Terminal) site, Salt Lane, Cliffe, Rochester, ME3 7SU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by **Britannia Assets (UK) Ltd** against an enforcement notice issued by The Medway Council.
- The Council's reference is **Notice L**.
- The notice was issued on 3 November 2008.
- The breach of planning control as alleged in the notice is:

(i) Material Change of Use

Without the benefit of planning permission the change of use of the Site to use for the manufacture of steel cages and for the storage of steel

(ii) Operational Development

Without the benefit of planning permission

(a) the erection of two workshop buildings on the Site in the positions shown coloured pink on the Plan [TT08]

(b) the affixing of static portacabins on the Site in the positions shown coloured green on the plan [TT08]

(c) the laying of a hardstanding on the Site other than in the area shown cross hatched black on the Plan [TT08]

- The requirements of the notice are:

(i) Cease using the Site for the manufacture of steel cages and for the storage of steel

(ii) Remove from the Site all of the portacabins affixed to or sited on the Site and all materials used in affixing them to the Site

(iii) Demolish the workshop buildings on the Site and remove all materials used in their construction from the Site

(iv) Remove from the Site the hardstanding on the Site other than in the area shown crosshatched black on the Plan [TT08] and all materials used for the hardstanding

(v) Restore the Site, other than that part shown cross hatched black on the Plan [TT08], by spreading a minimum of 150mm topsoil over it and seeding it with a wild grass seed mix

- The period for compliance with the requirements is:

(i) In respect of the requirement set out in (i) above, one month from the date the notice takes effect.

(ii) Each of the requirements set out in (ii) and (iii) above must be complied with during the period July-October immediately following the date upon which the notice takes effect.

- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Annex B – Letter from Planning Inspectorate giving a ruling on nullity

The Planning Inspectorate

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John Collins
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ME14 3EN

Your Ref: JAC/6381

Our Ref: APP/A2280/C/07/2052356
Further appeal references at foot of letter

Date: 16 July 2008

Dear Mr Collins

Town and Country Planning Act 1990
Appeals by Britannia Assets (UK) Ltd, AIB (Group) UK Plc, All Cabin Services Ltd, B & T Plant Hire, H&M Plant (Rochester) Ltd, Milbank Trucks Ltd, KKB3R Ltd, The Roe Group and Fitzpatrick Contractors Ltd
Site at Former Conoco Site, Thameside Terminal, Salt Lane, Cliffe, Rochester, ME3 7SU and Thameside Terminal, Salt Lane, Cliffe

As agreed at the inquiry on 27 June, I am now writing to let you know the Inspectors' final ruling on the Appellants' submission that the notice is a nullity. This would normally be addressed within the formal appeal decision but before reaching any decision on the appeals themselves. For the sake of certainty, the Inspectors regard the issue as now closed and will hear no further argument on it when the inquiry is resumed. The ruling is as follows, as drafted by Inspector R O Evans, and agreed by Inspector Dr J V Stiles:

Nullity
Principal Submissions for the Appellants

Ten enforcement notices had been served on the owners and mortgagees of the land affected and on each of the occupiers of 8 plots within it. All the notices were in the same form. Each was accompanied by a plan. None of the notices distinguished the use to which the area occupied by the recipient was said to be put nor the operational development said to have taken place on that area. The notice it was accepted applied to the whole of the land identified but at best, only the owners and mortgagees could have understood what was alleged against them.

The origin of the plan attached to the notices was unknown but it came from the days when the fuel depot was still in being because it showed the storage tanks and what was assumed to be a number of buildings. It did not show the present development

on the site which was the subject of the Council's complaint. Four forms of operational development were identified in the text of the notice, with the palisade fencing a possible fifth. There was however no means of telling from the notice or the plan the length or width of the roadway, nor the extent of the hardstandings or lighting, nor the position of the fencing nor which buildings were said to be unlawful.

A recipient of the notice would know that fences had been erected but there were said to be 9 units not 8 and it was not apparent what allegation was made in respect of each plot. More significantly, the uses were described in blanket fashion where the characterisation of the use to which each unit was put was not straight forward. The occupiers of each plot would have to guess what allegation was made about their plot and whether it was one or other of the uses alleged or a combination of them.

Section 173 of the Act drew a distinction between what was required to be stated in the allegation and what was to be specified in the notice requirements. It would not therefore be lawful to look at the requirements for the purpose of identifying the allegation. If that were not accepted, from the requirements it appeared that all business activity was considered unlawful as it was all required to cease. It was not safe to draw that conclusion. The third requirement begged the question first of finding the unlawful use, the fourth was uncertain in what was meant by the phrase "these features" while the fifth implied that everything had to be removed, a conclusion which could not be drawn from the preceding requirements.

Section 173 set out the minimum requirements for a notice not to be void; its provisions could not be obviated by saying the recipient of a notice has knowledge of the site. Further, it would be entirely inappropriate to issue a notice in an approximate form and then rely on section 176 to correct it. The ability to do so only arose on appeal in any event.

