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**Tunbridge Wells Borough Local Plan Examination**

Response on behalf of Castle Hill Developments Ltd (Comment no. 1912)

This statement is accompanied by the following appendices:

*Appendix 1: Inspector's letter on Examination of the Chiltern & South Bucks Local Plan, 7th May 2020*

*Appendix 2: Save Historic Newmarket Ltd v Secretary of State & Forest Heath District Council [2011] EWHC 606 (Admin)*

*Appendix 3: Compton PC v Guildford BC [2019] EWHC 3242 (Admin)*

*Appendix 4: Heard v Broadland DC [2012] EWHC 344 (Admin)*

*Appendix 5: Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin)*

*Appendix 6: Ashdown Forest Economic Development LLP v Secretary of State & Wealden DC [2014] EWHC 406 (Admin)*

**MATTER 1: LEGAL AND PROCEDURAL REQUIREMENTS AND OTHER GENERAL MATTERS**

***Issue 1: The Duty to Co-operate***

Q1. The Duty to Cooperate Statement – Part 1 (Revised November 2021)[1] states that the Council has identified sufficient sites to meet its local housing need in full. Whilst this involves the removal of land from the Green Belt and some major development in the High Weald AONB, paragraph 4.14 states that neighbouring authorities were approached to help in meeting housing needs but were unable to assist. What did this process entail and how did the Council explore the possibility of meeting housing needs in areas outside the Green Belt and High Weald AONB? Can the Council point to evidence of effective and on-going joint working with neighbouring authorities beyond Green Belt and AONB boundaries?

1 Whilst this is primarily a matter for the Council to respond to with evidence on the effective and on-going engagement with other authorities, the Council's correspondence with Sevenoaks District (SDC15 in CD 3.132cii (Appendix B)) indicates that a request was submitted to that authority on 6th October 2020 highlighting that Tunbridge Wells Borough had an unmet need for between 1,608 and 1,772 dwellings together with 14ha of employment land. This request was also sent to other authorities in October 2020 as indicated in the draft Statements of Common Ground included in appendix A of CD 3.132cii[2]. The Council's response to this question will therefore explain its approach with respect of addressing the Borough's housing need.

[1] CD 3.132a
[2] See paragraph 2.16 of SoCG with Ashford Borough (March 2021) (appendix A8) and para 6.13 of SoCG with TMBC (Oct 2021) (appendix A4)

Q2. Likewise, how did the Council approach strategic decisions about meeting employment needs? Were options explored with duty to cooperate partners which sought to meet needs without releasing Green Belt land or requiring major development in an AONB? If so, where is this set out?

2 As indicated in the representation (appendix 11), the Council on 23rd September 2020 resolved to approve major employment development on a site lying within both the AONB and Green Belt to the north-east of Tunbridge Wells. Furthermore, the Planning Committee Report[3] notes that the site was a provisional allocation within the draft Local Plan 2019 (site ref AL/RTW12) (CD3.9).

3 The Council's confirmation of the acceptability of major employment development within both Green Belt and AONB in advance any request to neighbouring authorities highlights the importance it placed on resolving this and was an approach that is supported. As indicated in our representation (paragraph 10.12), there were alternative employment locations outside of the AONB and Green Belt which were equally commercial attractive to companies. For consistency, the Council's acceptance of a need for employment justifies major employment development within both AONB and Green Belt should have been applied to other types of development, including residential. This is explained further in the response to Matter 1, Issue 3, question 6.

Q3. Paragraph 27 of the National Planning Policy Framework ('the Framework') states that in order to demonstrate effective and on-going joint working, strategic policy-making authorities should prepare and maintain one or more statements of common ground, documenting the cross-boundary matters being addressed and progress in cooperating to address these. Has a signed statement of common ground been prepared with Sevenoaks District Council, as required by the Framework?

4 No evidence currently provided that a Statement of Common Ground has been signed with Sevenoaks District.

5 Whilst this is a matter for the Council, the information within the documents submitted for examination do not indicate that a SoCG has been signed with Sevenoaks DC. This is despite assurances that SoCG's would be signed when the Council was recommended to approve the local plan for regulation 19 consultation and regulation 20 submission[4]

Q4. In the absence of a statement of common ground with Sevenoaks District Council, what evidence can the Council point to in order to demonstrate effective and on-going joint working on strategic cross-boundary matters?

6 This is primarily a matter for the Council to demonstrate. The PPG (ID ref 61-015-20190315) highlights the value of Joint Evidence and that this can contribute towards demonstrating the Duty to Co-operate. This section of the PPG states:

*Strategic policy-making authorities are expected to document the activities undertaken when in the process of addressing strategic cross-boundary matters whilst cooperating. These will include (but are not limited to):*

- *working together at the outset of plan-making to identify cross-boundary matters which will need addressing;*

[3] See appendix 11 in representation, paragraphs 7.116 & 7.117.
[4] See paragraph 3.29 of the Reports to Cabinet (21st Jan 2021) (CD3.3) and Council (3rd Feb 2021) (CD3.4) regarding the regulation 19 version of the Local Plan

- *producing or commissioning joint research and evidence to address cross-boundary matters;*
- *assessing impacts of emerging policies; and*
- *preparing joint, or agreeing, strategic policies affecting more than one authority area to ensure development is coordinated, (such as the distribution of unmet needs or policies relating to county matters).*

*These activities will need to be tailored to address local circumstances* (my emphasis)

7 Therefore, the extent that Tunbridge Wells Borough has commissioned joint evidence could illustrate whether it has "**engaged constructively, actively and on an ongoing basis**" as required by Section 33A of the Planning & Compulsory Purchase Act 2004 (as amended).

8 In contrast to the aforementioned advice in the PPG regarding the value of joint evidence, it is clear the Council's commissioning of evidence indicates that since autumn 2016, these only relates to the authority's administrative area rather than a wider area/joint evidence base. This includes the key assessments on matters such as Green Belt (Nov 2016) (CD3.34a & CD3.93a), Landscape Sensitivity (Feb 2017) (CD3.40a & CD3.102a), AONB Setting Analysis (Nov 2020) (CD3.95a), the SHMA Update (Jan 2017) (CD3.24), Housing Needs Study (Jul 2018) (CD3.19) and Retail & Leisure (Apr 2017) (CD3.30 & CD3.85).

9 This contrasts with earlier assessments which related to wider areas including Economic Needs (Sevenoaks and Tunbridge Wells) (Aug 2016) (CD3.25), the SHMA (Sevenoaks and Tunbridge Wells) (Sep 2015) (CD3.25).

10 From this analysis, it appears that until autumn 2016 Tunbridge Wells Borough had been actively and constructively engaged in joint working with neighbouring authorities and that this had ceased by the end of 2016.

11 Additionally, the Stage 1 review of Green Belt was completed in November 2016 (CD3.34a & CD3.93a). This was more than 2 years ahead of the submission of the Local Plans by Sevenoaks[5] and Tonbridge & Malling[6] Councils. Consequently, there was clearly the opportunity for this appraisal to have covered a wider area. This is therefore an indication of when Tunbridge Wells Borough ceased to effectively engage with neighbouring authorities.

12 The PPG (ID ref 61-015-20190315) highlights the role of jointly prepared evidence in demonstrating compliance with the Duty to Co-operate. This advice is reflected in the earlier version of the PPG[7] which would have informed the work on Tunbridge Wells and its Neighbours when preparing evidence for the Plans. As indicated in the representation, the lack of joint working on evidence since autumn 2016 is an indication that the authority has not effectively engaged with its neighbours.

Q5. The Duty to Cooperate Statement – Part 1 (Revised November 2021) confirms that Sevenoaks District Council informed Tunbridge Wells Borough Council that it was unable to meet its own housing needs in April 2019. What steps has the Council taken since April 2019 in response to this request? Has the Council engaged constructively, actively and on an ongoing basis insofar as the preparation of the Tunbridge Wells Borough Local Plan is concerned?

[5] See Appendix 3 of Representation. Sevenoaks Plan was submitted on 30th Apr 2019
[6] See appendix 2 of Representation. Tonbridge & Malling Local Plan was submitted in January 2019 (para 4 of letter)
[7] ID ref 9-011-20140306

13 No, although this is for the Council to demonstrate, as indicated in the representations and further in this statement, we do not consider that Tunbridge Wells Council engaged constructively, actively and on an ongoing basis[8] with other local authorities as there is no clear evidence to demonstrate this. The information in the Council's Duty to Co-operate Statements is not considered to be sufficient as it does not accord with the PPG (ID ref 61-015-20190315.

14 As indicated in the response to Matter 1, question 4, the authority has not undertaken joint evidence since autumn 2016, which importantly means that studies like the Green Belt Assessment were not undertaken in collaboration with neighbouring authorities.

15 The correspondence in the Duty to Co-operate Statement[9] post April 2019 does not come close to meeting the statutory test of Section 33A(2)(a)[10] of "**engaging constructively, actively and on an ongoing basis"** on the preparation of the Tunbridge Wells Borough Local Plan. This is evident from two extracts from document SDC10 in the Sevenoaks District DtC summary (CD3.132ciii). The first is the Council's response of 8th September 2019 to Sevenoaks that "**Without prejudging the outcome of the TWBC local plan work there, and as discussed under the DtC meetings, there should be no presumption that there is capacity within Tunbridge Wells borough to accommodate unmet development need from another authority area**"[11]. The second immediately follows this and refers to the Council's response at the earlier DtC workshop on 24th April 2019 (included as SDC9) that "**TWBC was adamant that it was not able to meet SDC's unmet need**". The Council's clear and unambiguous response of 24th April was only 13 days after it had formally received the request from Sevenoaks District. There is no way that this can constitute engagement in a constructive, active and on-going basis as obligation by the 2004 Act. This is a clear failure of the requirement under the Duty to Co-operate.

16 The Local Plan Inspector will also be aware of the failure of the joint plan prepared by Chiltern and South Bucks Council's to demonstrate compliance with the Duty to Co-operate (appendix 1 of this statement), as this was an earlier examination he oversaw. The Joint Chiltern and South Bucks failed as they also did not adequate engage in discussing how clearly identified unmet needs of a neighbouring authority could be addressed (in that case Slough Borough). As is indicated in the correspondence and the Inspector's questions for this examination, Tunbridge Wells has been aware of unmet need in the adjoining Sevenoaks District since April 2019. However, the authority has not undertaken any effective joint work in resolving the unmet need. Therefore, as with the examinations of the Local Plans for Sevenoaks, Tonbridge & Malling together with that for the Joint Chiltern & South Bucks document, it is clear that it has failed the Duty to Co-operate.

17 The absence of an agreed Statement of Common with Sevenoaks District is a further indication of the failure under the Duty to Co-operate. As confirmed in the Inspector's judgements on other Local Plans[12], a failure under the Duty to Co-operate cannot be rectified once the Plan has been submitted for examination.

[8] As obligated by Section 33A (2)(a) of the Planning & Compulsory Purchase Act 2004 (as amended)
[9] Especially with respect of engagement with Sevenoaks District
[10] 2004 Planning & Compulsory Purchase Act (as amended)
[11] Page 95 of the document CD3.132ciii
[12] See paragraph 7 of the Inspector's Report into the Sevenoaks Local Plan (Appendix 3 of our representation) and paragraph 20 of the Inspector's letter on the examination of the Tonbridge & Malling Local Plan (appendix 2 of our representation)

Q6. Planning Practice Guidance advises that local planning authorities are not obliged to accept needs from other areas where it can be demonstrated that it would have an adverse impact when assessed against policies in the Framework[13]. How has the Council considered the likely possible impacts of accommodating unmet housing needs from elsewhere as part of the Plan's preparation? What does this show and how have the results been shared and/or discussed with duty to cooperate partners?

18 This is a matter for the Council. However, the representation and the response to Matter 1, Issue 3 concerning Sustainability Appraisal indicates that the authority did not assess a reasonable alternative and consequently it was unable to demonstrate that "**any adverse impacts of doing so would significantly and demonstrably outweigh the benefits**."

19 Our representations confirms that a smaller, more sensitive development at Castle Hill, consistent with the Council's Landscape Sensitivity Study[14] would not give rise to adverse impacts upon either the Green Belt (paragraphs 10.42-47) or AONB (paragraphs 10.10-41). Consequently, the development of Castle Hill for a residential led development passes the respective tests in the NPPF concerning Green Belt (paragraph 138) and AONB (paragraph 177). As a result, it is an appropriate location for development which should have been selected through a robust review of reasonable alternatives (as discussed in response to question 6 of Issue 3).

20 The representations also indicated that it was not considered that the authority had adequately addressed a housing requirement above the minimum Local Housing Need figure. This therefore further illustrates that it has not adequately appraised the possible impacts of higher growth which could contribute towards unmet needs of other authorities.

Q7. Has the Council been approached by other strategic policy-making authorities to accommodate any unmet needs in the Tunbridge Wells Borough Local Plan? What were the outcomes of these discussions?

21 Yes. The Duty to Co-operate Statement (appendix A of document 3.132cii) indicates that it has been approach by another authority - Elmbridge[15]. There is no indication of what discussions have taken place with Elmbridge, notwithstanding it is not a neighbouring authority.

Q8. Does the Plan seek to meet any unmet housing needs from elsewhere? If not, what are the reasons for this and is it justified?

22 No. The reasons for this are to be explained by the Council. For Sevenoaks, the Council indicates that the constraints within the Borough prevent addressing any unmet needs[16]. However, that response was based upon high level assessments of overly large land parcels with respect of Green Belt (large parcel BA2[17]) and AONB matters (large parcel PE1)[18].

23 In particular, with regard of land north of Royal Tunbridge Wells/ A21 corridor, the Landscape Sensitivity Study acknowledged that at a localised scale, landscape containment offered scope to limit the impact of built development within the AONB landscape. Accordingly, the Study

[13] Paragraph: 022 Reference ID: 61-022-20190315
[14] Site ref PE1 in CD3.102bi (page 92)
[15] See para 2.10 of the Rother SoCG (Oct 2020) (appendix A9) although it is referenced in other SoCG, including Ashford Borough
[16] See response in SDC8 within CD3.132.cii (page 86 of the pdf file)
[17] With the Green Belt Study (CD3.34a & CD3.93a)
[18] Site ref PE1 in CD3.102bi (page 92)

indicated that there may be pockets of land associated with the A21 or existing development that could be appropriate for limited small scale development that could be relatively contained in the wider landscape with only potentially medium/high sensitivity. The degree of sensitivity is the same categorisation on sensitivity for the now accepted major employment development in the AONB at Longfield Road. Accordingly, there was no justification for rejecting some of the unmet housing needs with identical levels of sensitivity to accepted major employment development within the AONB and Green Belt.

24 In particular with regard of land north of Royal Tunbridge Wells/ A21 corridor whereas the Landscape Sensitivity Study[19] acknowledged that at a localised scale, landscape containment offered scope to limit the impact of built development such that there may be pockets of land associated with the A21 or existing development where sensitivity to limited small scale development could be relatively contained in the wider landscape with only potentially medium/high sensitivity (comparable to same categorisation[20] on sensitivity for the now accepted major employment development in the AONB). Accordingly, there was no justification for rejecting some of the unmet housing needs with identical levels of sensitivity to accepted major employment development within the AONB and Green Belt.

Q9. The submitted Local Plan proposes two strategic developments (at Tudeley Village and Paddock Wood, including land at east Capel) which are situated reasonably close to the boundary with Tonbridge & Malling Borough. The Statement of Common Ground with Tonbridge & Malling Borough Council[21] includes details of a 'Strategic Sites Working Group' which meets monthly and includes examples of some policy outcomes as a result of this joint working.
The Statement of Common Ground also clarifies that Tonbridge & Malling Borough Council has raised 'serious concerns' relating to the transport evidence base, transport impacts, flooding and infrastructure provision. In response, paragraph 5.12 concludes that both authorities will continue working to address these concerns, including where necessary with key infrastructure providers and statutory consultees.
How have these strategic cross-boundary matters been considered throughout the plan-making process and has the Council engaged constructively, actively and on an on-going basis in addressing them?
In answering this question, has the Council's approach been consistent with advice contained in the Planning Practice Guidance? It states that Inspectors will expect to see that strategic policy making authorities have addressed key strategic matters through effective joint working, and not deferred them to subsequent plan updates or are not relying on the Inspector to direct them. If agreements cannot be reached, Planning Practice Guidance advises that plans may still be submitted for examination, but, states that comprehensive and robust evidence of the efforts made to cooperate, and any outcomes achieved, will be required.

25 The extent that cross-boundary measures have been considered through the Plan making process is for the Council and Tonbridge & Malling BC to respond.

26 The responses of Tonbridge & Malling Council to the consultations undertaken on the Draft[22] and Pre-submission[23] versions of the Local Plan indicate that they had serious concerns with respect of the evidence base for the document. There is no information submitted for the

[19] Site ref PE1 in CD3.102bi (page 92)
[20] Typologies shown in table 2.3 of CD3.102a (page 17) which confirms the Longfield Road approved scheme is a large development scenario.
[21] Contained within Core Document 3.132c(iv)
[22] Appendix C4 of 3.132civ – response of 16th October 2019
[23] Appendix C5 of 3.132civ – response of 2nd June 2021 from councillors and 3rd June 2021 from the authority

examination indicating that any essential infrastructure improvements for delivery of either Tudeley Village and Paddock Wood expansion is feasible where it entails works within Tonbridge & Malling Borough[24]. Consequently, the schemes are neither deliverable or developable and other options should be included to maintain delivery of Tunbridge Wells Borough's development needs.

27 In addition, the responses of Tonbridge & Malling BC have highlighted concerns over the timing of infrastructure improvements, including educational provision and the impacts this would have on that authority whilst they are delivered.

Q10. The Statement of Common Ground with Kent County Council (Highways) refers to the preparation of a Transport Assessment Addendum (dated September 2021) and a second Addendum dated October 2021. It then concludes that the Council and Kent County Council agree to continue working together over the coming weeks and months and will seek to update their positions through a further statement of common ground 'prior to the examination'. What is the latest position regarding 1) the completion, publication and consultation on this evidence and 2) the statement of common ground?

28 This is a matter for the Council to respond to, especially with respect of queries 1 and 2.

Q11. How does the preparation of additional highways evidence and further dialogue with the County Council demonstrate compliance with the duty to cooperate, which relates to the preparation of the Plan and thus cannot be rectified post-submission?

29 The responses of other local authorities, especially Tonbridge & Malling have highlighted significant concerns over the transport and traffic implications of the emerging Plan. These are matters which can only be resolved through effective and constructive engagement with a range of bodies including the County Highways Authority. This is consequently a matter for the Council to demonstrate.

Q12. Has the Council engaged with all relevant local planning authorities, county councils and other prescribed bodies in the preparation of the Plan?

30 No, on the basis of the evidence provided to date as noted above. However, this is a matter for the Council to demonstrate.

Q13. Has the Duty to Cooperate under sections 22(5)(c) and 33A of the 2004 Act and Regulation 4 of the 2012 Regulations been complied with, having regard to advice contained in the National Planning Policy Framework (the 'Framework') and the National Planning Practice Guidance (the 'PPG')?

31 No, on the basis of the evidence provided to date as noted above. However, this is a matter for the Council to demonstrate.

<u>Conclusion on Duty to Co-operate</u>

32 Whilst it is a matter for the Council, we consider that further evidence should be provided to demonstrate that the Council has complied with the Duty. Whilst joint commissioning of evidence occurred at the start of the preparation of the Local Plan, this stopped in autumn 2016, which is at least 2 years before the neighbouring authorities of Sevenoaks District and Tonbridge & Malling Borough had submitted their Local Plan. The commissioning of joint

[24] As indicated in the Infrastructure Delivery Plan (Oct 2021) i.e. page 22 (CD3.142)

evidence is referenced in the PPG[25] as an illustration of activities which demonstrates compliance with the Duty.

33 Tunbridge Well's rejection of Sevenoaks request to meet its housing needs within 12 days suggests a lack of meaningful discussions on how that unmet need could be addressed and an absence of constructive engagement in an attempt to address the issue prior to the submission of the Local Plan. Moreover, the evidence base, in particular the Green Belt and Landscape Sensitivity Assessments failed to adopt a fine grained analysis where development options would have been identified and indeed and have been acknowledged to exist with similar levels of landscape sensitivities to major employment development that could consequently be suitable for residential proposals, which could also have contributed towards meeting some of the identified unmet needs.

***Issue 2 – Habitats Regulations Assessment ('HRA')***

34 The questions with respect of Issue 2 "Habitats Regulations Assessment" are matters for the Council.

***Issue 3: Sustainability Appraisal***

Q1. Option 11 in the Sustainability Appraisal of the Local Plan (Version for Submission)[26] tests a growth strategy which includes an additional 1,900 dwellings (equivalent to the need identified by Sevenoaks District Council in April 2019). What were the outcomes of this assessment and how did they inform the preparation of the Plan?

35 The outcomes of the assessment and the extent that they informed the preparation of the Plan are matters for the Council to response.

Q2. Does Option 11 test the minimum housing requirement plus 1,900 dwellings to help meet unmet needs from elsewhere, or an alternative, higher figure? What is the justification for this?

36 The outcomes of the assessment and the extent that they informed the preparation of the Plan are matters for the Council to response.

37 The justification of this as an alternative, whilst a matter for the Council, must be explained consistent with the conclusions in *Save Historic Newmarket Ltd v Secretary of State & Forest Heath District Council [2011] EWHC 606 (Admin*).[27]

Q3. Does the Sustainability Appraisal adequately and robustly test a strategy that would contribute towards meeting previously identified unmet housing needs from Sevenoaks?

38 No. The reasons for concluding that the Sustainability Appraisal has not adequately and robustly tested a strategy which would contribute towards unmet housing needs is detailed in the response to question 6 and whether the extent alternative growth strategies for Royal Tunbridge Wells were assessed.

39 The Environment Assessment of Plans & Programmes Regulations 2004 (as amended) is clear (Schedule 2, part 8) that in preparing the plan, that "**An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken**

[25] ID ref 61-015-20190315
[26] Core Document 3.130a
[27] See paragraph 40 – judgement included as appendix 2

**including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information**". This is consequently a legal obligation for the Local Plan.

40 The NPPF (paragraph 32) provides further guidance on this legal requirement indicating how the Sustainability Appraisal[28] and Strategic Environmental Assessment[29] is to be prepared and examined. The NPPF indicates that where significant adverse effects are identified, it is necessary to consider firstly mitigation measures and where this is not possible, compensatory measures.

41 The Sustainability Appraisal has failed to adequately and robustly test an alternative strategy which either reduce or eliminate any identified significant adverse impacts. The acknowledgement within the NPPF (paragraph 32) to "reduce" implies that an alternative strategy that gives rise to a degree of impact, as opposed to no impact, could, and should have been pursued. Secondly, NPPF (paragraph 32) also makes clear that where adverse impacts are unavoidable, those alternative strategies should not be rejected but suitable mitigation measures be considered and proposed or, where this is not possible, compensatory measures should be considered. There is no evidence that the SA has considered these additional steps consistent with the legal obligations and the NPPF.

42 In failing to consider reasonable alternative strategies for addressing the Borough's development needs (as detailed in the response to question 6), it has also not appraised whether these other approaches could have contributed towards meeting unmet needs from Sevenoaks District.

Q4. Has the Council, through the Sustainability Appraisal, considered alternative strategies which avoid major development in the High Weald AONB altogether?

43 This is a matter for the Council to respond. However, as indicated in the representation[30] and this statement, the Council has accepted there were insufficient alternatives beyond the AONB resulting in exceptional circumstances justifying major development within the High Weald AONB. The same therefore applies to residential development.

Q5. Has the Council, through the Sustainability Appraisal, considered alternative strategies which avoid releasing land from the Green Belt?

44 This is a matter for the Council to respond. However, as indicated in the representation[31] and this statement, the Council has accepted there were insufficient alternatives beyond the Green Belt resulting in exceptional circumstances justifying inappropriate development within the Green Belt.

Q6. Does the Sustainability Appraisal adequately and robustly consider alternative distributions of development, such as focusing growth towards existing settlements such as Royal Tunbridge Wells, rather than relying on a new settlement?

45 No. As indicated in our Regulation 19 Representation, the SA did not adequately consider the acceptability of growth at Royal Tunbridge Wells in comparison to a new settlement. This is as

[28] Required by Section 19 (5) of the Planning & Compulsory Purchase Act 2004 (as amended)
[29] Pursuant to the Environmental Assessment of Plans and Programmes Regulations 2004 (as amended)
[30] See appraisal of the land off Longfield Way employment allocation under ref RTW/AL17.
[31] See appraisal of the land off Longfield Way employment allocation under ref RTW/AL17.

a result of the rejection of the growth opportunities at Castle Hill as detailed in table 27 of the SA (ref 14).

46 The Local Plan Issues and Options document (May 2017) (CD3.6a) included five options, which other than option 5 (new settlement) envisaged growth at Royal Tunbridge Wells. The accompanying Interim Sustainability Appraisal (May 2017) (CD3.7) indicated (paragraph 5.3.1) that the preferred approach would be option 5, the new settlement together with option 4 (A21 growth corridor) included "**making up any shortfall in development needs**".

47 A subsequent Sustainability Appraisal was prepared in December 2017 (CD3.7a) following the consultation upon the Issues and Options document. The identification of a new settlement as the preferred option with option 4 retained to address any shortfall is endorsed in paragraph 5.3.1.

48 Although the A21 corridor (option 4) had been identified as an appropriate location for growth, including making up any shortfalls in development needs, when areas for urban extensions/ new settlements were initially identified, there were none on the identified A21 corridor adjoining Royal Tunbridge Wells (as indicated in figure 5 of the Sustainability Appraisal of the Draft Local Plan (May 2019) (CD3.11)). The subsequent Sustainability Appraisal accompanying the Pre-Submission Local Plan (February 2021) (CD3.62) included Castle Hill ((ref 14) as shown on figure 5) adjoining Royal Tunbridge Wells. This is therefore when strategic growth adjoining the town was assessed.

49 Table 27 of the SA (CD3.62) indicates that Castle Hill had been discounted initially as its potential residential yield had been 488-976 dwellings[32] i.e. as it had been too small. Table 27 of the SA (CD3.62) indicates that through the consultation on the Draft Local Plan, the authority had been advised that its capacity had increased to up to 1,600 dwellings and therefore it "**now warrants consideration amongst the sites in this table as a potential garden settlement**".

50 When comparing the SHELAA which accompanied the Draft Local Plan 2019 (CD3.22) several of the sites reviewed in figure 5 of the SA (CD3.11) were of a comparable size to Castle Hill as had been submitted. This is shown in the table below.

**Table of comparable sites in figure 3 of SA (CD3.11) with Castle Hill, derived from the information in the SHELAA (CD3.22)**

| Figure 5 of SA (CD3.11) ref | Site location | SHELAA document ref | SHELAA site capacity (dwellings) |
|---|---|---|---|
| 4 | Horsmonden | 144 within CD3.22j (page 21) | 622 - 1,243 |
| 5 | Iden Green | 437 in CD3.22b (page 27) | 450 - 700 |
| 7 | Land adj Colliers Green Primary School | 325 in CD3.22f (page 69) | Up to 500 |
| 11 | Langton Green | Late 23 and DPC21 in CD3.22r (page 39) | 395 - 789 |
| n/a | Castle Hill | 49 in CD3.22e (page 15) | 488 - 976 |

[32] As detailed in the SHELAA (CD3.22e)

51 The analysis in the above table indicates that the authority had not been justified in excluding Castle Hill as an option as it was comparable with others which and been identified as reasonable. The subsequent inclusion of Castle Hill in the SA which accompanied the Pre-Submission Plan (Table 27 of CD3.62) has partially addressed this oversight. Its inclusion reflects the acceptance that the SA is an iterative process which can be refined through its preparation[33].

52 Whilst it is an iterative process, the SA must have regard to changes in circumstances which could necessitate reconsideration of initial conclusions where these are no longer valid[34]. In this context, Table 27 of the SA (CD3.62 and 3.130a) both indicate that Castle Hill (at 1,600 dwellings) was rejected as:

> **To this end, the site is within the AONB and landscape impacts were considered too severe to warrant further consideration as a reasonable alternative.**

53 The only evidence to support the contention that the landscape impacts were too severe is within the SHELAA (CD3.22e and CD3.77e) which relies upon the Landscape Sensitivity Assessment (CD3.102).

54 Within the July 2019 SHELAA (CD3.22e), the Castle Hill site promoted in the SHLEAA (ref 49)[35] was rejected as:

> **This is a constrained site, has a complex topography and there is concern that development of this site would result in large scale development in the AONB.**

55 The subsequent Jan 2021 SHELAA (CD3.77e) indicates that the Castle Hill site promoted in the SHLEAA (ref 49)[36] was rejected as:

> **The site has been submitted as a potential new settlement with the potential for housing, employment, etc. development to be delivered on that basis.**
>
> **Given the strong policy protection given to the AONB (a national designation) in the NPPF, and other concerns about the achievability[37] of this site, the site is considered unsuitable as a potential Local Plan allocation.**

56 Through the subsequent representations to the pre-Submission Local Plan in June 2021, the capacity was revised to 900 dwellings. A masterplan was provided (appendix 18 to the representations) which demonstrated how development could be accommodated on the site avoiding severe impacts upon the AONB consistent with the findings of the Landscape Sensitivity Assessment (Feb 2017) (CD3.102bi). This states (page 15) for the parcel including the Castle Hill site (parcel ref PE1) that:

> **In terms of its physical and historic character this area is a characteristic High Weald AONB landscape. Landform and land cover increase sensitivity by creating distinct**

[33] See paragraph 7 of Save Historic Newmarket v Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2)
[34] See paragraph 7 of Save Historic Newmarket v Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2)
[35] Page 15 of CD3.22e which confirms an expected capacity of 488-976 dwellings
[36] Page 17 of CD3.77e – capacity of site was subject to masterplanning
[37] These were stated as "However, the high pressure gas pipeline running through the site raises questions over the quantum of new dwellings which could be provided to deliver a sustainable new settlement, especially in light of the Ancient Woodland which would also limit the layout of the development"

> **separation from the urban edge, a distinction emphasised by the large scale industrial and commercial buildings that form the settlement edge to the west of the A21, The area's woodlands and topography are important to the landscape setting of Tunbridge Wells, Southborough, Pembury and Tonbridge, and they are visually important as part of an AONB landscape. At a localised scale, landscape containment offers scope to limit the impact of built development, but it also helps to preserve strong perceptual qualities over large parts of the sub-area, limiting the visual impact of built development and major transport routes. Sub-area PE1 is therefore considered to have a generally high sensitivity to any scale of development; however there may be pockets of land associated with the A21 or existing development where sensitivity to limited small-scale development which could be relatively contained in the wider landscape would be medium-high**. (our underlining)

57 The SHELAA (July 2019) (CD3.22e) notes that the 47.73ha Castle Hill site lies within parcel PE1 of the Landscape Sensitivity Study (Feb 2017) (CD3.102). The Landscape Sensitivity Study (CD3.102) indicates that parcel PE1 extends to nearly 900ha. Therefore, the Castle Hill promoted site represents 5% of the total area assessed. The information in CD3.102[38] indicates that parcel PE1 is larger than other areas which adjoin Royal Tunbridge Wells. This is especially noticeable compared to parcel PE3[39] (the area allocated for employment development off Longfield Road (AL/RTW17)).

58 The assessment of parcel PE1 is the only appraisal of the site a potential landscape impact. The conclusions (page 92 of CD3.102bi) of the 900ha parcel are set out above (paragraph 55). The Council's landscape assessment therefore relates to a very significantly larger area than that promoted at Castle Hill. As noted, it also acknowledges that small scale development could have been acceptable. This recognition is not reflected in the SA.

59 The assessment of the parcel containing the employment allocation (PE3) in contrast states:

> **There is some sensitivity associated with the undulating slopes of this sub-area, rising up above existing development immediately to the west, but there is no inconsistency with settlement form in the broader Tunbridge Wells context, in which 'inward-facing' development typically occupies sloping higher ground, including the new development at Knights Wood to the south of Longfield Road. The sub-area's location between commercial development on Kingstanding Way, Longfield Road and the A21 means that it is relatively well contained visually, and already significantly influenced by built development and traffic movement. Overall sensitivity to small scale development is considered to be medium-low. It is important to retain a wooded settlement setting, particularly to residential areas, so there would be greater sensitivity to development which had a skyline impact. Large scale development on this rising ground would have a greater impact on landscape character than the adjacent commercial development on lower ground to the west, which although prominent locally has a sense of being contained within the landscape rather than dominating it, so there is a medium sensitivity to medium-scale development and medium-high to large-scale development.**

[38] Figures 4.1-3
[39] This extends to 47.4ha, comparable to the Castle Hill site

60 Since the assessment in CD3.103 was undertaken (prior to its publication in Feb 2017), the land within assessed parcel PE3 now has planning permission for employment development[40] (as indicated in appendices 11 and 12 which accompanied the representation).

61 As indicated in our representation, development on AL/RTW17 for employment will result in a changed relationship of Castle Hill with Royal Tunbridge Wells, especially within the context of any impacts upon the AONB. This is not however acknowledged in the CD3.103 as it does not provide a finer grained analysis, unlike that for parcel PE3.

62 The Council's landscape assessment therefore relates to a very significantly larger area than that promoted at Castle Hill, it is not considered that the justification for its rejection through the SA is still valid, especially as it did acknowledge that smaller scale development could have been acceptable prior to the approval of the employment site. Our Regulation 19 representations, dated June 2021 included a more refined masterplan scheme at Castle Hill for 902 dwellings (Appendix 18) that avoided severe impacts upon the AONB and very much reflected the findings in the Landscape Sensitivity Analysis (CD3.102bi) (Page 92) as highlighted above.

63 The SA has failed to acknowledge or assess this submitted scheme as a reasonable alternative. Moreover, with implementation of the employment proposal, the context and impacts of residential development at Castle Hill would be further reduced from that originally assessed in the Landscape Sensitivity Assessment (CD3.103bi). Therefore, the Council's rejection of the site through the SA is no longer substantiated.

64 Our Regulation 19 Representations[41] highlight that the authority resolved to approve planning permission for employment development on land north of Longfield Way[42]. This was allocated for employment (AL/RTW17), notwithstanding the clear availability of alternatives at Paddock Wood[43], which were outside of both the Green Belt and AONB and in an equally attractive location for companies. This contrasts with the approach for housing.

65 The Council's reasons for discounting the Castle Hill site were the perceived impacts upon the AONB as indicated in Table 27 of the SA (CD3.62 and 3.130a). As referred to above (reflecting the representations[44]), this perceived impact was as result of the excessively large parcel of land appraised, especially when compared to the more discrete (finer grained) evaluation of the land north of Longfield Way (included as allocation AL/RTW17).

66 The Inspector examining the St Albans Local Plan[45] highlighted the failure to adequately assess smaller parcels to the same rigor as other locations as a further reason why that plan failed. As indicated in our Regulation 19 Representation[46], the same applies with respect of the Castle Hill site. The Council's Landscape Assessment (CD3.102bi) for parcel PE1 specifically notes that "**there may be pockets of land associated with the A21 or existing development where sensitivity to limited small-scale development which could be relatively contained in the wider landscape would be medium-high".** This is an indication that parts of the Castle Hill site had potential for residential development, prior to the confirmation of employment

[40] Application 19/2267/OUT for up to 74,000sqm B1 and B8 floorspace approved on 12th March 2021
[41] Paragraph 5.44
[42] As acknowledged in paragraph 5.109 of the Submitted Local Plan (CD 3.128)
[43] See paragraph 10.12 of representation
[44] Section 10
[45] See paragraphs 61 and 62 of the Letter included as appendix 13
[46] Paragraphs 10.43-47

development on draft allocation AL/RTW17. There is however no assessment of parts of the PE1 site within the SA as a reasonable alternative[47].

67 The Council accepted a medium-high sensitivity major employment development in the AONB at Longfield Road (AL/RTW17). Despite this, the SA failed to include, as a reasonable alternative, a housing scheme (reduced Castle Hill proposal (900 dwellings) which consistent with NPPF paragraph 32 relating to alternative options which reduce originally identified adverse impacts) in contrast to the assumed new settlement option (circa 1,600 dwellings)) in the AONB with similar medium-high sensitivity, consistent with the findings of the Landscape Sensitivity Assessment (CD3.102bi) (page 92), further confirming the failure to consider a reasonable alternative.

68 With respect of impacts upon the AONB, whilst the SA (CD3.130a) indicated that landscaping was an acceptable form of mitigation to address unavoidable impacts (consistent the NPPF and PPG as indicated in the response to question 3) for the Longfield Road employment allocation (AL/RTW17)[48], it rejected this an equally acceptable and appropriate form of mitigation for the Castle Hill site[49]. This is therefore an illustration of the failure of the SA to adequately and robustly assess a reasonable alternative. As indicated above, the landscape assessment did not rule our development of the Castle Hill as contended by the authority as it acknowledged smaller scale development could be appropriate.

69 Additionally, whilst the Council (consistent with paragraph 11(b)) accepts that the need for employment justifies the allocation of land in both the AONB and Green Belt[50] as the adverse impacts do not come close to significantly and demonstrably outweigh the benefits, the same must also apply when considering housing growth around the town, including at Castle Hill.

70 Furthermore, whilst the Council (consistent with paragraph 11(b)) accepts that the need for employment justifies the allocation of land in both the AONB and Green Belt[51] as the adverse impacts do not come close to significantly and demonstrably outweigh the benefits, the same must also apply when considering housing growth including the benefits of meeting the identified unmet needs of Sevenoaks, including at Castle Hill, Royal Tunbridge Wells.

71 The Compton PC v Guildford judgement[52] (paragraph 70) clarifies that the phrase "exceptional circumstances" is a less demanding test than the development control test for permitting inappropriate development in the Green Belt, which requires "very special circumstances". Secondly, at paragraph 71, the judgement confirms that the phrase "exceptional circumstances" which in the NPPF is the relevant test for both the Green Belt and major development in the AONB can be a cumulation or combination of circumstances, or varying natures, which the decision maker as a matter of planning judgement can conclude that the circumstances are sufficiently exceptional to warrant altering the Green Belt boundary and allowing major development within AONB. Finally, the judgement (paragraph 72) confirmed that ordinary housing need can fall within the scope of exceptional circumstances. The existence and magnitude of the Borough's identified housing needs, irrespective of unmet need from Sevenoaks District therefore is also relevant.