The distinction drawn in *Miller-Mead*[1] between nullity and invalidity remained good law. This notice fell squarely within the description of being "hopelessly ambiguous and uncertain" so that its recipients could not tell in what respect it was alleged they had developed the land without permission, nor was it clear whether the fencing was alleged to be operational development or the subdivision itself to be unlawful.

In reply to the Council's response, the allegation was still unclear. They appeared to be saying that where a site is put to a number of uses in confined parts of it, the Authority was entitled to say the whole site had been developed by a change of use to that mix of uses. Their planning witness had (previously) stated that the change was to a mixed use. The issue was one of law. There was clearly ambiguity in that it was uncertain whether the complaint was of a change to a mixed use or of operational development and subdivision into units put to individual uses. These had been ingeniously increased to 9 (by reference to the roadway) but that was not how the notice was drawn. The Council had themselves demonstrated the ambiguity. While acknowledging the approach favoured to the interpretation and correction of notices in *Bracken*[2], it was vital to be certain of the allegation in order to understand whether planning permission was required. That was not possible from this notice.

Response for the Council

The Appellants' submission was based on ambiguity not on a failure to include any of the elements required by section 173. It was for the Appellants to show, as stated in the *Miller-Mead* case, that the matters set out in the notice were so "hopelessly ambiguous and uncertain" that the recipients could not be reasonably certain of what

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[1] *Miller-Mead v Minister of Housing & Local Govt & Anr CA [1963] 2 QB 196*
[2] *Bracken v East Hertfordshire District Council 2000 WL 491370*

they were. On its face, the notice said what those matters were. The attack was only on paragraph 3 of the notice, not on the requirements in paragraph 5. The Appellants had further to show that the notice was a nullity, not simply invalid; there needed to be more than the "artificial and nice distinctions" referred to in *Bracken* for the notice to be void.

The test of the matters making up the allegation, at section 173(2), was whether the notice "enables those on whom a copy of it is served to know what those matters are". There had been a change in wording of the statute to require that those matters be simply "stated" rather than, as in the cases before 1992, that they be "specified". The latter remained for the requirements since failure to comply with them could result in prosecution.

One notice had been issued and copies of it served on 10 recipients. As demonstrated by the *Gregory and Rawlins*[3] cases, there was nothing wrong in principle with the issue of a notice covering the whole site where it had been divided into individual plots. The *Bristol*[4] case showed that it was appropriate to look at the general scope of the allegation to understand it. The case of *Payne*[5] illustrated how 'bad' a notice had to be to find it to be a nullity.

Paragraph 3 of this notice was sufficiently clear on its face without any need to refer to paragraph 5. It was said that at best the notice served on the owners and mortgagees would have been understood by them and accepted that the notice applied to the full site. The allegations of operational development met the test in the *Bristol* case in telling the recipients the general scope of what was complained about. It was not necessary to specify more. There might be grounds for correction or variation but the allegations were not so ambiguous for the notice to be a nullity. The site had been divided into 9 areas including the roadway and set out the general scope of the uses to which it was being put.

It could not be said that the requirements did not tell the recipients clearly what they had to do. The only possible attack in relation to paragraph 5 was in the link at 5 (iii) to the 'unauthorised uses' in paragraph 3. The latter however was itself clear for the reasons stated. The question was whether some part of the notice was so hopelessly ambiguous and uncertain that the whole was not an enforcement notice. That had not been made out.

Inspector's conclusions

The submission was made shortly after the start of the inquiry. I indicated then that I had not reached a final conclusion but that my preliminary view was that the notice was not obviously defective on its face, whether for ambiguity or otherwise, and that a final decision would be made after the inquiry had closed. Because the inquiry was adjourned for a long period, the parties agreed to that decision being made forthwith on the basis of the submissions already made.

In reaching my conclusions I have had regard to the various authorities cited and relevant passages in the Encyclopaedia of Planning Law ("the EPL") as well as the submissions for the parties.

Section 173 of the Act, together with the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002, sets out the matters which are required to be stated, specified or contained within an enforcement notice. There is

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[3] Gregory & Others v SoSE & Reigate & Banstead BC; Rawlins & Others V SoSE & Tandridge DC (1990) 60 P&CR 413
[4] *Bristol Stadium Ltd v Brown (1980) JPL 107*
[5] *Payne v National Assembly for Wales [2007] 1 P&CR 4*

no dispute that this notice contains all the elements there described. The issue rather is whether "the matters which appear to the local planning authority to constitute the breach of planning control"[6] are so ambiguously and uncertainly described as to make the notice a nullity.

The first point is that there is one notice, copies of which were served on the 10 recipients described above, not 10 different notices with different considerations arising. The issue of a single notice in relation to the whole of an area of land which has been subdivided has been upheld as an acceptable approach (*Gregory*) in other cases. The adoption of that approach where the subdivision itself is only disputed by reference to the number of units does not make this notice a nullity. I deal with the activities alleged below.