[47] See Figure 12 of the SA for Submitted Plan (CD3.130a)
[48] See appendix F of SA (page 298)
[49] Appraisal of site ref 14 in Table 27 (CD3.130a) (page 90)
[50] Land off Longfield Way, Tunbridge Wells – AL/RTW17
[51] Land off Longfield Way, Tunbridge Wells – AL/RTW17
[52] Compton PC v Guildford BC [2019] EWHC 3242 (Admin) (Appendix 3 of this statement)

72 Therefore, in failing to adequately consider the impacts of the reduced scheme at Castle Hill, consistent with NPPF paragraph 32 (including mitigation through landscaping), the SA has not justified the exclusion of this as a reasonable alternative. Consequently, this means that the SA has not justified the rejection of further growth at Royal Tunbridge Wells, especially as the Castle Hill site lies within the A21 corridor (within option 4 of the Initial SA - an accepted element of the strategy for delivery as outlined in the SA). Therefore, it is not considered that the Plan has adequately considered growth at Royal Tunbridge Wells as an alternative to the new settlement.

Q7. Having established the strategy, what reasonable alternatives has the Council considered through the Sustainability Appraisal to the new settlement proposed at Tudeley?

73 This is a matter for the Council to explain, although the derivation of reasonable alternatives must be justified with the necessary evidence[53]. Additionally, as indicated in the representation[54] and this statement, the Council has accepted that the need for employment development justifies major development in both the Green Belt and High Weald AONB.

Q8. What was the justification for ruling out alternative options in locations such as Frittenden and Horsmonden on transport grounds, but not Tudeley Village?

74 This is a matter for the Council to explain, although the derivation of reasonable alternatives must be justified with the necessary evidence[55].

Q9. Does the Sustainability Appraisal adequately and robustly consider reasonable alternative strategies for the size and scale of development proposed at Tudeley Village and Paddock Wood, including land at East Capel? For example, does it consider smaller and/or larger forms of development as a way of meeting housing needs?

75 No. Although this is a matter for the Council to explain, the derivation of reasonable alternatives must be justified with the necessary evidence[56]. As indicated in the response to question 6, we do not agree that all reasonable alternatives have been adequately assessed in particular a more refined proposal at Castle that is consistent with the evidence base of the Plan.

76 As indicated in the representation, the SA does not adequately appraise alternative strategic sites such as Castle Hill, let alone those entailing a range of sizes. The failure to adequately consider credible and obvious alternative sized sites effectively was one of the reasons why the Inspector examining the St Albans Local Plan concluded that the SA was flawed[57]. The same conclusions must therefore apply to the Tunbridge Wells Local Plan.

[53] See paragraph 40 of Save Historic Newmarket v Secretary of State & Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2), paragraphs 10 and 71 of Heard v Broadland DC [2012] EWHC 344 (Admin) (appendix 4) and paragraph 132 of Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin) (appendix 5)
[54] See appraisal of the land off Longfield Way employment allocation under ref RTW/AL17.
[55] See paragraph 40 of Save Historic Newmarket v Secretary of State & Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2) and paragraphs 10 and 71 of Heard v Broadland DC [2012] EWHC 344 (Admin) and paragraph 132 of Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin) (appendix 5)
[56] See paragraph 40 of Save Historic Newmarket v Secretary of State & Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2) and paragraphs 10 and 71 of Heard v Broadland DC [2012] EWHC 344 (Admin) and paragraph 132 of Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin) (appendix 5)
[57] See paragraph 3 of Inspectors letter included as appendix 13 to our representation.

Q10. Where individual sites are concerned, how did the Sustainability Appraisal determine what were reasonable alternatives?

77 This is a matter for the Council to explain, although the derivation of reasonable alternatives must be justified with the necessary evidence[58]. As indicated in the response to question 6, we do not agree that all reasonable alternatives have been adequately assessed.

Q11. Are the scores and conclusions reached in the Sustainability Appraisal reasonable, sufficiently accurate and robust to inform the submission version of the Local Plan?

78 No. As detailed in the representation and this statement, it is not considered that the scores and conclusions are justified, especially having regard to the rejection of reasonable alternatives. This is covered in the response to question 6 within issue 3.

79 Furthermore, as explained in our representation[59], there is inconsistency in accepting major employment growth in the AONB and Green Belt[60] when there were clear opportunities equally attractive to companies in locations outside of these designations. This contrasts with the rejection of sites in these designations for housing development.

Q12. What alternative strategies and/or site allocations does the Sustainability Appraisal consider for the provision of new employment land and buildings?

80 This is a matter for the Council to explain. However, as indicated in our Regulation 19 Representation[61], whilst there were clear alternatives to the Longfield Road site as an employment allocation, which would have avoided the Green Belt and AONB and been equally attractive for companies, this site was nevertheless included as an allocation (notwithstanding it has a planning permission[62]).

81 It is therefore for the Council to explain the justification for this and its inconsistency in approach with respect of housing sites.

Conclusions on Sustainability Appraisal

82 As indicated in our Regulation 19 Representation, it is not considered that the SA assessed all credible alternatives, especially on a consistent basis taking account of the authority's resolution to approve major employment development in the Green Belt and AONB alongside its draft allocation in the Plan whilst rejecting housing proposals subject to the same designations in the same broad location. This is illustrated by the allocation of the land at Longfield Road (AL/RTW17) for employment whilst failing to consider the smaller scheme, which has been appropriately scaled to the sensitivities of the landscape, at the adjacent Castle Hill site for housing that had an identically assessed medium-high sensitivity to development as appraised in the Landscape Sensitivity Study (CD3.102bi).

[58] See paragraph 40 of Save Historic Newmarket v Secretary of State & Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2), paragraphs 10 and 71 of Heard v Broadland DC [2012] EWHC 344 (Admin) (appendix 4) and paragraph 132 of Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin) (appendix 5)
[59] Paragraph 10.3
[60] On land off Longfield Road (ref RTW/AL17)
[61] Paragraph 10.3
[62] See appendices 11 and 12 which accompanied the representation.

83 As the SA is to be an iterative process (as confirmed in the Regulations and Court judgements[63]), this inconsistency should have been addressed prior to the consultation on the Draft Submission Plan. Nevertheless, there remains the potential for this to be addressed through the examination of the Local Plan, although this is subject to the conclusions of a refined SA information the Plan which is subsequently adopted. This addressing through subsequent stages is however dependent on the reasons for rejecting alternatives to be clearly identified and justified, taking account of any changes in circumstances[64].

***Issue 4: Other Aspects of Legal Compliance***

84 These are matters for the Council.

[63] See paragraph 16 of Save Historic Newmarket v Secretary of State & Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2), paragraph 96 of Ashdown Forest Economic Development LLP v Secretary of State & Wealden DC [2014] EWHC 406 (Admin) (appendix 6) and paragraph 36 of Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin) (appendix 5)
[64] See paragraph 40 of Save Historic Newmarket v Secretary of State & Forest Heath DC [2011] EWHC 606 (Admin) (appendix 2)

Appendix 1

The Planning Inspectorate

**Examination of the Chiltern and South Bucks Local Plan**

Inspectors: Matthew Birkinshaw BA(Hons) Msc MRTPI
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Programme Officer: Ian Kemp
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John Cheston
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King George V House
King George V Road
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HP6 5AW

7 May 2020

Dear Mr Cheston,

**Examination of the Chiltern and South Bucks Local Plan**

1. We write further to the postponed Stage 1 hearing sessions, which were due to run between 17-20 March and 25-26 March 2020. We would like to start by thanking Officers for their assistance in postponing the hearings at such short notice and putting in place measures to ensure that the examination could continue, despite the difficult circumstances that we all find ourselves in regarding the Coronavirus ('COVID-19').

2. Following receipt of the written representations, rebuttal statements and further information requested on 1 April 2020, we are now in a position to set out some initial findings on Matter 1 – Duty to Cooperate ('DTC'). In summary, we have significant concerns that in preparing the Plan the Councils did not engage constructively, actively and on an ongoing basis in relation to a strategic matter as required by Section 33A of the Planning and Compulsory Purchase Act 2004 ('the Act'), having particular regard to Slough's unmet housing needs.

3. We note that as of 1 April 2020 Chiltern and South Bucks Councils now form part of Buckinghamshire Council. However, it is our understanding that it is not the intention to rename the submission version Local Plan to avoid any confusion with the forthcoming 'Buckinghamshire Local Plan'. Any references to the Plan in this letter therefore refer to the Chiltern and South Bucks Local Plan, submitted for examination in September 2019. References to the 'Councils' also refer to Chiltern and South Bucks Councils prior to 1 April 2020.

## Starting Point

4. As you will be aware, Section 33A of the Act places a duty on local planning authorities to co-operate in maximising the effectiveness of plan preparation. In particular, it requires local planning authorities to engage constructively, actively and on an ongoing basis in the preparation of development plan documents so far as they relate to strategic matters. A strategic matter is defined as sustainable development or the use of land that would have a significant impact on at least two planning areas. It can therefore include planning for new housing.

5. The National Planning Policy Framework ('the Framework') also includes a requirement in national policy to maintain effective cooperation. More specifically, paragraph 26 states that effective and ongoing joint working is *"integral to the production of a positively prepared and justified strategy"*. It should help to determine where additional infrastructure is required, and whether development needs that cannot be met within a particular area could be met elsewhere.

6. It is clear from evidence before the examination that Slough Borough Council's ('SBC') ability to meet its own housing needs has been a longstanding matter for discussion. Although there is some debate about whether or not SBC has ever formally requested assistance with the issue, correspondence[1] received by SBC from the Councils confirms that:

> *"In drafting the report to our own committee meetings to seek approval to publish and submit the Local Plan, I was advised that we had not received any formal requests to meet any unmet housing needs of neighbouring areas. Having looked into this issue subsequently, I can confirm that we did receive representations from your Council to ask for this assistance in response to the Local Plan Issues and Options and Green Belt Preferred Options Consultations in 2016. I hope that this now sets the record straight on this matter."*

7. The strategic matter of SBC's unmet housing need was therefore before the Councils at a very early stage in the Plan's preparation.

## Constructive, Active and Ongoing Engagement

8. Based on the submitted information, the first DTC meeting with SBC was held on 9 September 2016. The next recorded meeting was over a year later, on 17 October 2017. It was facilitated by an independent planning consultant who sought to *"…direct the meeting and facilitate discussion towards the goal of creating a statement of common ground."*

9. From the notes of the meeting it appears that the majority of discussions centred around unresolved disputes concerning housing market areas.[2] At

[1] Extract provided in Slough Borough Council's Duty to Cooperate Written Statement (March 2020)
[2] Examination Document EXAM33A

the time South Bucks' position was that there was effectively one housing market area comprising all the Berkshire authorities, and for that reason, suggested that SBC should look further afield for assistance in meeting its unmet housing needs. The scale of unmet need was described as *"…between 5,000 and 10,000"* new homes.

10. The minutes from the October 2017 meeting includes advice from the facilitator, upon hearing the parties' positions on wider housing need issues, that Chiltern and South Bucks Councils could *"…be at significant risk [of] failing [the] duty to cooperate."* One of the outcomes of the meeting was therefore to work towards the preparation of a statement of common ground, with all parties agreeing that they would work more closely together in the future.

11. The next DTC meeting followed shortly afterwards, on 22 January 2018. Again, it was facilitated by an independent planning consultant and one of the aims of the meeting was to focus on the preparation of statements of common ground. Agreed matters included a recognition that SBC has an unmet housing need issue, and that its ability to expand to the south is constrained. This reflects the geography of the area, with the M4 motorway and River Thames limiting options for any significant southern expansion.

12. No further meetings were held between Chiltern and South Bucks Councils and SBC on this issue until 14 June 2019, approximately 18 months later, and after the Councils had published the submission version Local Plan for consultation. At the meeting SBC appears to have once more reiterated concerns that the Plan fails to meet any of its unmet housing need. Despite raising these concerns, there is nothing to suggest that the Councils took any immediate action insofar as the submission version Local Plan was concerned. Examination Document 33A confirms that *"no formal note was taken of this meeting"*.

13. Since identifying the issue and discussing it at DTC meetings in late 2017/early 2018, there does not appear to have been any constructive, active or ongoing engagement with SBC as part of the preparation of the Local Plan. In terms of how the submitted Plan seeks to address SBC's unmet housing need, there is very little evidence of any effective and ongoing joint working leading to the production of a positively prepared and justified strategy, as required by the Framework.

14. This is further highlighted by the lack of a signed statement of common ground with SBC. Paragraph 27 of the Framework is clear that in order to demonstrate effective and ongoing joint working, strategic policy making authorities should prepare and maintain one or more statements of common ground which should be made publically available throughout the plan-making process. The Planning Practice Guidance ('PPG') also advises that in the case of local planning authorities, statements of common ground form part of the evidence required to demonstrate that they have complied with

the DTC.[3] Furthermore, the PPG makes it clear that agreements (or disagreements) about the extent to which unmet needs are capable of being re-distributed should be included in such statements.[4] Despite being raised in DTC meetings in 2017, the Councils have only very recently (March 2020) submitted a draft, unsigned statement of common ground.[5]

**Wider Area Growth Study ('WAGS')**

15. One of the outcomes of the DTC meetings in 2017 and 2018 was a commitment to procure a joint growth study between SBC, Chiltern and South Bucks Councils and the Royal Borough of Windsor and Maidenhead. The *Wider Area Growth Study Part 1* was published in June 2019 and aims to identify potential locations that could accommodate the future housing needs of the Slough, Windsor and Maidenhead 'core'. Part 2, which is expected later in the year, will look at specific locations where new housing development could be deliverable and sustainable.

16. Commitment to the joint growth study is a positive step forward in seeking to address SBC's unmet housing needs. However, the WAGS is intended to form *"…part of the evidence base to supporting future plan making…"* (our emphasis).[6] As a result, although the Councils are now seeking to work collaboratively towards addressing the issue of unmet housing needs, this relates to future plan preparation. Published in June 2019, the WAGS in its published form has not influenced the preparation of the Chiltern and South Bucks Local Plan, which is before us for examination, nor is it clear that the emerging document did so.

17. Paragraph 3.5.7 of the submitted Plan states that one of the Strategic Objectives is to *"Establish a new, strengthened Green Belt boundary that will continue to meet national Green Belt purposes, prevent inappropriate development, secure opportunities for enhancement in accordance with national Green Belt objectives and, subject potentially to further consideration of the Green Belt boundary north of Slough in a review of the Plan, have boundaries that will endure beyond 2036"*

18. The Councils' response[7] to our Initial Questions[8] provides further clarity on this point. It states that, because of the uncertainty over the scale of SBC's unmet housing need, it is intended to pick up the matter through either a review of the Plan or a new Buckinghamshire-wide Local Plan. Essentially, *"CSB considered it better to get an up-to-date Local Plan in place, even if this has a limited time frame before its review, rather than to rely on two Local Plans adopted in the late 1990s."*

[3] Paragraph: 010 Reference ID: 61-010-20190315
[4] Paragraph: 012 Reference ID: 61-012-20190315
[5] Examination Document EXAM31
[6] Paragraph 1.1 of WAGS Part 1 (June 2019)
[7] Examination Document EXAM2
[8] Examination Document EXAM1

19. We can see that there may be some merit in this way forward, and have approached the examination pragmatically, recognising the importance of getting up-to-date Local Plans in place. But the PPG[9] is clear that *"Inspectors will expect to see that strategic policy making authorities have addressed key strategy matters through effective joint working, and not deferred them to subsequent plan updates…"*. Paragraph 35 of the Framework also states that Plans are sound if they are *"…based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground."*

20. Furthermore, the issue of SBC's unmet housing need was identified as far back as 2016, and the physical constraints and subsequent need for family housing has been a longstanding issue in the area. 'Potentially' considering the area north of Slough in a future review does not represent a positively prepared, justified strategy based on effective engagement. It cannot be said that the decision to potentially consider Slough's unmet housing needs in a future review was only reached following constructive, active and ongoing engagement having failed to find an agreed way of addressing the unmet housing needs in the current plan.

**Need for Agreement?**

21. The DTC does not place a requirement on local planning authorities to agree on all strategic cross boundary matters. The PPG[10] confirms that where agreements cannot be reached, it should not prevent a plan from being submitted for examination.

22. Nevertheless, in such circumstances the authority *"…will need to submit comprehensive and robust evidence of the efforts it has made to cooperate and any outcomes achieved; this will be thoroughly tested at examination."* Based on the evidence provided we are not convinced that the Councils have actively engaged with SBC on the issue of unmet housing needs, or adequately demonstrated what outcomes this engagement has resulted in. For example, the Councils do not appear to have actively explored options for growth around Slough, as might be expected as part of considering reasonable alternative strategies in the Sustainability Appraisal. The fact that the draft Statement of Common Ground was sent to SBC in December 2019, three months after submission, only serves to emphasise a lack of constructive dialogue on this key, strategic cross-boundary issue.

23. In response to our Initial Questions the Councils advised that they are *"…not in a position to accommodate Slough's request at the present time."* Essentially, *"If an authority cannot meet its own needs, then it cannot be considered to be in a position to provide assistance for anyone else. This is not considered to be a complex equation."*

[9] Paragraph: 022 Reference ID: 61-022-20190315
[10] Paragraph: 022 Reference ID: 61-022-20190315

24. The Green Belt is clearly a significant consideration in deciding how best to deal with SBC's unmet housing need. The PPG[11] advises that local planning authorities are not obliged to accept needs from other areas where it can be demonstrated that doing so would have an adverse impact when assessed against policies in the Framework. This reflects paragraph 11 of the Framework, which states that strategic policies should provide for objectively assessed needs for housing, as well as any needs that cannot be met in neighbouring areas, *unless* the application of policies in the Framework provide a strong reason for restricting the scale, type or distribution of development, or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits.

25. However, there does not appear to have been any detailed analysis as part of the Plan's preparation to determine whether or not the adverse impacts of contributing towards SBC's unmet housing needs would significantly and demonstrably outweigh the benefits. Furthermore, the Framework's policies do not prevent Councils from amending Green Belt boundaries where there are exceptional circumstances in accordance with paragraph 136. The submission version Local Plan actually proposes to release land from the Green Belt for 1,000 homes, 12,000 square metres of office floorspace and a community hub including a new primary school near to Slough at Iver Station (Policy SP BP11). Land is also proposed to be released from the Green Belt adjacent to Taplow Station for around 4,000 square metres of office floorspace (Policy SP BP14). The Green Belt has therefore not precluded land from being identified for development in the submitted Plan.

26. The Councils also point to the lack of an exact, up-to-date figure which establishes the precise level of unmet need in Slough. As we understand, this will be for the WAGS Part 2 to establish. But the minutes from the October 2017 meeting refer to the unmet housing need as between 5,000 to 10,000 dwellings, and published outcomes from the January 2018 meeting state that *"Slough has a unmet housing need issue".* The 2017 Slough Local Plan Issues and Options described the shortfall at around 8,000 dwellings.

27. SBC's written representations also point to qualitative housing needs. Due to the tightly drawn administrative boundary and extent of the built-up area, the main identified supply of housing in Slough is flatted developments. It is for this reason, and in order to provide larger 3 and 4-bedroom family houses, that the Council is seeking to deliver new development beyond the borough boundary. Whilst a more precise and up-to-date figure will be established through the WAGS Part 2, it appears to us that the need to provide a significant number of new homes beyond Slough's administrative boundary is a matter which is therefore not in dispute. Given the constraints imposed by the M4 motorway and the River Thames, in order to provide housing as close as possible to Slough the areas for search recommended in the WAGS Part 1 include land within South Bucks.[12]

[11] Paragraph: 022 Reference ID: 61-022-20190315
[12] Paragraph 7.11 and Figure 7.1 of WAGS Part 1 (June 2019)

## Summary and Conclusions

28. In summary, it is evident that the issue of SBC's unmet housing need was raised early in the preparation of the Chiltern and South Bucks Local Plan, as far back as 2016. Although the precise level of need has changed, and is yet to be accurately established, it is also evident that SBC has quantitative and qualitative needs that cannot be met within its tightly drawn administrative boundary.

29. The DTC is not a duty to agree, but the Act is clear that strategic plan making authorities should engage constructively, actively and on an ongoing basis. From dialogue in October 2017 and January 2018, no further meetings were held with SBC for almost 18 months, until after publication of the submission version Local Plan. Despite SBC raising concerns once more, no formal notes of the meeting were taken, and the Plan proceeded to submission in September 2019. In our opinion, this does not demonstrate that the Councils have taken reasonable steps to engage actively, constructively and on an ongoing basis in relation to the strategic issue of unmet housing need. Not having a signed statement of common ground in place with SBC only serves to demonstrate a lack of effective dialogue.

30. Although work on the WAGS is a positive step-forward in seeking to identify SBC's unmet housing needs and sustainable locations for growth, it does not relate to the preparation of the submitted Plan before us. As the Part 1 Study confirms, it's focus is on future plan-making in the area.

31. It has been suggested by some participants that the issue surrounding SBC's unmet housing need could be addressed through Main Modifications to the Plan, either by allocating more land for development or requiring an early review to take account of the WAGS Part 2. However, a failure to meet the DTC cannot be remedied during the examination because it applies to the preparation of the plan, which ends upon submission.

32. Based on the evidence provided we therefore have very serious concerns that the Councils have not engaged actively, constructively and on an ongoing basis in relation to a strategic matter in the Plan's preparation as required by Section 33A of the Act. Whilst we have sought to be pragmatic in our approach, Section 20(7A) of the Act requires that the examiners must recommend non-adoption of the Plan if they consider that a Council has not complied with the DTC. We will not reach a final conclusion on this matter until the Council has had the opportunity to consider our findings and respond to this letter. However, it is important that we point out that there is a strong likelihood that the only option will be for the Council to withdraw the Plan.

33. We appreciate that the Council will be disappointed with our findings and we have only come to this view after carefully considering the information provided in response to our Initial Questions, the Hearing Statements, Written Representations and Rebuttal Statements. We are also conscious that this is a difficult time for everyone due to the Coronavirus ('COVID-19').

However, Officers have indicated that the Council would wish to receive our findings on Matter 1 as soon as possible.

34. Clearly the Council will need some time to consider our findings and we recognise that the usual decision-making processes are likely to have been affected by restrictions arising from the Coronavirus ('COVID-19'). For this reason, we have not set a deadline for responding, although an indication of when a reply can be expected would assist for ourselves and participants.

35. We have asked the Programme Officer, Ian Kemp, to upload a copy of our letter to the website for those who are following the examination, but we are not seeking any comments from participants at this stage. In the meantime, should you have any further queries, please do not hesitate to contact us.

Yours Sincerely,

*Matthew Birkinshaw and David Troy*

Inspectors

Neutral Citation Number: [2011] EWHC 606 (Admin)

Case No: CO/6882/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2011

**Before** :
**Mr Justice Collins**
- - - - - - - - - - - - - - - - - - - - -
**Between :**

| | |
|---|---|
| **(1)Save Historic Newmarket Ltd**<br>**(2) Tattersalls Ltd**<br>**(3) Unex Group Holdings Ltd**<br>**(4) Jockey Club Estates Ltd**<br>**(5) Newmarket Trainers' Federation**<br>**(6) Godolphin Management Company Limited**<br>**(7) Darley Stud Management Company Ltd** | Claimants |
| **- and -** | |
| **(1) Forest Heath District Council** | Defendants |
| **-and-** | |
| **(2) Secretary of State for Communities & Local Government** | |
| **-and-** | |
| **Edward Richard William Stanley, 19th Earl of Derby ("Lord Derby")** | Interested Party |

- - - - - - - - - - - - - - - - - - - - -
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**Mr David Elvin, Q.C. & Mr Charles Banner** (instructed by **Ashurst LLP**) for the **Claimants**
**Mr Mark Lowe, Q.C. & Mr Michael Bedford** (instructed by **the Solicitor to the Council**) for the **First Defendant**
**Mr Jonathan Karas, Q.C.** (instructed by **Lawrence Graham**) for the Interested Party

Hearing dates: 22 & 23 February 2011
- - - - - - - - - - - - - - - - - - - - -

## Judgment

**Mr Justice Collins:**

1. This claim is brought pursuant to s.113 of the Planning and Compulsory Purchase Act 2004. It seeks to quash to the extent the court considers appropriate the Forest Heath Core Strategy (FHCS) which was adopted by the first defendant on 12 May 2010. The policies in the FHCS which are under attack relate to what is described as an urban

extension to the north-east of Newmarket for approximately 1200 dwellings as part of a mixed use development. That development is intended to take place over 20 years.

2. The claimants' main concern is that the development will have a seriously adverse effect on the horse racing industry. Newmarket is recognised as being what is described as the capital of the horse racing industry in national and international terms. Apart from the presence of the Jockey Club and Tattersalls and the National Stud, both outside and within the town limits there are many training establishments and so movements of valuable race horses inevitably clash with those of vehicles. Thus any increase in traffic generated by a development may have serious effects. Some 20% of residents are employed in the horse racing industry and any damage to it would be disastrous. This, to be fair to the Council, is recognised in the Core Strategy, but the concern of the claimants, all of whom have an interest and are persons aggrieved, is that the urban extension will have a seriously adverse effect on the industry.

3. Since it is and has always been recognised that the bulk of the proposed development will be on land known as Hatchfield Farm owned by the Interested Party, he applied to be and was joined in these proceedings on 15 September 2010. He supports the first defendant in resisting this claim.

4. Under the 2004 Act, a Development Plan comprises a Regional Spatial Strategy (RSS) and a Local Development Framework (LDF). The LDF itself has a number of components. The relevant one is the Core Strategy. This, like all LDF documents, must be in general conformity with the RSS. It is what is described as a Local Development Document (LDD) within the meaning of s.17 of the 2004 Act. By s.17(3) a local planning authority's LDDs 'must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area'. The definition of a Core Strategy and its designation as an LDD document is achieved by Regulation 6 of the Town and Country Planning (Local Development)(England) Regulations 2004 (SI 2004 No.2204).

   Regulation 6(3) provides that a document of the description in Paragraph (1)(a) is to be referred to as a Core Strategy. Regulation 6(1)(a) refers to any document containing statements of –

> "(i) the development and use of land which the local planning authority wish to encourage during any specified period;
>
> (ii) objectives relating to design and access which the local planning authority wish to encourage during any specified period;
>
> (iii) any environmental, social and economic objectives which are relevant to the attainment of the development and use of land maintained in paragraph (i);
>
> (iv) the authority's general policies in respect of the matters referred to in paragraphs (i) to (iii) …"

5. As their title suggests and the definition in regulation 6(1) indicates, Core Strategies are intended to contain more general policies looking to objectives rather than site specific developments. In PPS12, which discusses local spatial planning, guidance is given in the following terms:-

> "4.5. It is essential that the Core Strategy makes clear spatial choices about where developments should go in broad terms. This strong direction will mean that the work involved in the preparation of any subsequent DPDs is reduced. It is also means that decisions on planning applications can be given a clear steer immediately.
>
> 4.6. Core strategies may allocate specific sites for development. These should be those sites considered central to achievement of the strategy. Progress on the Core Strategy should not be held up by inclusion of non strategic sites."

In 4.7 the point is made that the Core Strategy looks to the long term and in general will not include site specific detail. It may be preferable for a site area to be delineated in outline rather than detailed terms and the detail can be dealt with in subsequent planning documents which do deal with the particular in the light of the general approach set out in the RSS and the Core Strategy.

6. The present system is due to be changed. However, until that happens, it has to be followed. Furthermore, even when the system is changed the Core Strategy will still exist as a development plan within the meaning of s.38 of the 2004 Act. S.38(6) provides that if regard is to be had to any development plan, any determination must be made in accordance with that plan unless material considerations indicate otherwise. Whatever the future holds, until amended, it will inevitably remain as a material consideration.

7. The challenge is brought on two grounds. First it is said that there was a failure to comply with the relevant EU Directive and the Regulations made to implement it in that the strategic environmental assessment (SEA) did not contain all that it should have contained. This if established would render the policy made in breach unlawful whether or not the omission could in fact have made any difference. That, as is common ground, is made clear by the decision of the House of Lords in *Berkeley v SSE* [2001] 2AC 603. Although *Berkeley* concerned an EIA, the same principle applies to a SEA. To uphold a planning permission granted contrary to the provisions of that Directive would be inconsistent with the Court's obligations under European Law to enforce Community rights. The same would apply to policies in a plan.

8. The second ground asserts that there was a procedural defect. It is said that some technical documents, in particular a Transport Impacts Study, a strategic flood risk and water cycle study and an affordable housing viability study were produced after the consultation period prior to the examination held before an inspector to decide whether the Core Strategy should stand as the Council proposed or should be modified. This meant that persons who might have been concerned if they had seen those studies were deprived of the opportunity of commenting on them. Since only those who had made representations during the consultation exercise were permitted to appear at the examination, some may have wanted to but been unable to appear at and call evidence before the inspector.

9. S.113(3) of the 2004 Act enables a person aggrieved to make an application to this court in respect of a relevant document on the ground that

> "(a) the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with."

S.113(6) enables the court to quash the relevant document wholly or in part and generally or as it affects the property of the applicant if the court is satisfied

> "(a) that a relevant document is to any extent outside the appropriate power;
>
> (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement."

There is thus no need to show prejudice to the applicant if s.113(6)(a) applies, but it is required if there is a procedural failure. Since the claimants accept that they had the documents in question and were able to deal with them at the examination the question whether they have suffered substantial or indeed any prejudice has obviously to be considered.

10. I shall consider first the claim that there was a breach of the Directive and the Regulations. The Directive in question is 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. This has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No.1633)(the 2004 Regulations). The Directive in paragraph (4) of the preamble identifies the importance of environmental assessment as a tool for integrating environmental considerations into the adoption of certain plans and programmes. That the Directive and the Regulations apply to the preparation of a Core Strategy is recognised by all parties. Paragraphs (14) & (15) of the preamble provide as follows:-

> "(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme; Member States should communicate to the Commission any measures they take concerning the quality of environmental reports.
>
> (15) in order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion."

11. The objectives are spelt out in Article 1. It provides:-

> "The objective of the Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to permitting sustainable development, by ensuring that, in accordance with the Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

Article 2(b) defines an environmental assessment to mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9. Since the urban extension in question is likely to have significant environmental effect and comes within Annex II to Directive 85/337/EEC as amended which applies to the assessment of all public and private projects which are likely to have significant effect on the environment, there is no doubt, and the contrary is not argued, that the requirements set out in the 2004 Directive had to be fulfilled. Article 5 is of central importance since it sets out what an environmental report must contain. It provides:-

> "1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex 1.
>
> 2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

> 3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex 1.
>
> 4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report."

The information required by Annex 1 includes the likely significant effects on the environment, the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme and, most importantly, by (h):-

> "an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information."

12. Article 12(2) requires Member States to ensure 'that environmental reports are of a sufficient quality to meet the requirements of this Directive …'. Quality involves ensuring that a report is based on proper information and expertise and covers all the potential effects of the plan or programme in question. In addition, since one of the purposes of the Directive is to allow members of the public to be consulted about plans or programmes which may affect them, the report should enable them to understand why the proposals are said to be environmentally sound. To that end, the report must not only be comprehensible but must contain the necessary information required by the Directive. The Directive by Article 6(2) requires that the public likely to be affected must be given an effective and early opportunity within appropriate time frames to express their opinion on the plan or programme and the accompanying environmental report before the adoption of the plan or programme. As must be obvious, a Core Strategy will develop over a period of time. The usual practice, which was followed in this case, would be to consult on various draft proposals until the LPA was able to decide what it wanted to put in place.

13. In this case, the process commenced in March 2005. I shall have to refer to the relevant documentation in due course. It was not until March 2009 that the council put forward its final proposals which were to go before an inspector. These were put to any member of the public who wished to make representations and who might want to appear before the inspector. His decision would be final in the sense that he could approve or modify the Core Strategy. If he decided any modifications were needed, the council could either implement the Core Strategy as modified or decide not to implement it in which case the process would have to start again.

14. The 2004 Regulations largely follow the language of the Directive. Regulation 5 requires the carrying out of an environmental assessment where the first formal preparatory act of a plan or programme to which the Regulations apply is on or after 21 July 2004. Regulation 13(1) requires that every draft plan or programme for which an environmental report has been prepared and its accompanying environmental report must be made available for the purposes of consultation to all those whom the LPA considers are or are likely to be affected by or have an interest in the decisions involved in the assessment and adoption of the plan. This can be and was done by use of the Council's website. Regulation 12 sets out what the assessment must contain. It must identify the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme (Regulation 12(2)(a) and (b)). It must also contain the information set out in Schedule 2, which reflects Annex 1 to the Directive (Regulation 12(3)). Paragraph 6 of Schedule 2 sets out a comprehensive list of the various significant effects which must be identified. It reads:-

> "The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues such as-

(a) Biodiversity;

(b) population;

(c) human health;

(d) fauna;

(e) flora;

(f) soil;

(g) water;

(h) air;

(i) climatic factors;

(j) material assets;

(k) cultural heritage, including architectural and archaeological heritage;

(l) landscape; and

(m) the inter-relationship between the issues referred to in sub-paragraphs (a) to (l)."

15. In its guidance on implementation, the EU Commission said this in paragraphs 4.6 and 4.7:-

> "4.6 If certain aspects of a plan or programme have been assessed at one stage of the planning process and the assessment of a plan or programme at a later stage of the process uses the findings of the earlier assessment, those findings must be up to date and accurate for them to be used in the new assessment. They will also have to be placed in the context of the assessment. If these conditions cannot be met, the later plan or programme may require a fresh or updated assessment, even though it is dealing with matter which was also the subject of the earlier plan or programme.
>
> 4.7 It is clear that the decision to reuse material from one assessment in carrying out another will depend on the structure of the planning, the contents of the plan or programme, and the appropriateness of the information in the environment report, and that decisions will have to be taken case by case. They will have to ensure that comprehensive assessments of each element of the planning process are not impaired, and that a previous assessment used at a subsequent stage is placed in the context of the current assessment and taken into account in the same way. In order to form an identifiable report, the relevant information must be brought together: it should not be necessary to embark on a paper-chase in order to understand the environmental effects of a proposal. Depending on the case, it might be appropriate to summarise earlier material, refer to it, or repeat it. But there is no need to repeat large amounts of data in a new context in which it is not appropriate."

As the second half of 4.7 makes clear, the final report may rely on earlier material but must bring it together so that it is identifiable in that report. This is consistent with the requirement that members of the public must be able to involve themselves in the decision-making process and for that purpose receive all relevant information. It cannot be assumed that all those potentially affected would have read all or indeed any previous reports (in the context of this claim previous environmental assessments).

16. The process adopted is in the planning jargon described as iterative. Thus it is open to an authority to reject alternatives at an early stage of the process and, provided that there is no change of circumstances, to decide that it is unnecessary to revisit them. That is what the Council did in this case. But the claimants submit that it has not in any of the SEAs which it produced given its reasons for deciding to reject the alternatives and that in any event it has failed properly to refer to the necessary information so as to enable the person affected to find it. In addition, initially when the alternatives were rejected the proposal was for 500 dwellings over a 15 year timescale but this was subsequently increased to 1000 and then 1200 when the housing provision was extended over a further 10 year period. That at any rate was what I was told. While the extension of time may explain the increase, the effect of 1200 as the end result will be greater than that of 500 and the effect of 500 could be considered and would be likely to be material in deciding whether any increase was desirable in environmental terms.

17. It is clear from the terms of Article 5 of the Directive and the guidance from the Commission that the authority responsible for the adoption of the plan or programme as well as the authorities and public consulted must be presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option (See Commission Guidance Paragraphs 5.11 to 5.14). Equally, the environmental assessment and the draft plan must operate together so that consultees can consider each in the light of the other. That was the view of Weatherup J in the Northern Irish case *Re Seaport investments Ltd's Application for Judicial Review* [2008] Env. LR 23. However that does not mean that when the draft plan finally decided on by the authority and the accompanying environmental assessment are put out to consultation before the necessary examination is held there cannot have been during the iterative process a prior ruling out of alternatives. But this is subject to the important proviso that reasons have been given for the rejection of the alternatives, that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary, by repeating them, to know from the assessment accompanying the draft plan what those reasons are. I do not think the *Seaport* case, which turned on its own facts including the lapse of time of over a year between the assessment and the draft plan, can provide any further assistance.

18. It is accordingly necessary to follow the documentation, bearing in mind that the required information must be contained in the environmental assessment which accompanies the draft plan. In its statement of Community Involvement produced in October 2004 (although entitled a draft statement, there was no other and so it was treated as final) the Council described how it would conduct the necessary consultative process. It stated (p 7 of the Statement):-

> "Consultation methods
>
> When we submit a development plan document for independent examination to the Secretary of State we will publish a notice and invite representations to be made within a specified period of six weeks. We will also send two copies of the development plan document and the following documents to the Planning Inspectorate:
>
> - The final report of the sustainability appraisal
> - Any supporting technical documents such as the urban capacity study and housing needs surveys
> - A copy of the Statement of Community Involvement
> - A statement of compliance, which should also indicate how we have addressed the main issues raised in representations received."

The sustainability appraisal included the environmental assessment.

19. The first draft document was produced in March 2005. It described itself as Initial Strategic Environmental Assessment Report and Sustainability Appraisal and Scoping Report Consultation Draft. In paragraph 1.3, its approach is described thus:-

> "The requirement to carry out a Sustainability Appraisal and a Strategic Environmental Assessment are distinct. However, Government guidance states that it is possible to satisfy both through a single appraisal process. This is the approach the District Council intends to take with the Forest Heath LDF. This document is both a sustainability appraisal and a strategic environmental assessment, but hereafter it will be referred to simply as a 'sustainability appraisal' on the basis that this is the more comprehensive and inclusive term."

In 1.4 it is described as the first stage of the sustainability assessment (SA) of the emerging Local Development Framework. This includes the Core Strategy. In Paragraph 19, the national and international importance of Newmarket is recognised. In Paragraph 36, under the heading 'unique heritage of Newmarket' it is noted that Newmarket is the only place in the world which still has horseracing stables operating in and around the town centre. Thus, one of the purposes of the LDF will be to safeguard 'the unique character of Newmarket and historic racecourse racing grounds'.

20. Since this was a scoping report, it indicated what in general terms was the scope of the issues that needed to be addressed. It recognised the need to protect the unique character of Newmarket as the centre of the horseracing industry and the numerous stables and training establishments in and around the town. It also recognised that there would be a need to take some greenfield sites to meet the future increase in housing which would be required.