As recognised at EPL P173.12, the obligation is now to "state" the matters complained of, not to "specify" them. The test of whether the notice complies with section 173(1)(a), set out in section 173(2), is whether it enables any person on whom a copy of it is served to know what those matters are. Even before the change in the wording of the statute moreover, it was held that it was unnecessary to identify each constituent operation and that the test of fairness (as in *Miller-Mead*) was capable of being satisfied by a description in general terms (*Bristol*).

The notice identifies the forms of operational development said to have been carried out but does not particularise them in detail. That in my assessment is enough to "state" or to identify what it is the Authority considers has been done that amounts to the breach of control and for the recipients of the notice to know what they have "done wrong"[7], albeit in general terms. The appeal process provides the opportunity to argue over the lawfulness of different items or parts of them, particularly as the onus in that respect is on the Appellants to establish it. Even the phrase "various buildings", though certainly imprecise, is clear on the particular form of development, leaving it to the Appellants to establish which buildings may or may not be lawful and the reasons for that.

The notice then goes on to describe the alleged change of use by reference not only to the business activities which the Authority believed were being undertaken on the site but also the method by which the change of use was achieved. Whether or not the palisade fencing is by itself a form of operational development does not matter for this purpose, any more than does the question of whether the sub-division of itself was unlawful. Both these elements, as well as the list of activities, form part of the whole (change of use) allegation, which should be read as such.

Again, the appeal process is the method by which the accuracy of this part of paragraph 3 can be tested. Any recipient of the notice, in my assessment, would know what was alleged in relation to the change of use of the site as a whole and could hardly be said not to know what was actually happening on his own unit. It is the former to which this notice is addressed. There is absolutely nothing to prevent an individual unit occupier saying on appeal 'this is what I am doing and these are the reasons why there has been no change of use/no breach of planning control'. A number of the occupiers began that process indeed before the inquiry was adjourned (though for the sake of clarity, if needed, no conclusions have yet been drawn from their evidence). Whether there has been a change of use at all, and if so whether it has involved the creation of separate planning units in different uses, or was of a single unit that is now in mixed use, as well as the characterisation of those use(s), are all questions of fact and degree for determination through the appeal process. The notice as drawn is however clear in alleging a change of use of the whole site.

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[6] *Section 173(1)(a)*
[7] *Miller-Mead*

None of that is to say that a planning authority can rely on a recipient's knowledge of a site to 'make good' any deficiencies in an enforcement notice. By their very nature however, those people are likely to have sometimes extensive knowledge of it and its history. More importantly, neither the Act nor the cases cited indicate that a notice need describe what is alleged in great detail. My conclusion therefore is that paragraph 3 of the notice by itself is sufficiently clear and unambiguous for the notice as drawn to be an enforcement notice for the purposes of S173.

If I am wrong on that however, and while noting the Council's position, the fact that the contents of the allegation and those of the requirements are covered by separate sub-sections does not prevent me looking at the latter in order to clarify or interpret the former. No authority was cited for the opposite contention other than the existence of the 2 sub-sections. Section 173(2) states that "a *notice* complies with sub-section (1)(a) if *it* enables..." etc, as above (my italics). It does not say "the paragraph describing the matters alleged complies with etc" or words to that effect. I see no reason therefore why clarification, if needed, should not be sought by looking at the requirements.

If therefore the question were asked "which buildings does the Council think are unlawful", or at least, "which do they want me to remove", the answer is at paragraph 5(iii), namely those (and incidentally all fencing, lamp standards and other structures) erected in connection with the unauthorised uses. That may beg the question of what if any, are the unauthorised use or uses, but that is for determination through the appeal process for the reasons already given. So too would be that of whether the buildings were connected with them and the extent of any lawfully constructed roadway and hardstandings. The fact that there may be substantive issues to be resolved through the appeals does not mean the requirements do not satisfy section 173 nor that they would necessarily be retained in their present form if the notice is upheld. As they stand they add to an understanding of the allegation but, as above, are not crucial to it.

None of the above indeed means either that the notice will be upheld, nor if it is, that it would remain as drafted, nor that I am yet satisfied that the notice is capable of being corrected and/or varied (as the Council have already suggested) without causing injustice. All it means is that I remain of the view that it is not a nullity, whether for reasons of ambiguity or otherwise.

Yours sincerely

Tracey Smith
Operational Support Team

Further appeal references:- APP/A2280/C/07/2052358, APP/A2280/C/07/2052359, APP/A2280/C/07/2052361, APP/A2280/C/07/2052362, APP/A2280/C/07/2052363, APP/A2280/C/07/2052365, APP/A2280/C/07/2052366 and APP/A2280/C/07/2052064

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http://www.pcs.planningportal.gov.uk/pcsportal/casesearch.asp
You can access this case by putting the above reference number into the 'Case Ref' field of the 'Search' page and clicking on the search button

Annex C – Re-revised APP9