21. Between March and July 2005 the Council prepared an issues and options paper together with an associated SA. This was published in September 2005. The question posed was where new development should go. The key question was whether most new development should go to Newmarket or whether it should be spread more evenly between Brandon and Mildenhall, the two other market towns within the Council's area. Further, should new development be allocated for the larger villages which were identified? Should other villages be included? Further, and specifically to Newmarket, an issue identified was to ask what role it should have in accommodating the demand for new development. Five options for a Core Spatial Strategy were identified. They were:-

> 1. Should the majority of new developments be directed to Newmarket because it is the most sustainable settlement in the District?
>
> 2. Should there be a more even spread of development between the three market towns of Brandon, Mildenhall and Newmarket?
>
> 3. Should development be spread between the three market towns and some or all of the sustainable villages?
>
> 4. Should development be spread between the three market towns and some or all of the sustainable villages plus other villages?
>
> 5. Should the vast majority of development be concentrated on a single new settlement … with very limited development in any of the towns or sustainable villages?

There was also raised as an issue whether residential development on greenfield sites should be preferred if the national and regional target of 60% brownfield development was not being met in the District.

22. Under Housing, issue 17 asked what number/proportion of new dwellings should go to the three towns and what number/ proportion in the villages. One question not asked was

how the total number of new dwellings required should be split between the individual towns or villages depending on which of the alternatives 1 to 5 set out above was chosen.

23. The accompanying SA was in a form which was used in every SA produced in the iterative process. A matrix set out the various options which were then given a score from 1 to 5. 1 represented the option considered most in line with sustainable development, 5 the least. Reasons for the various choices were said to be given. The best option (given 1) for the location of main development was that it should be spread between the three market towns and sustainable villages. This was because it would be most in line with the RSS objective. Question 28 asked whether the established use of horse racing land/buildings in Newmarket should be protected in order to produce the unique character and economy of the town. The public response to those issues was to prefer the option of spreading new development mainly to the three market towns and to agree that the horse racing land and buildings must be protected.

24. Following consideration of the responses, in August and September 2006, the Council published an SA of the preferred options. The SA set out in Table 1 how it was said there was compliance with the requirements of the Directive as to what had to be contained in an SEA. It was said that the likely significant effects on the environment, the measures envisaged to offset possible significant adverse effects and 'an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information' were all in Section 6 of the document. This was a table which set out against each policy the number of objectives upon which that policy would have an impact ranging from a major positive impact through to a major negative impact. In addition, if the impact was neutral or unknown, that was recorded.

25. Policy 23 was the relevant policy in the Table, headed 'Scale and Location of Housing provision: Whole Policy'. Overall, as the comments stated, the policy was said to be 'slightly beneficial but some uncertainty and negatives relate to environmental objectives …'

26. Table 17 (part of the 2006 SEA) set out the proposed number of dwellings in each location deemed appropriate. Newmarket's allocation was 500 altogether of which 400 were to be on 'land east of Fordham Road at Hatchfield Farm'. In answer to the question whether the housing should be spread more or less equally between the 4 main settlements (in addition to the 3 market towns a settlement at Red Lodge could take a considerable number of new dwellings) it was said that 41% to Newmarket with 33% to Red Lodge, 15% to Mildenhall and 11% to Brandon reflected the sustainability of the biggest settlement, Newmarket and the aspirations of the Red Lodge masterplan.

27. The preferred options paper stated that as Newmarket was the most self sufficient and hence the most sustainable town in the District, the priority would be to allocate as much new development at Newmarket as possible, balanced by the need to protect its unique character and its landscape setting. Preferred Policy 2 was to direct the majority of new development to the three market towns. Preferred policy 22 (referred to in the SA as 23) proposed the development of 5,341 dwellings between 2006 and 2021. The allocation for Newmarket was to be about 700 dwellings and, in addition, more specifically, 'a Greenfield urban extension to the north east of Newmarket (500 dwellings) as part of a mixed use development, subject to highway improvements to the A141/A142 junction'. It was said that at least 60% of the overall allocation in the District would be on previously developed land.

28. Under the heading 'Alternative approaches considered (Paragraph 3.4.5) this is said:-

> "The District's housing requirement is decided by the RSS. The District Council supported the draft requirement at the examination in public (EIP) but indicated that this was considered to be the upper limit of what could be delivered sustainably. At the issues and options consultation broadly supported this approach. Issues such as the windfall and non-implementation allowances are based on past evidence.

> The broad locational aspects of policy 22 are based on policy 2 and the alternatives considered at the issues and options stage are outlined in the policy 2 section. The approach taken in policy 22 needs to be in general conformity with higher level plans, particularly RSS14, and to take account of the local evidence base, particularly the urban capacity study. The following key factors have been influential in rejecting alternative approaches.
>
> - Of all the settlements Newmarket has the best range of services/facilities and employment opportunities. However, there are limited opportunities for further development without a Greenfield urban extension to the development boundary.
>
> - The urban capacity study (UCS) demonstrates that Red lodge could accommodate a significant proportion of dwellings within the existing development boundary. This is based on implementing previous allocations in the existing Local Plan which had planned on Red Lodge being regenerated to become a key service centre.
>
> - Table 2 shows that the key service centres are providing a higher proportion of dwellings from unimplemented planning permissions than the towns. If overall (between 2001-2021) the majority of dwellings are to be accommodated in the towns, than there needs to be a high proportion of allocations in the towns to redress the balance."

29. Those reasons are not in the SEA. The alternatives considered under Policy 2 are the five set out in paragraph 21 above. I should add that the need to protect the horse racing industry is emphasised in the document.

30. In July and August 2008 the Council produced what are entitled its final policy options and an accompanying SA. Option CS2 provided that Greenfield land would be allocated as an urban extension to the north west (sic) of Newmarket for approximately 1000 dwellings as part of a mixed use development subject to highway improvements to the A14/A142 junction to be built between 2010 and 2020". What had previously been described as land to the north east in proposed policy 22 of the September 2006 document was the same as that now said to be the north west of the town. The adopted plan refers to the land as being to the north east. Thus the reference in option CS2 was erroneous, which is unfortunate. The whole of CS2 was new and had not been the subject of consultation. The increase from 500 to 1000 is obviously material since the result is taken to 2020. This seems to be the year before the total of 500 was earlier supposed to be met and so the explanation that the increase was to meet an increase in the years over which the target was to be met does not seem to be correct. Whichever it be, there was, as I have said, on any view a material change of circumstances which should have been addressed in the SA. However, policy CS7 allocated for greenfield development 500 between 2010 and 2015 and 500 between 2015 and 2020.

31. In March 2009 the Council produced its policies which it proposed to submit to the inspector together with a SA. Policy CS1.7 stated:-

> "Greenfield land will be allocated as an urban extension to the north east of Newmarket to approximately 1200 dwellings as part of a mixed use development subject to any necessary highway improvements along Fordham Road to the High Street and improvements to the A14/A142 junction to be phased between 2010 and 2031."

As can be seen, this differed from what had been in CS2 in the 2008 "final" options in an increase from 1,000 to 1,200, an extension of the period from 2020 to 2031 and required improvements to Fordham Road. Policy CS7, which dealt with overall housing provision, indicated a minimum provision in the district of 6,400 dwellings and a further 3,700

between 2021 and 2031. For Newmarket on the Greenfield sites (i.e. that in question in this case) there were proposed 500 between 2010 and 2015, 500 between 2015 and 2020 and 200 in each of the periods 2020 to 2025 and 2025 to 2031.

32. The accompanying SA, should have contained all the material required by the Directive and the Regulations. The appraisal methodology is described in Paragraph 2 and in 2.1 we find this:-

> "Stage B: Developing and refining options and assessing effects
>
> The draft Core Strategy was developed in 2005 and a Sustainability Appraisal (SA) undertaken of five alternative approaches. In September 2005 the draft Core Strategy and SA were published for consultation. The results of these consultations have assisted the development of a set of preferred options.
>
> During 2006 the Preferred Options for the Core Strategy and the Site Specific issues and Options were prepared. The Preferred Options have been subject to an SA/SEA and both documents were consulted on in October 2006.
>
> In 2008 the Core Strategy Final Policy Option document was published. The Final Policy Option was subject to an SA/SEA which was consulted on in August/September 2008."

The documents referred to were on the Council's website and could, it is said, have been brought up by any interested consultee. It is to be noted that under Stage E, the Council said that it would consult on the documents 'and deal with appraising significant changes'.

33. As to the previous SA, it is said that all required information is to be found in Section 6. At the outset of Table 1, which is headed 'Compliance with requirements of the SEA Directive', this is stated as a requirement of the Directive:-

> "Preparation of an environmental report in which likely effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and geographical scope of the plan or programme, are identified, described and evaluated."

In the column headed 'Compliance' against this are the words 'This report'. Thus any consultee would expect the report to contain all that was cited above. But nowhere does it identify or evaluate reasonable alternatives or explain why they are rejected in favour of what is proposed.

34. Section 6 contains Table 4 headed 'Appraisal Summary of Core Strategy Policies'. It is in the same form as that contained in the 2008 SA. Nothing is said under housing (Policy 7) about alternatives, nor is it explained why the increase in numbers from 500 to 1,000 to 1,200 had been decided and whether the effect, which is obviously greater, would make any difference in the evaluation carried out in the SA.

35. In responding to the consultation, the Interested Party asked that the plan should identify Hatchfield Farm as the strategic allocation to the north east. Internal Council reports dealing with this are relied on by Mr Elvin. The response suggested by a report of the Strategic Directive to the Local Development Working Group of 8 July 2009 was that the 'expansion north east of Newmarket should be kept as a broad location rather than allocated as a strategic site.

The response continued:-

> "For it to be identified as a strategic site it would need to have been tested against all other reasonable alternatives. The Council would also need to

> include the specific infra-structure requirements of any strategic sites which are allocated which again has not been done in absolute detail. Any change to promote land north east of Newmarket as a strategic site would lead to the holding up of the Core Strategy, as the further testing of alternatives and the preparation of a specific infrastructure requirement were undertaken. This would conflict with the requirements of PPS 12 that progress on the core strategy should not be held up by the inclusion of non strategic sites. The approach adopted has been agreed with the Government Office."

36. In fact, when the Interested Party made the point that Hatchfield Farm should be specified as the site for the urban development, the officers took the view that Go-East should be asked for its advice. On 22 December 2008 Marie Smith, who is the Forward Planning Manager employed by the Council, e-mailed Go-East. In it, she said this:-

> "Due to the nature of Newmarket which is constrained/protected almost entirely by the horse racing policies, the only suitable site which could reasonably come forward is Hatchfield Farm.
>
> With this in mind, the Council would like to pursue a Strategic Site rather than a broad location which will eventually form a site within the Site Specific Allocations anyway. However, I am conscious that I have not consulted on 'Strategic Sites' throughout the issues and options stage. Would the Council be able to pursue such a proposal coming forward in the proposed submission consultation following the Final Policy Option consultation and the representations received?
>
> If I cannot pursue this option, do I use PPS 12 Paragraphs 4.6 and 4.7 which further state that a Core Strategy can allocate Strategic Sites as long as it does not delay the Core Strategy process?"

37. In her witness statement, Ms Smith says (paragraph 86) that she did not receive a written reply but was telephoned and (although she made no notes of the conversation at the time) she recalled that 'the discussions related to the detailed evidence that would be needed to support a site allocation, which would delay the submission of the Core Strategy, rather than to any alleged inadequacies in the existing SA/SEA work'. She also says that saying Hatchfield Farm was the only suitable site was not accurate because it 'overlooked the existence of other land in the vicinity which would also be part of the urban extension (such as the George Lambton Playing Fields) and it ignored the fact that not all of the Hatchfield Farm site might be needed'. She says that the reference cited in Paragraph 35 above to the need for testing against reasonable alternatives was not a reference to testing the principle of urban extension against reasonable extensions which had, she says, been done as part of the SA/SEA work in 2005 and 2006. It was a reference to whether the site eventually allocated should be all or some parts only of Hatchfield Farm with other land in the vicinity.

38. Mr Elvin argued that because the Council had initially and indeed in answer to the interested party's representations indicated a wish to refer to Hatchfield Farm by name, the reason for its removal was because it was believed that it avoided a need for the SA to include an assessment of alternatives. I see no reason to doubt Ms Smith's evidence that that was not the position. However, there is a degree of artificiality in the way the Council have dealt with this since the area (which includes Hatchfield Farm) proposed for the development is very close to being specific. Certainly if not the whole a large part of Hatchfield Farm will be used. Thus the need for a proper consideration of any alternatives and of the effects of the increases in the number of dwellings is all the more important.

39. In her statement (Paragraphs 88 and 89), Ms Smith asserts that the increase in the scale of residential development did not alter the principle as to the choice of the proposed location compared to reasonable alternatives. She and other officers did consider the implications of the changes but concluded that there were no realistic alternatives to the spatial strategy that had already been identified. While that view may have been justified, it should have been dealt with and reasons given in the SA why it had been taken,

40. In my judgment, Mr Elvin is correct to submit that the final report accompanying the proposed Core Strategy to be put to the inspector was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements of the Directive and so relief must be given to the claimants.

41. The second ground can be dealt with more briefly. I will assume because I do not need to decide that the need for a Transport Study should have been appreciated by the Council so that it was at fault in not obtaining one earlier. I make it clear that I am not deciding that there was any fault. But albeit it came later it was dealt with by the claimants in the course of the examination. Thus there was no direct prejudice to them in the failure to put it in the general consultation before the hearing.

42. It is submitted that there was prejudice because others who did not see it might, if they had, have wished to make representations and so were unable to involve themselves in the examination. I am prepared to accept the possibility of prejudice to a party who has failed to succeed before an inspector where others have been prevented by a procedural defect from appearing. However, it is impossible to see how there would be any prejudice where the matter not put to consultation has been dealt with by the party unless there is something which could have been put by whoever was unable to appear, which was unknown to the party in question and which might have affected the result.

43. In this case, there is no evidence that anyone might have wanted to appear nor that there could have been any additional matter which was not dealt with by the claimants and which could have been advanced. Certainly there can be no sensible suggestion that there was any additional material which might have affected the result. Thus there was no prejudice and so the procedural defect (if there was one: it is very doubtful that there was) cannot avail the claimants. The second ground I reject.

44. However, the claimants succeed on their first ground. I shall hear counsel on the order I should make as a result.

Appendix 3

Neutral Citation Number: [2019] EWHC 3242 (Admin)

Case Nos: CO/2173,2174,2175/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2019

**Before** :

**SIR DUNCAN OUSELEY**
**Sitting as a High Court Judge**

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**Between :**

| | |
|---|---|
| **COMPTON PARISH COUNCIL (2173)** | **Claimants** |
| **JULIAN CRANWELL (2174)** | |
| **OCKHAM PARISH COUNCIL (2175)** | |
| **- and -** | |
| **GUILDFORD BOROUGH COUNCIL** | **Defendants** |
| **SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT** | |
| **-and-** | |
| **WISLEY PROPERTY INVESTMENTS LTD** | |
| **BLACKWELL PARK LTD** | **Interested** |
| **MARTIN GRANT HOMES LTD** | **Parties** |
| **CATESBY ESTATES PLC** | |

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**Richard Kimblin QC** (instructed by **Richard Buxton & Co**) for **Compton Parish Council**
**Richard Kimblin QC and Richard Harwood QC** (instructed by **Richard Buxton & Co**) for **Julian Cranwell**
**Richard Harwood QC** (instructed by **Richard Buxton & Co**) for **Ockham Parish Council**

**James Findlay QC** and **Robert Williams** (instructed by the solicitor to Guildford Borough Council) for the **First Defendant**
**Richard Honey (**instructed by the Government Legal Department**)** for the **Second Defendant**

**James Maurici QC and Heather Sargent (**instructed by Herbert Smith Freehills LLP **)** for the **First Interested Party**
**Richard Turney** (instructed by Mills & Reeve LLP ) for the **Second Interested Party**
**Andrew Parkinson** (instructed by Cripps Pemberton Greenish LLP ) for the **Third Interested Party**
**Christopher Young QC and James Corbet Burcher** (instructed by Eversheds Sutherland LLP) for the **Fourth Interested Party (in 2174)**

Hearing dates: 5,6 and 7 November 2019

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**Approved Judgment**

**Sir Duncan Ouseley:**

1. Guildford Borough Council submitted its amended proposed "Local Plan: Strategy and Sites (2015-2034)" to the Secretary of State for Housing, Communities and Local Government on 13 December 2017. It did so after public consultation on the 2016 version of the Plan and later on the amendments to it in the 2017 version, as eventually submitted. This submission was for the purpose of a Public Examination, PE, of the Plan, pursuant to s20 of the Planning and Compulsory Purchase Act 2004, by an Inspector appointed by the Secretary of State. The Inspector held the PE in June and July 2018. Guildford BC published the Main Modifications which it proposed asking the Inspector to make to the submitted Plan to make it sound; there was public consultation upon those proposed Main Modifications in September to October 2018. The publication in September 2018 of revised household projections, and the effect which that also had in reducing the need for housing in Guildford BC's area to meet needs from the neighbouring Woking BC area, caused Guildford BC to make representations to the Inspector about the housing requirements in the submitted Plan and its Proposed Modifications. In February 2019, the Inspector resumed the PE for two days to consider this issue. On 28 March 2019, the Inspector published his report. The Plan, with the Main Modifications he required, was adopted by Guildford BC on 25 April 2019. I shall refer to the adopted Local Plan as the LPSS.

2. The Claimants were all participants in the PE, Mr Cranwell as a member of Guildford Green Belt Group. They opposed the principle and extent of land which the submitted Plan proposed to release from the Green Belt, as well as the allocation for development of specific sites proposed for release from the Green Belt. The four Interested Parties were also participants at the PE, supporting the release of Green Belt sites in which they were interested, as well as contending that Guildford BC was proposing to make insufficient provision for housing needs.

3. The three Claimants have brought these challenges to the adoption of the LPSS, under s113 of the 2004 Act. The language of s113(3) is in familiar terms; a challenge can be brought on the grounds that the local plan is not within the appropriate powers or that a procedural requirement has not been complied with. The three claims were heard together, with argument and evidence produced for one being admissible and applicable in all three.

4. All Claimants challenge, with degrees of difference but on wide bases, the release of sites from the Green Belt and their allocation for development, with Mr Cranwell's contentions ranging the widest. His case was argued by Mr Kimblin QC and Mr Harwood QC in conjunction with the various points they were making on behalf of the Parish Council each represented; Mr Cranwell's advocate of choice was not available on the dates fixed for the hearing, but he was not let down by his substitutes. Compton Parish Council, represented by Mr Kimblin, in addition to the general arguments about the release of land from the Green Belt, focused on the removal from the Green Belt of the site known as Blackwell Farm, just west of Guildford town. Mr Harwood for Ockham Parish Council, likewise, focused on the former Wisley airfield site, its removal from the Green Belt and its allocation for a new settlement.

5. Mr Findlay QC for Guildford BC defended the LPSS from the challenges, supported by Mr Honey for the Secretary of State, taking a more active role than is common. They were supported by Mr Maurici QC for Wisley Property Investments Ltd which

was promoting the allocation of the former Wisley airfield for development, Mr Turney for Blackwell Park Ltd, a company owned by the University of Surrey which was promoting the allocation of the Blackwell Farm site for residential and research park use, Mr Parkinson for Martin Grant Homes Ltd which was promoting the allocation of a site at Gosden Hill Farm for residential purposes, and Mr Young QC for Catesby Estates Ltd which was promoting the allocation of a site for residential purposes north of Horsley railway station. The site specific oral arguments focussed on Wisley and Blackwell Farm. The Interested Parties' advocates adopted the submissions of Mr Findlay and Mr Honey, which were themselves in harmony if not unison, with limited additions.

6. I am grateful to all the parties for the way in which they agreed the statement of facts, and in effect agreed chronologies, and legal propositions, and in argument adhered to the case timetable so that it was completed within the allotted three days. The various grounds of claim were usefully distilled into issues.

7. The main general issue (numbered 2 in the list used by the parties) was whether the Inspector had erred in law in his approach to what constituted the "exceptional circumstances" required for the redrawing of Green Belt boundaries on a local plan review. This had a number of aspects, including whether he had treated the normal as exceptional, and had failed to consider rationally, or with adequate reasons, why Green Belt boundaries should be redrawn so as to allow for some 4000 more houses to be built than Guildford BC objectively needed. The scale of the buffer did not result, it was said, from any consideration of why a buffer of such a scale was required but was simply the sum of the site capacities of the previously allocated sites. There were two other general issues (1) and (7): (1) had the Inspector considered lawfully or provided adequate reasoning for not reducing the housing requirement, leaving some needs unmet to reflect the Green Belt policy constraints faced by Guildford BC? (7) Did Guildford BC breach the Environmental Assessment of Plans and Programmes Regulations 2004 SI No.1633, in deciding not to reconsider what might be reasonable alternatives to the proposed Plan when, in 2018, the objectively assessed housing needs figure was reduced from 12,426 to 10,678, with housing land supply allocations totalling 14,602. It was submitted that it ought to have considered alternatives such as removing the development allocation in the Green Belt from one or more of the contentious large sites.

8. The site specific considerations at the former Wisley airfield and at Blackwell Farm formed part of the attack on the Inspector's general approach to the release of land from the Green Belt.

9. But there were also site specific grounds of challenge. The first site specific issue, (4), relating to the former Wisley airfield, was the adequacy of reasons given by the Inspector in his report on the PE for reaching conclusions which, it was said, were inconsistent with the views expressed by an Inspector, accepted by the Secretary of State, on an appeal against the refusal of planning permission for a major residential development at the former Wisley airfield, taking up most of the Local Plan allocation there. The appeal Inquiry began before the PE and the decision emerged in the course of the PE. The second site specific issue at Wisley, (5a), concerned the extent of land removed from the Green Belt yet not allocated for development, termed "white land"; issue (5b) concerned the lawfulness and effect of the submission of the 2017 version of the Plan, when the further consultation on it was restricted to the 2017 changes, and

did not encompass unchanged aspects of the 2016 version, upon which there had already been consultation in 2016. The third issue, (8), concerned the lawfulness of the approach by the Inspector to the air quality impact of the Wisley allocation on the Thames Basin Heaths Special Protection Area, the SPA. It was initially said that the Conservation of Habitats and Species Regulations 2017 SI No.2012 required the decision-maker to leave mitigation and avoidance measures out of account; but the argument was refined so that it attacked the assessment that there would be no adverse effects, on the basis that there would still be exceedances of critical thresholds, even though the baseline levels of pollution would have reduced.

10. The site-specific issues raised in respect of the Blackwell Farm allocation were, (3), that the local exceptional circumstances relied on by the Inspector were not legally capable of being regarded as "exceptional", and that strategic and local "exceptional circumstances" overlapped, leading to double counting of exceptional circumstances. The other issue at Blackwell Farm was, (6), whether the Inspector erred in law in the way he considered the new access road. This would have to climb the escarpment to link to the A31, and a section of which would pass through the part of the Surrey Hills Area of Outstanding Natural Beauty, the AONB, which lay to the north of the A31. Should he have concluded that this would be "major development" in the AONB and so face a policy obstacle to its approval which could put the allocation at risk, or even prevent its being delivered? He should at least have taken this risk into account.

**The legal framework for the public examination**

11. The statutory functions of the PE, Inspector and plan-making authority are set out in s20 of the 2004 Act. The lawfulness of the steps taken before the PE were not generally at issue, but one earlier provision became relevant to issue (5b) and another to issue 7. I shall pick up those provisions when I come to those issues, and including the Town and Country Planning (Local Planning) (England) Regulations 2012 SI No.767, the 2012 Regulations.

12. S20(1) requires the local planning authority to submit every development plan document for examination, but (2), not to do so unless it considers that the relevant requirements have been complied with and that the document is ready for independent examination. That has a bearing on issue 5(b).

13. By s20(5), the purpose of the independent examination is to determine (a) whether the submitted Plan satisfies various statutory requirements, including having regard to national planning policies, (b) whether it is "sound", a term which has no statutory definition, but which is explained in the National Planning Policy Framework, NPPF, as set out later, and (c) whether any duty in s33A had been complied with. This is the duty of co-operation between local planning authorities "in maximising the effectiveness" with which local plans are prepared in relation to "strategic matters", that is "sustainable development… of land…which would have a significant impact on at least two planning areas...." This duty has superseded the provision of housing numbers for planning authorities through regional strategies.

14. There are provisions for those who make representations to be heard, and enabling the Secretary of State to consider particular matters and to control procedure. S20(7) requires the Inspector, if satisfied that the Plan is sound and that legal requirements have been met, to recommend that the Plan is adopted and "to give reasons for the

recommendation." If not so satisfied, he must recommend that the Plan is not adopted and give reasons for the recommendation; s20 (7A). S20(7B and C) applied here. If the Inspector does not consider that the Plan is "sound", as it stands, or that the various legal requirements of s20(5)(a) have been met, but that the duty to co-operate has been complied with by the local planning authority, he must recommend modifications to the document which would make it sound, and satisfy the requirements of s20(5)(a), if the submitting authority asks him to do so. These are known as Main Modifications.

15. If that course is followed, the reasons obligation in s20(7) applies to the final recommendation. The recommendation and reasons must be published. Minor modifications can be made by the submitting authority; they do not need to go through that Main Modifications process.

16. In fact, after the initial 12 days of hearings, Guildford BC prepared a schedule of Main Modifications which it was to ask the Inspector to recommend to it. These were the subject of public consultation; the responses were provided to the Inspector, before the resumed PE hearing in February 2019.

17. The NPPF provides an explanation of soundness, which Inspectors routinely apply. I set it out from [182] of the applicable 2012 version, in view of the debate before the Inspector, and before me about the release of Green Belt land to meet Guildford BC's own housing needs, and a portion of those from Woking BC's area:

> "**Positively prepared** - the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;
>
> **Justified** - the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportional evidence;
>
> **Effective** - the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities; and
>
> **Consistent** with national policy - the plan should enable the delivery of sustainable development in accordance with the policies in the Framework."

18. The judgment as to whether a plan is sound or not is plainly a planning judgment, unlawful only on the basis of general public law principles. A plan is not to be judged unsound by an Inspector simply because there might be a better way of dealing with an issue, or because the Inspector would have preferred a different approach, after hearing representations.

19. I described the inquisitorial nature of the process of the public examination, and its significance for the reasons which an Inspector has to give, in *Cooper Estates Strategic Land Ltd v Royal Tonbridge Wells BC* [2017] EWHC 224 (Admin) at [26-

29]. A similar issue on reasons was also considered in *CPRE Surrey v Waverley BC* [2019] EWCA Civ 1826 in [71-72], observing the distinction between the task of an Inspector on a public examination, considering soundness, the duty to co-operate and legal compliance, and on an appeal.

20. The conduct of this PE, including the number of participants and the preparation by the Inspector of question papers and agendas, amply bear out these different functions.

21. Before turning to the issues before me, it is necessary to set out some of the Inspector's Report.

## The Inspector's Report

22. The first issue addressed in the Inspector's Report, IR, was whether the Plan made adequate provision for new housing, an issue which was at the heart of the need for Green Belt releases and of almost all the issues before me. The calculation of the objectively assessed housing need, the first topic under that heading, was not itself controversial before me. The variations in those figures over time were more relevant to the justification for the degree of "headroom" between the need figure and the capacity of the sites allocated to meet the need.

23. The Inspector's task was to judge the soundness of the Guildford BC's calculation of its Objectively Assessed Housing Needs, the OAN or OAHN. The outcome, after allowing for the change in September 2018 through the 2016-based household projections, was a requirement of 562 dwellings per annum, dpa, or 10678 dwellings during the Plan period; IR24. He decided not to make a further upwards adjustment for affordability, though recognising that there was a pressing affordability problem, as the figure of 562 dpa was already a 79% uplift over the demographic starting point of 313 dpa, and a significant increase above historic delivery rates. That uplift could be expected to improve affordability and to boost the supply of housing; IR 30.

24. He also decided not to increase the 562 dpa figure further by way of allowance for further affordable housing. Meeting the need for such housing of 517 dpa would require 1300 dpa, if 40% of every site were affordable housing. That level of housing would not be practicable, nor would an increase above 562 dpa be appropriate, IR31, "but it is further evidence of a pressing housing need and it lends strong support to the figure of 562 dpa rather than a lower requirement." The wider context supported 562 dpa; he referred to the importance of Guildford, its University, the successful science park and the "significant incursion" of students into the housing market, IR 33: "These factors, together with a seriously poor and deteriorating housing affordability and the very high level of need for affordable housing make a compelling case for a supply of housing significantly above historic rates."

25. The Inspector also saw 562 dpa as realistic in comparison with the housing requirements of the two other authorities in the West Surrey Strategic Housing Market Area, SHMA, Woking and Waverley BCs. He was well aware of their circumstances, having been the Inspector in the Waverley Local Plan PE, which found its way to the Court of Appeal on the challenge by CPRE Surrey, above.

26. He continued in IR 35, that the 562 dpa OAN figure was consistent with the characteristics of Guildford, its district and the wider context. A lower housing requirement, such as the 361 dpa put forward by some local participants:

> "would not have regard to the reality of Guildford's characteristics or its context, would pose a risk to local economic prospects and plans, would not adequately address housing affordability or the availability of affordable housing, would potentially increase the rate of commuting, and would be inconsistent with the assessed housing need of the other authorities in the housing market area. A higher requirement would imply a scale of uplift which would start to become divorced from the demographic starting point and from the context of the housing market area described above."

27. Although the Inspector is here considering the first stage in the assessment of the housing requirement, that is what the need figure is before the application of any policy constraints, the so-called "policy-off" figure, and is using those factors to support the soundness of 562 dpa, those factors are also relevant when he comes to consider whether a policy constraint should be applied, the so-called "policy-on" stage, to reduce the housing requirement figure, leaving an unmet need.

28. Finally, the Inspector analysed the unmet need from Woking BC's area. Various allowances had been made for it over the evolution of the Plan, including an allowance of 42 dpa in a proposed Main Modification. Although, after September 2018, Woking BC no longer claimed an unmet need, the Inspector considered that there probably was still an ongoing unmet need from Woking, not all of which would be accommodated by the allowance in Waverley. But it was unnecessary to make a specific allowance in Guildford's housing requirement on that account because the likely residual amount of unmet need could be accommodated within the Plan's "headroom", that is the difference between the requirement of 562 dpa, (10,678), and the number of dwellings that could be delivered from all sources over the life of the Plan, (14602).

29. The second topic which the Inspector had to consider in his Issue 1 concerned the delivery of an adequate supply of homes, providing a rolling five-year housing land supply throughout the Plan period. Guildford BC had accumulated a significant shortfall, amounting to some 66 dpa if spread evenly over the Plan period. This had to be met. NPPF [47], seeking to "boost significantly the supply of housing", required local planning authorities to:

> "use their evidence base to ensure that their Local Plan meets the full objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period."

30. The housing trajectory is important; it is required by NPPF [47] to illustrate the expected rate of housing delivery, showing when sites may come on stream, how much each is expected to produce each year of production, and when they are

expected to cease production. This enables a planning authority to show whether it has or lacks a five-year housing land supply, what sites may be brought forward to cope with any shortfall, and how the rolling 5 year supply can be maintained over the plan period. This is concerned therefore with the delivery of the housing requirement. In the case of Guildford BC, its persistent shortfall in meeting housing needs meant that its five-year housing land requirement, together with the accumulated shortfall of 66 dpa, was increased by 20%, under the NPPF, for the purposes of calculating whether it had a five-year housing land supply.

31. The difference between the OAN of 10,678 homes over the plan period, and the potential to deliver 14,602 homes over that period was a central topic which the Inspector addressed under his Issue 5. But he introduced the need for that level of housing in IR 42-46. I set it out:

> "42. The housing trajectory indicates that there is potential to deliver 14,602 homes over the plan period. The difference between this and the total housing requirement of 10,678 homes has been raised during the examination in the context of whether there are exceptional circumstances to release land from the Green Belt. This is dealt with in more detail under Issue 5. But purely in terms of housing supply, there is enough headroom to ensure that the Plan remains robust in the event that there is slippage in the delivery of housing from the allocated or committed sites, avoiding the need to allocate reserve sites; and enough headroom to provide for the anticipated level of unmet need from Woking, bearing in mind that there would be a continuing level of undersupply over the period of Woking's newly reviewed plan. The overall plan provision would also provide more affordable housing and go further to address serious and deteriorating housing affordability.
>
> 43. The reduced housing requirement in MM2 enables the plan to proceed without the [4] additional sites allocated by [Main Modifications], but it is not of an order that would justify the deletion of any of the strategic sites which, in addition to their substantial housing contributions, bring other significant benefits to the Borough through their critical mass and well-chosen locations. Again, this is discussed in more detail under Issue 5.
>
> 44. No further sustainability appraisal is required in respect of the requirement of 562 dpa because the overall housing delivery figure of 14,602 homes falls within the range of eight delivery scenarios that were considered as reasonable alternatives, ranging from 13,600 homes to 15,680 homes and the housing allocations remain the same as in the submitted Plan except for [one].
>
> 45. The trajectory indicates a 5 year housing land supply on adoption of 5.93 years rising to 6.74 years in year 5. The 5 year

> supply calculation includes a 20% buffer for past persistent under-delivery and uses the Liverpool method [spreading the catchup evenly over the plan period] in recognition of the contribution made by the strategic locations which typically have a longer lead-in time. These are the Council's figures and it is recognised that slippage could reduce this supply, but there is enough flexibility built in to the trajectory to maintain a rolling 5 year housing land supply.
>
> 46. In conclusion, whilst the submitted plan's figure of 654 dpa is not sound because it does not reflect the most recent evidence, the Council's calculated housing requirement of 562 dpa, or 10,678 dwellings over the life of the plan, as set out in the revised version of MM 2 is sound. It reflects the latest evidence and is based on sound analysis. The overall level of housing delivery, currently calculated at 14,602 homes, will ensure that an adequate 5 year supply of land will be maintained and will ensure that the plan is robust; it will deliver sufficient housing to help address the pressing issues of affordability and affordable housing need, and contribute towards addressing unmet housing need in the housing market area."

32. Mr Findlay put considerable weight upon the housing trajectory, appended to the IR. This showed that the sequentially less preferred housing allocations around villages, to the north and west of West Horsley, near to Horsley Railway Station, at Send, Send Marsh/Burnt Common, and amounting to 945 dwellings, were required in the early part of the Plan period, in the first five years from adoption. They could not be omitted without Guildford BC failing to provide for the five year housing supply with the 20% buffer for past underperformance, and the 66 dpa contribution to meeting the shortfall. The larger contentious Green Belt sites, at the former Wisley airfield, Gosden Hill Farm and Blackwell Farm, were all required for their contribution to supply after the initial 3 or so years from adoption. They came on stream together, at a low rate, building up over the next five years, and increasing markedly in years 11-15, i.e.2029/30-2033/34, and continuing beyond the plan period in the case of the latter two.

33. The reasoned justification to Policy S2, the spatial strategy for 562 dpa and "at least" 10678 new homes, as modified, states at 4.1.11, in the language of the Inspector's Main Modifications:

> "National policies require that we meet objectively assessed housing needs, including any unmet needs from neighbouring authorities, where it is practical to do so and consistent with achieving sustainable development. Guildford's objectively assessed housing need has been based on a consideration of the latest 2016-based population and household projections. Applied to this demographic housing need is a necessary uplift to take account of market signals and affordable housing need, assumptions of future economic growth, and an increase growth in student population."

34. The total supply over the plan period amounted to 14,602 dwellings. The reasoned justification at 4.1.14, as modified, identified the national policy requirement for a demonstrable rolling 5 year housing land supply from the date of adoption, taking account of the accrued deficit with a 20% buffer. The expected phasing of sites was set out in the housing trajectory, in the form in which it had been appended to the IR.

35. The Inspector's Issue 2 concerned whether the Plan adequately addressed the identified housing needs "of all the community." The strategic housing allocation policies mattered in this context because the needs of gypsies, travellers and travelling showmen was to be addressed on sites of 500 homes or more.

36. His Issue 3 dealt with employment and business. This issue is relevant to these challenges because the Inspector said, IR60, that the larger residential-led allocated sites in the Green Belt "make substantial contributions towards meeting employment needs," including Gosden Hill Farm (10,000 sq.ms), Blackwell Farm (about 30,000 sq.ms of B1 use as an extension to the Surrey Research Park), and the former Wisley airfield (4,300 sq.ms). For some, including Gosden Hill Farm and former Wisley airfield, "the amounts of employment floorspace are an integral part of these residential-led mixed schemes. They are necessary to create balanced, sustainable development." Blackwell Farm contained a much larger business component, of a nature encouraged by the NPPF, and, he said at IR61: "Building on the success of the existing Research Park by allocating further land close to it for similar uses represents the best opportunity in the Borough to meet these objectives."

37. I have referred to those two issues because Mr Findlay was at pains to emphasise that the exceptional circumstances for the contentious Green Belt allocations included not just the provision of housing but provision for other uses as well, and that that was how the Inspector saw them, as I shall come to.

38. Issue 5 raised by the Inspector is critical to the challenges. It was entitled "Whether at the strategic level there are exceptional circumstances which justify altering Green Belt boundaries to meet development needs and whether the Plan's Green Belt policy is sound."

39. Before turning to the IR, I need to set out what the NPPF said about this subject since it provides the frame of reference for the Inspector's approach. NPPF [14] contains the presumption in favour of "sustainable development." This means that, in plan-making, authorities: "should positively seek opportunities to meet the development needs of their area; Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:…specific policies in this Framework indicate development should be restricted." Designated Green Belt is one such restricting policy, in footnote 9. It is a core planning principle, NPPF [17], that planning should make every effort objectively to identify:

> "and then meet the housing, business and other development needs of an area….Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities."

40. The NPPF in section 9 set out the Green Belt policies. The fundamental aim was to prevent urban sprawl by keeping land permanently open; "the essential characteristics of Green Belts are their openness and their permanence." It identified in [80] the familiar five purposes of the Green Belt, pointing out that their general extent was already established. At [83] and following, it said:

> "83. Once established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to the intended permanence in the long term, so that they should be capable of enduring beyond the plan period.
>
> 84.When… reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development. They should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt boundary or towards locations beyond the outer Green Belt boundary.
>
> 85. When defining boundaries, local planning authorities should … define boundaries clearly, using physical features that are readily recognisable and likely to be permanent."

41. The Inspector set his consideration of his Issue 5 firmly in the context of whether exceptional circumstances existed, as required. Under the subheading "The need for housing" he said at IR79:

> "This has already been discussed under Issues 1 and 2. Guildford has a pressing housing need, severe and deteriorating housing affordability and a very serious shortfall in the provision of affordable homes. There is additional unmet housing need from Woking. There is no scope to export Guildford's housing need to another district; the neighbouring authorities in the housing market area are significantly constrained in terms of Green Belt and other designations and both have their own significant development needs. The overall level of provision will address serious and deteriorating housing affordability and will provide more affordable homes. The headroom can also accommodate the likely residual level of unmet need from Woking."

42. Likewise, at IR80, the Inspector found that land available for additional business development in the Guildford urban area was very limited, and it was unrealistic that much extra capacity could be obtained on existing sites such as the existing Surrey Research Park:

> "The ability to meet the identified business needs therefore depends on making suitable new land available and there is no

> realistic alternative to releasing land from the Green Belt. Exceptional circumstances therefore arise at the strategic level to alter Green Belt boundaries to accommodate business and employment needs."

43. The Inspector also concluded, at IR81, that it was not possible to rely on increasing the supply of housing within the urban areas so as to obviate alterations to the Green Belt boundary. Development opportunities in those areas had been thoroughly investigated and assessed; he referred to the identified constraints in the urban areas. Having canvassed various possibilities, he concluded that any extra yield from such sites "would fall a long way short of making the scale of contribution towards meeting overall development needs that would enable the allocated sites in the Green Belt to be taken out of the Plan."

44. The fourth subheading went to the heart of the issue underlying the argument before me: "Whether the difference between potential supply of 14,602 dwellings in the latest MM2 housing requirement of 10,678 implies that the plan should allocate fewer sites and release less Green Belt land." I need to set out almost all of it, in view of the Claimants' submissions. The passage is relevant to local exceptional circumstances and to the spatial distribution strategy which underlay the choice of sites.

> "83. The first point here is that the plan must be considered as a whole; it contains an integrated set of proposals that work together. As is discussed below in Issue 6, the strategic locations operate to deliver a range of benefits which cannot be achieved by smaller dispersed sites. A25 *Gosden Hill* provides a park and ride facility and part of the sustainable movement corridor and contributes towards a new railway station; A26 *Blackwell Farm* provides land to enable the expansion of an important research park, together with part of the sustainable movement corridor and it contributes towards a new railway station. They work together to provide housing, employment and sustainable movement across Guildford. Site A35 *Former Wisley airfield* provides the A3 slip roads and bus services and cycle network that benefit the allocations at Send, Send Marsh/Burnt Common and Ripley and feed into local stations; in turn, Burnt Common provides an employment facility for the Borough. The large sites also make an important contribution towards meeting the needs of gypsies, travellers and travelling showpeople. The sites all work in concert to deliver a sound, integrated approach to the proper planning the area.
>
> 84. Secondly, the plan needs to be robust and capable of meeting unexpected contingencies such as delivery failure or slippage on one or more sites. It needs to be borne in mind that the housing requirement is a minimum figure, not a target. A robust strategy is particularly relevant for Guildford where longer term housing delivery is largely by means of large strategic housing sites. There is also uncertainty about the timing of the A3 RIS [road improvement strategy] scheme…; The headroom provides some flexibility over timing and

> ensures that if a degree of slippage does occur, the Plan is not vulnerable. The amount of headroom between potential housing provision and the housing requirement means it is not necessary to create safeguarded land which would have to be removed from the Green Belt to meet longer term development needs, or to identify reserve sites to be brought forward should sites fail to deliver as expected. In any case, if it had been necessary to identify reserve sites, they would almost certainly have had to be on land removed from the Green Belt.
>
> 85. Thirdly, that Plan needs to be effective over its life and have regard to potential changes in circumstances. To that end it contains a balance of short- and long-term sites. This can be seen in the housing trajectory…; The permitted and commenced sites and smaller allocations deliver the 5 year supply. These include for example the allocations at West Horsley, Send, Send Marsh/ Burnt Common and Ripley and on land at the inset villages. Land needs to be released from the Green Belt to allow these sites to be developed, in order to meet housing needs in the first 5 year of the Plan. When delivery from these sites starts to diminish, that from the strategic sites builds up. But large strategic sites have long lead-in times and development periods - their timespan may cover a number of plan reviews and housing requirement re-calculations. Circumstances may change, and new strategic sites cannot be brought forward quickly to meet revised housing requirements; they have to be planned well in advance. Therefore, by making the allocations now, the Council have aimed to future proof the Plan. This is in accordance with the NPPF which says that plans should have sufficient flexibility to adapt to rapid change. The Plan clearly demonstrates a flexible, integrated and forward-looking approach towards meeting present and future needs in the Borough and towards encouraging more sustainable modes of travel. Removing one or more sites would significantly diminish the Plan's ability to meet these objectives."

45. IR86 specifically dealt with whether development should be restricted having regard to the Green Belt, as raised by footnote 9 to NPPF [14]. The Inspector said:

> "86. Subject to the proposed Green Belt alterations, the Plan is capable of meeting objectively assessed needs with adequate flexibility. The alterations to the Green Belt boundary would have relatively limited impacts on openness as discussed in Issues 10 and 11 and would not cause severe or widespread harm to the purposes of the Green Belt. The allocations at A25 *Gosden Hill Farm* and A26 *Blackwell Farm* would be planned urban extensions rather than sprawl. Site A25 together with the allocations at Send and Burnt Common/Send Marsh would be visually and physically separate, as discussed in Issue 7 and

> would not add to sprawl or coalescence. A35 *Former Wisley airfield* would include a substantial amount of previously developed land and is separate in character from its wider Green Belt surroundings. The other Green Belt sites would be adjacent to settlements and would have very localised effects on openness. There is therefore no justification for applying a restriction on the quantity of development. Considerations in respect of the Surrey Hills Area of Outstanding Natural Beauty (AONB) and the Thames Basin Heaths Special Protection Area (SPA) do not alter this conclusion; see issue 7."

46. All this, concluded the Inspector in IR 89, amounted "to strategic-level exceptional circumstances to alter the Green Belt boundary to meet development needs in the interests of the proper long-term planning of the Borough." Local-level exceptional circumstances were considered later.

47. The soundness of the Plan's overall distribution of development was relevant to the Green Belt issues, and to "exceptional circumstances". The Inspector considered this next under Issue 6. At IR91 onwards, the Inspector accepted that the urban areas, inset villages and identified Green Belt villages could accommodate 4600 houses but not all Guildford BC's development needs. Land had therefore been identified for development beyond the Green Belt, in urban extensions to Guildford, in a new settlement at the former Wisley airfield, and in development around villages. Strategic and non-strategic sites were spread across the middle of the Borough, constrained by the SPA to the north and the AONB to the south. Five strategic sites, including Gosden Hill Farm and Blackwell Farm, both extensions to Guildford, and the freestanding Wisley site close to the junction of the A3 and M25, delivered a significant proportion of the housing and employment land needed. Gosden Hill Farm and the Wisley site were residential-led mixed-use allocations supporting a range of housing types and employment, social and community facilities, which would help provide improved highway and sustainable transport links. Blackwell Farm would deliver a large number of homes and a large employment allocation next to the Surrey Research Park.

48. At IR95, the Inspector summarised the "considerable advantages" of this spatial strategy:

> "Firstly, it allocates the largest amounts of development to the most sustainable locations, or those which can be made sustainable; secondly, it achieves a satisfactory spatial balance in a variety of locations and types of site; and thirdly, the strategic sites will accommodate a significant amount of the Borough's housing and employment needs whilst at the same time meeting their own social needs and contributing towards transport improvements that have wider benefits. The advantages of the last of these points is recognised by the Sustainability Appraisal and it justifies the inclusion of the larger sites including Gosden Hill Farm, Blackwell Farm and the former Wisley airfield."

49. Allocating more sites to the villages would risk eroding their character without achieving the social and transport benefits of the larger sites; further development beyond the Green Belt would risk creating a sprawl and could exacerbate highway problems. The inclusion of the strategic sites made for an effective plan meeting the sustainable needs of the Borough, IR97:

> "Their size facilitates the delivery of social, transport and other facilities that would be more difficult to achieve by spreading the same amount of development around on smaller sites. They serve housing, employment and social needs in different parts of the Borough, yet are well positioned in relation to Guildford. They are in locations where they do not significantly affect areas important for landscape and diversity."

50. The Inspector continued his analysis of the spatial strategy by considering, among other matters, the allocation of sites for growth in villages such as East and West Horsley, Send, Send Marsh/Burnt Common, and Ripley. He regarded the allocations as proportionate extensions to these medium-sized villages, with access to their facilities, and with the opportunity to assist or take advantage of transport or highway improvements associated with the strategic sites. They would make an important contribution towards the delivery of sites in the early years of the Plan. Subject to the Main Modifications, the Inspector concluded that the overall spatial development strategy was sound in every respect.

51. Issue 10 concerned whether various strategic allocations including Gosden Hill Farm, Blackwell Farm and the former Wisley airfield, were sound; and relates to the extent of housing allocations above the OAN figure of 10678. The Inspector had dealt with the justification for the location of the strategic sites and the strategic level exceptional circumstances for moving the Green Belt boundaries when dealing with the Spatial Strategy. Issue 10 concerned the local impacts of the larger allocations and the effectiveness of these specific policies for their development. The Inspector was here considering local "exceptional circumstances".

52. The Inspector considered Gosden Hill Farm at IR156 onwards. He introduced the issues in this way:

> "Policy A25 [the site] is located in the submitted Plan for a residential-led mixed-use development delivering about 2000 homes with a minimum of 1700 homes during the plan period, as well as gypsy and traveller pitches, retail and service facilities and primary and secondary schools. The delivery trajectory for the site is consistent with the assumed delivery of A3 improvements, but MM35 reduces the overall site capacity to about 1800 dwellings based on more recent master planning with a consequent reduction in the number of gypsy and traveller pitches to 6. The key issues are whether there are local-level exceptional circumstances to alter Green Belt boundaries, and whether the allocation is acceptable in terms of highway impact."

53. He made the following points about the Green Belt at IR 157:

> "…the site is adjacent to the built-up area of Guildford and its development would appear as a natural urban extension rather than a major incursion into the Green Belt. The Green Belt and Countryside study considered it to be a medium sensitivity land parcel. The landscape is not subject to any designation and is not crossed by any public right of way. The local topography and tree cover ensure that the site is not widely prominent, and it would be possible to establish a new defensible Green Belt boundary. As discussed above under Issue 7, in respect of openness and countryside impact, the cumulative impact of this allocation in combination with allocations to the east of Guildford is acceptable. MM35 responds to concerns about the visual impact by including a new requirement for increased landscaped buffer/ strategic planting with frontage development set back from the A3 and other measures to mitigate the visual impact. The selection of this site is therefore appropriate on the basis of its local characteristics, and exceptional circumstances exist at the Local-level to alter the Green Belt boundaries to facilitate the allocation."

54. Measures to cater for the increased traffic, including that brought about by the necessary improvements to the A3 junction, would promote sustainable travel options, including a new park-and-ride facility, plus assistance with the proposed Sustainable Movement Corridor, and a contribution towards a new railway station. Having considered other matters, the Inspector concluded that the allocation was sound.

55. The Inspector then turned at IR 164, to Blackwell Farm. This too was a residential-led mixed use allocation, for about 1800 homes of which all but 300 would be delivered in the plan period. A Main Modification raised the B1 floorspace extension to the Surrey Research Park to 35,000sm, of which 30,000 would be delivered in the plan period. There would be specialist and self build plots, 6 gypsy and traveller pitches, a primary and a secondary school, retail and community uses. "The key issues are whether there are local-level exceptional circumstances to alter Green Belt boundaries, the effect on the Surrey Hills AONB and the Area of Great Landscape Value, and whether the allocation is acceptable in terms of highway impact." He dealt with the Local-level exceptional circumstances as follows, at IR165:

> "As regards the local circumstances, the Green Belt and Countryside study identifies the site as a potential development area. It is on gently sloping land on the edge of Guildford adjacent to the Research Park and is well-enclosed by woodland and hedgerows which visually separate the allocation from the more open land to the west and would form good defensible boundaries. The site is well separated from the historic centre of Guildford by extensive development and does not contribute to the setting of the Cathedral or its historic core. It would appear as a logical addition to Guildford rather than an obtrusive extension into the wider Green Belt. It would make an important contribution towards meeting housing, employment and educational needs and has obvious locational

> advantages, firstly in terms of its position immediately adjacent to the Research Park presenting a unique opportunity to further enhance this already successful business cluster, and secondly in its ability to contribute towards sustainable transport including a new station. There are therefore exceptional circumstances at the Local-level to justify moving the Green Belt boundary to accommodate this site allocation."

56. I deal with what the Inspector said about the AONB, the access to the A31 and "major development," when I come to that ground. The Inspector considered other issues, including transport sustainability, before concluding that, subject to certain main modifications, the allocation was sound.

57. Next, the former Wisley airfield, Ockham; Policy A35. This was a residential-led development for about 2000 homes, plus about 100 sheltered or extra care homes, gypsy and traveller pitches, employment land, retail facilities services, community uses and a new primary and secondary school. The Inspector identified the key issues as being whether there were Local-level exceptional circumstances to alter the Green Belt boundary to accommodate the allocation, transport impacts and the effect on biodiversity.

58. The PE Inspector first dealt with the decision of the Secretary of State, accepting the recommendation of the appeal Inspector, dismissing the developer's appeal against the refusal of planning permission for up to 2068 dwellings on land included in the allocation, but which was not as extensive as the allocation. I set out what the PE Inspector had to say about it here, as objectors to the allocation understandably exploited its conclusions. The Inspector said, IR 181:

> "The principal reasons for refusal concerned Green Belt, the strategic road network and the character and appearance of the area. Many other issues were examined during the course of the inquiry, including the effect on the Thames Basin Heaths Special Protection Area, the local road network and air quality, but were not cited as reasons for refusal. The harm to heritage assets was considered less than substantial and was outweighed by the public benefits. It is important to note that this appeal decision was made in the context of the background of the saved policies of the Guildford Borough Local Plan 2003, against which the scheme was unlikely to be considered anything other than inappropriate development in the Green Belt and development affecting the character of the countryside. However the conclusion of this report is that there are compelling strategic-level exceptional circumstances to make significant alterations to the Green Belt boundary to accommodate the Borough's assessed housing, employment and other needs to 2034."

59. The Inspector then turned to the local-level exceptional circumstances at IR182, saying:

> "…the Green Belt and Countryside Study considered the site to be of medium Green Belt sensitivity. It shares little of the character of the countryside around it; most of the site is flat, rather featureless, contains a runway and hard surfacing and can be regarded in part as previously developed land. It is separated from much of Ockham by a valley and a small knoll. Development here would be fairly self-contained visually and would not add to the appearance of sprawl.
>
> 183. The allocation has the ability to deliver a significant contribution towards the Borough's housing requirement, helping to meet a pressing housing need as well as providing homes to meet the needs of particular groups. Its size means that it can support a suitable range of facilities to meet the needs of the new residents, creating the character of an integrated large new village with its own employment, schools, shops and community facilities, and it can support sustainable transport modes. This would avoid putting pressure on other areas of the Green Belt of greater sensitivity, and would avoid pressure on other communities too, because alternative smaller sites would be less able to deliver such a comprehensive range of facilities to serve the development. For all the above reasons there are exceptional circumstances at the Local-level to alter Green Belt boundaries to accommodate this allocation."

60. He noted that, at the time of the appeal, Natural England had been satisfied that the appeal proposal would not have a significant effect on the SPA, and it had confirmed that it had no objection in principle to the larger allocation site as there was sufficient land available to create additional Suitable Alternative Natural Greenspace, SANG. Then he concluded, after considering other topics, that the allocation was sound.

61. Next, transport. The transport impacts of the development strategy were relevant both to the selection of the sites and the overall extent of the allocations. The assumption behind the Plan had been that the A3 Guildford Road Investment Strategy (RIS) scheme would be delivered. The Inspector, IR 128, pointed out that planned development in the later stages of the plan period could be affected by the delivery of the A3 improvement scheme, which had implications for the delivery rates at Gosden Hill Farm, Blackwell Farm and one other major site.

62. There was also a link between additional A3 slip roads to deal with the development at Wisley airfield, which would relieve Ripley of some through traffic, and would also serve development at Send, Send Marsh and Burnt Common. New Guildford stations, as part of broader rail network improvements were to be funded by development contributions including from Gosden Hill Farm and Blackwell Farm; IR 137. Those two, and other site allocations, contained measures contributing to the provision of sections of the multi-modal Sustainable Movement Corridor; IR138. This Corridor linked new sites, new rail stations, a new park and ride site at Gosden Hill Farm, Guildford railway station, and town centre and Surrey University. Gosden Hill Farm, Blackwell Farm and Wisley airfield all had to provide a significant bus network.

**Issue 1: did the Inspector consider and provide legally adequate reasons for his conclusion that the objectively assessed need for 10678 dwellings should be met in full, notwithstanding the consequent need for the release of land from the Green Belt?**

63. Mr Kimblin submitted that the two stage process of establishing the housing requirement figure had not been followed. The first stage was the establishment of the objectively assessed housing needs without the application of any policy constraint. The second stage was to consider whether policy constraints, of which Green Belt was the one principally deployed here, required a housing requirement figure below those needs to be adopted. 89% of the area of Guildford Borough was covered by Green Belt policy.

64. The Inspector had only asked whether there should be a restriction on the 14602 figure. His task was to consider whether soundness required releases from the Green Belt for housing, bearing in mind that the NPPF itself recognised that the Green Belt was one of those constraints, applicable at the second, or policy-on, stage. Its application could mean that the OAN would not be met. The Inspector's approach, in any event, did not identify lawfully, or with adequate reasoning, the "exceptional circumstances" warranting release of land from the Green Belt to meet housing needs.

65. In addition to the large sites removed from the Green Belt, Mr Cranwell challenged the removal of other sites under this head. They included land north of Keens Lane (150 dwellings and a 60-bed care home within 400m of the SPA), the various sites making up the 945 dwellings in allocations around villages such as Send, Send Marsh/Burnt Common, the Horsleys, and land for new north facing slip roads to the A3 at Send Marsh. The challenge to them all is based on the general contention that there were no exceptional circumstances to warrant releasing land from the Green Belt generally, even if the application of that policy restraint meant that Guildford BC housing needs, as expressed in the OAN, would be unmet.

66. I accept that the two stage process, "policy-off" and "policy-on", is well known and applicable; the analysis comes from *St Albans CC v Hunston Properties Ltd* [2013] EWCA Civ 1610, and *Gallagher Estates v Solihull MBC* [2014] EWCA Civ 1610.

67. The NPPF itself recognises that the OAN at the policy-off stage may not be met by the conclusion of the policy-on stage. NPPF [47], set out above, accepts that the OAN is to be met "so far as is consistent with the policies set out in this Framework." NPPF [14] puts it slightly differently but to the same effect: those needs should be met "unless specific policies in the Framework indicate that development should be restricted." Those include Green Belt policies. But importantly for Local Plans, NPPF [83] recognises that the preparation or review of a Local Plan is the mechanism whereby Green Belt boundaries can be altered in "exceptional circumstances," and, as altered, should be capable of enduring beyond the plan period.

68. There is no definition of the policy concept of "exceptional circumstances". This itself is a deliberate policy decision, demonstrating that there is a planning judgment to be made in all the circumstances of any particular case; *Calverton Parish Council v Nottingham City Council* [2015] EWHC 1078 at [20], Jay J. It is deliberately broad, and not susceptible to dictionary definition.

69. The parties agreed that whether a particular factor was capable of being an "exceptional circumstance" in any particular case was a matter of law; but whether in any particular case it was treated as such, was a matter of planning judgment. That does not take one very far, in my judgment, because a judicial decision that a factor relied on by a planning decision-maker as an "exceptional circumstance" was not in law capable of being one is likely to require some caution and judicial restraint. All that is required is that the circumstances relied on, taken together, rationally fit within the scope of "exceptional circumstances" in this context. The breadth of the phrase and the array of circumstances which may come within it place the judicial emphasis very much more on the rationality of the judgment than on providing a definition or criteria or characteristics for that which the policy-maker has left in deliberately broad terms.

70. "Exceptional circumstances" is a less demanding test than the development control test for permitting inappropriate development in the Green Belt, which requires "very special circumstances." That difference is clear enough from the language itself and the different contexts in which they appear, but if authority were necessary, it can be found in *R(Luton BC) v Central Bedfordshire Council* [2015] EWCA Civ 537 at [56], Sales LJ. As Patterson J pointed out in *IM Properties Development Ltd v Lichfield DC* [2014] EWHC 2240 at [90-91 and 95-96], there is no requirement that Green Belt land be released as a last resort, nor was it necessary to show that assumptions upon which the Green Belt boundary had been drawn, had been falsified by subsequent events.

71. There is however a danger of the simple question of whether there are "exceptional circumstances" being judicially over-analysed. This phrase does not require at least more than one individual "exceptional circumstance". The "exceptional circumstances" can be found in the accumulation or combination of circumstances, of varying natures, which entitle the decision-maker, in the rational exercise of a planning judgment, to say that the circumstances are sufficiently exceptional to warrant altering the Green Belt boundary.

72. General planning needs, such as ordinary housing, are not precluded from its scope; indeed, meeting such needs is often part of the judgment that "exceptional circumstances" exist; the phrase is not limited to some unusual form of housing, nor to a particular intensity of need. I accept that it is clearly implicit in the stage 2 process that restraint may mean that the OAN is not met. But that is not the same as saying that the unmet need is irrelevant to the existence of "exceptional circumstances", or that it cannot weigh heavily or decisively; it is simply not necessarily sufficient of itself. These factors do not exist in a vacuum or by themselves: there will almost inevitably be an analysis of the nature and degree of the need, allied to consideration of why the need cannot be met in locations which are sequentially preferable for such developments, an analysis of the impact on the functioning of the Green Belt and its purpose, and what other advantages the proposed locations, released from the Green Belt, might bring, for example, in terms of a sound spatial distribution strategy. The analysis in *Calverton PC* of how the issue should be approached was described by Jay J as perhaps a counsel of perfection; but it is not exhaustive or a checklist. The points may not all matter in any particular case, and others may be important especially the overall distribution of development, and the scope for other uses to be provided for along with sustainable infrastructure.

73. Mr Kimblin put forward Mr Cranwell's contention that the supply of land for ordinary housing, even with the combination of circumstances found here to constitute exceptional circumstances by the Inspector, could not in law amount to "exceptional circumstances." I cannot accept that, and I regard it as obviously wrong. These judgments were very much on the planning judgment side of the line; I do not see how they could be excluded from the scope of that phrase as a matter of law. This contention involves a considerably erroneous appreciation of the whole concept of "exceptional circumstances" and the role of the Inspector's planning judgment. Mr Kimblin accepted in oral argument that he might be putting it too high, but he said there still had to be something exceptional about the need.

74. It is of a piece with Mr Cranwell's further contention that the Inspector had ducked the issue of why the circumstances he found to be "exceptional" were "exceptional". The phrase "exceptional circumstances" should be considered as a whole, and in its context, which is to judge whether Green Belt boundaries should be altered in a Local Plan review. It is not necessary to explain why each factor or the combination is itself "exceptional". It does not mean that they have to be unlikely to recur in a similar fashion elsewhere. It is sufficient reasoning to spell out what those factors are, and to reach the judgment. There is a limit to the extent to which such a judgment can or should be elaborated.

75. I do not accept Mr Kimblin's further submissions on the way in which the Inspector considered the issue and reasoned his conclusions.

76. The order of magnitude of unmet need which these submissions contemplate is worth setting out, first. If there were to be no releases of land from the Green Belt in respect of any of those sites contentious to the Claimants in these proceedings, sites with a capacity for 6295 dwellings would not have been allocated; so on any view there would have been a shortfall against Guildford BC's OAN, of 10678, of over 2300, taking 6295 from 14602. The figure of 6295 includes the 945 sites in developments around villages without which the initial rolling 5 years supply could not be achieved, on the housing trajectory approved by the Inspector. If those under challenge were removed, there would have been a shortfall in supply at the end of 5 years. Here too the housing trajectory was essential to understanding the total picture.

77. There were in addition a further 447 dwellings on Green Belt sites which the Claimants in these proceedings did not challenge, but they still have to be deducted from the allocations for proper consideration of this issue. They all require exceptional circumstances to be shown; the distinction drawn by the Claimants between those which they make contentious and other releases from the Green Belt for housing is artificial. The deficit thus rises to over 2700 out of 10678. Mr Findlay did not agree either with the Claimants' calculation that none of the other sites were Green Belt developments; he said that at least 90 and more were Green Belt sites. I do not need to resolve that, because neither the Inspector nor Guildford BC's approach depended on the precise figure and the order of magnitude of need which would be unmet suffices to illustrate the point. Mr Findlay also pointed out that the Claimants' exercise ignored the other uses and infrastructure contributions which were an important part of the thinking behind the allocations; he said that such exercises as the Claimants had furnished me with had been a commonplace of the PE, and were simply grist to the mill of the planning judgment which it was for the Inspector to make. I agree.

78. Second, this issue did not arise at the PE without prior and careful consideration by Guildford BC. I shall deal with Sustainability Appraisals,SA, later but the approach contended for by Mr Cranwell was one of the alternatives addressed in SAs before the PE.

79. In the SA with the 2016 version of the submitted Plan, the options or reasonable alternatives discussed excluded expressly any potential for Guildford "to justifiably undersupply", i.e. provide for housing below the OAN figure. The option for providing no buffer was rejected as it would risk Guildford's OAN not being met in practice. The options with a buffer to help ensure that the OAN was met in practice ranged from OAN + 3% to OAN +14%, the latter including Wisley airfield. Higher buffers would enable some of Woking's needs to be met but the highest buffer considered was OAN+34%. The underlying figures differed from those in the adopted Plan but the question, whether the OAN should or should not be met, was considered.

80. In the 2017 version of the SA provision of housing below OAN was rejected again. I regard it as clear that the Inspector was to accept the soundness of this approach in his Report. It said:

> "Guildford Borough Council is committed to delivering its OAHN figure, having established that there is no potential to justifiably 'under-deliver' and rely on neighbouring authorities to meet the shortfall (under the Duty to Cooperate). Whilst Guildford Borough is heavily constrained environment, it does not *stand-out* as relatively constrained in the sub-regional context. This conclusion is reached on the basis of Duty to Cooperate discussions, past SA work (notably spatial strategy alternatives appraisal in 2013/14 …), an understanding of precedents being set elsewhere, and other sources of evidence. It is evidently the case that under-supplying in Guildford would lead to a range of socio-economic problems, given that Woking is already under-supplying within the HMA…. There is an argument for under-supplying to be preferable from an environmental perspective; however, this argument is far from clear-cut given an assumption that unmet needs would have to be met elsewhere within the HMA (i.e. within Waverley, which is heavily constrained) or elsewhere within a constrained sub-region. For these outline reasons, lower growth options- i.e. options that would involve planning for a level of growth below that necessary to meet OAHN - were determined to be unreasonable."

81. The Inspector, third, was satisfied that the duty to co-operate had been met; he had also been so satisfied when considering the Waverley Local Plan. The strategic housing market assessment, SHMA, involved the three Councils. Woking BC had insufficient capacity to meet its own needs, its boundaries tightly constraining the urban area. The duty to co-operate included consideration of Waverley and Guildford BCs providing part of the strategic housing area land supply for Woking BC's needs. There was no question of the duty to co-operate being invoked to ask either of those to meet Guildford BC's needs. There was no challenge to the lawfulness of his conclusion on the duty to co-operate.

82. Fourth, the Inspector's Report concludes that the allocations, involving releases from the Green Belt, taking the total supply of land up to 14602, with headroom over the 10678 OAN of 4000 dwellings, are justified by exceptional circumstances, strategic and local. Mr Kimblin accepted that, were I to conclude, as I explain later I do, that the challenge, under Issue 2, to the lawfulness of that later conclusion failed, it was inevitable that that lawful conclusion would also constitute a lawful and adequate explanation for why the OAN had not been restrained at the policy-on stage.

83. However, fifth, specific consideration was also given to that point by the Inspector; it was not just all swept up in the larger justification for the overall level of allocations. It was evident from the PE agenda that it was specifically identified as an issue, and was considered over a whole day. It was also related to the Inspector's Issue 9, the spatial strategy and whether there were exceptional circumstances for the amount of Green Belt releases, which was considered about two weeks later. As Mr Findlay and Mr Honey submitted, consideration of exceptional circumstances for the release of Green Belt land necessarily involves consideration of the application of restraint policies at the policy-on stage.

84. IR 22-38 are essentially dealing with the objective assessment of housing needs, stage 1, policy-off. But IR 35 is relevant to both stages. The policy-on stage was clearly considered in IR35. It also sets out why the OAN needs to be met by Guildford BC, apart only from the question of any contribution towards meeting unmet needs from Woking BC. The circumstances point clearly to the serious problems which would arise from a lower housing figure, such as 361dpa.That is the first reason why the policy restraint was not applied; there was a significant need which had to be met. The implication of Mr Kimblin's submission was that the Inspector ought to have explained why needs from Guildford BC could not simply be left unmet, to be picked up if at all in some unspecified place yet further afield than the Strategic Housing Market Area. But that is what IR35 explains.

85. IR79 is also relevant; it describes the pressing housing needs; the absence of scope to "export Guildford's housing need to another district". The "overall level of provision", 14602, "will address serious and deteriorating housing affordability and will provide more affordable homes." If that is true for 14602, it is obvious that the Inspector considered that a lesser figure would not address those pressing needs. IR 42 and 46, and 83-85 also address the need for flexibility above the OAN.

86. Mr Kimblin submitted that IR86 was irrelevant to this Issue because he submitted that it dealt only with the headroom. I disagree. IR86 addressed the question of "Whether the quantity of development should be restricted having regard to Footnote 9 of the NPPF", one of the passages in the NPPF in which the role of restraint policies, such as the Green Belt, is recognised to be a basis upon which the OAN might not be met in full. On the face of it the paragraph, even if also relevant to another purpose, covers the very point Mr Kimblin raised. The Inspector, in this section of the Report, is considering the strategic case for altering any of the Green Belt boundaries, and not just for strategic sites, nor just to the extent necessary to accommodate the headroom over 10678, or even the 10678. It is dealing with the very point which the "policy-on" stage raises. In my judgment, it is directly to the point.

87. The Inspector has already considered the pressing needs, and the consequence of them not being met. Here he considers whether the consequence of those needs being met,

through releases of Green Belt land, mean that they should nonetheless not be met. His conclusion is clear: there is no justification for applying a restriction on the quantity of development. His reasoning is clear and adequate: land can be found within the Green Belt, through boundary changes, with relatively limited impacts on openness, elaborated elsewhere in the Report, and without causing severe or widespread harm to its purposes. He also considered whether further land could be made available in the urban areas; IR 81-2; these had been thoroughly investigated; significant constraints existed; any extra yield from sites which could have potential not yet earmarked, "would fall a long way short of making the scale of contribution towards meeting overall development needs that would enable the allocated sites in the Green Belt to be taken out of the Plan."

88. I reject the Claimants' first ground of challenge. This issue and whether a policy restraint should be applied to the OAN was considered and the Inspector's conclusion that there should be no restraint below OAN was supported by ample reasoning.

**Issue 2: Was the conclusion that there were exceptional circumstances justifying the allocations of housing land, released from the Green Belt, to provide headroom of over 4000 dwellings above the 10678 OAN lawful, and adequately reasoned?**

89. This is the major issue in the challenge and permeates most of the grounds. I have already dealt with some general propositions about "exceptional circumstances".

90. The gravamen of Mr Kimblin's and Mr Harwood's submissions on this ground concerned the headroom of 4000 dwellings or "excess" over OAN as they put it. The matters relied on by the Inspector in that respect were said not to be exceptional. As the argument developed, led on this point by Mr Harwood, and the more so in reply, it became clear that the attack was not on the fact that there was some supply beyond the 10678, but concerned the extent of the headroom. Mr Harwood recognised that the delivery of the initial and the rolling 5 year housing land supply would require provision for a 20% buffer, at least initially. Land had to be allocated which could be brought forward throughout the plan period. He acknowledged that this was reflected in two of the strategic level factors behind the Inspector's acceptance that the strategic sites, which created the headroom, should be released from the Green Belt; IR 84-5.

91. However, in my judgment, once meeting the OAN is accepted as a strategic level factor contributing to "exceptional circumstances", as it has to be for the purpose of this Issue in the light of my conclusions on Issue 1, it follows that the provision of headroom against slippage and for flexibility to meet changes, "future-proofing" the Plan, as the Inspector put it, would also contribute to such circumstances. The challenge is to the scale of the headroom which it is said goes beyond that level; the headroom should have been judged to be sufficient at some lower level, between 10678 and 14602, enabling fewer Green Belt releases.

92. An impression of where the submissions go can be gleaned from adding 20% to the 10678, to give a rough idea of what in reality is contentious in this Issue. This issue comes down in practice to the inclusion of one or more of the three large strategic sites in the allocations. It is one or two of the former Wisley airfield site, and the sites at Gosden Hill Farm or Blackwell Farm which are at stake in this challenge. (The housing trajectory shows that the 945 dwellings on land around the villages are needed for the early years of the adopted Plan.) I accept that the unquantified unmet

need from Woking BC would not be more than a small component of the total headroom, in view of the way the Inspector expressed himself in IR38 and 79. It could have been added to the OAN, but providing for it in the headroom is reasonable, and either way meeting that need is equally capable of being an exceptional circumstance.

93. The housing trajectory showed that the largest Green Belt contributors are the three large sites to which I have referred, and which come on stream after the initial years from Plan adoption and build up over time. The Inspector considered whether that should be reduced, but did not reduce it, although the reduced OAN, after September 2018, meant that four additional sites in the proposed Main Modifications were deleted following the February 2019 resumed hearing.

94. Mr Kimblin challenged the logic of the exceptional circumstances relied on by the Inspector for the release of land from the Green Belt to supply land for 4000 dwellings over OAN. The housing land supply figures, during the Plan period, were the sum of the allocations, in so far as they are judged to produce dwellings during the Plan period. This leads to the figure of 14602. They were not allocated in order to provide a figure of 14602, because headroom of 4000 had been judged to be necessary by some form of assessment outside of the allocations. The precise headroom, though not the principle that there should be some, was the product of the specific allocations. This was said to be circular reasoning. The quantification of the need for the releases was calculated by reference to the releases to meet the quantified need.

95. Both advocates for the Claimants pointed to the way in which the headroom had varied, but had not reached 37% until the final adopted version of the Plan: 2016: 15,844 supply for 13,860 OAN; 2017: 14191 for 12,426; 2018: 15107 for 12,600; 2019: 14602 for 10,678.

96. First, I see nothing illogical in the Inspector's thought process, requiring a buffer of some significance and treating the total of the allocated sites as creating an appropriate buffer. There was no need to calculate a spuriously precise headroom figure, and then match it with sites. Sites do not present themselves or come forward in precisely matching dwelling numbers either. The headroom figure was a judgment based on the sites which were available to meet a requirement figure somewhat over 10678, and to do so in such a way that, over the initial and subsequent years of the plan, the rolling five year housing supply, with a 20% buffer for some years, would be maintained. The three would provide assurance that the requirement would be met, not just in total, but over the five year rolling periods. As the IR showed, the scale of the headroom was in part required because the sites to be released were themselves large, and could face delays on that account.

97. The Inspector asked, as part of the soundness judgment, whether those sites provided, not just the housing required, but did so with a good balance of location, size, meeting other needs such as for employment land, creating a coherent spatial distribution strategy. He asked whether there were significant advantages if more housing was provided than the OAN, in view of the pressing housing needs in Guildford, in terms of affordability and affordable housing. The way in which the buffer can meet the needs matters. The larger sites permitted other needs to be catered for, without peppering the area with Green Belt releases, or releases in more sensitive areas. The

question that then arose, in view of the extent of the headroom which those sites created, was whether there should be a reduction in release. This was specifically addressed in the IR. That is a logical approach.

98. The IR's analysis of the need to release land from the Green Belt considered the need for housing, IR79, the need for land for business uses which could not be met other than by Green Belt releases, IR80, the lack of scope for increasing housing on land within the urban areas, IR82, the need for a sound and integrated approach to the proper planning of the area, IR83, and the need for flexibility, IR84-5, along with the Local-level exceptional circumstances in relation to the major sites and issues. The question was then asked whether that was too much and one or more sites should be removed from the allocations. It was not a simple question of defining a need and then deciding where to meet it; the process was in reality more iterative. The number of dwellings for which land supply was allocated, was determined in the first place by the OAN, but in addition a buffer had to be provided and a satisfactory delivery trajectory provided for; the selection of sites was affected by where the needs could best be met, with least impact on the Green Belt, catering for other needs, and making a coherent strategy; the land thus allocated yielded the total supply, adjudged to be a sufficient buffer but not so much larger as to require the removal of sites from the allocations. In all of this, the Inspector would obviously have been aware of the function of the Green Belt, and the importance of keeping land permanently open and free from development. That permeates his whole consideration of exceptional circumstances; it is why he is considering them.

99. Second, having read the strategic and Local-level exceptional circumstances, which have to be taken together, I had no sense of having read something illogical or irrational, or which strained the true meaning of "exceptional circumstances." I can see that a different approach to the quantity of headroom might have commended itself, but that was plainly a matter of planning judgment.

100. I now turn to the specific points made by Mr Harwood in relation to IR83-89, headed "Whether the difference between potential supply of 14602 dwellings and the latest MM2 housing requirement of 10678 implies that the plan should allocate fewer sites and release less Green Belt land." IR 83 said that the plan had to be considered as a whole as it contained an integrated set of proposals which worked together, with strategic allocations delivering a range of benefits which could not be achieved by smaller dispersed sites. This was not in principle said to be irrational, and it could not be so described. This latter point was also foreshadowed in IR43.

101. It was however, irrational, submitted Mr Harwood in relation to Wisley airfield: Wisley's allocation helped with A3 slip roads, bus services and cycle network which benefited allocations around villages such as Send and Send Marsh/Burnt Common; Burnt Common provided an employment facility for the Borough. Most of this was to mitigate the impact of the allocation and so could not itself help justify it. The sites around the villages were sequentially less preferable than Wisley itself; facilitating unnecessary schemes could not be exceptional circumstances. Put in that way, Mr Harwood has a point on both fronts. But that way of putting it, is not the whole picture. The fact that mitigation at Wisley assists the development of other sites, that is to say, it functions beyond mitigation at Wisley, goes to the important point in the context of this topic, that the allocations work together as an integrated whole. The contention that the sites benefited were unnecessary anyway, rather depends on the

case for their release, accepted by the Inspector. The Inspector considered these village site releases in the context of the housing trajectory. They may be sequentially less preferable than the strategic sites, but they were necessary allocations in order to provide the initial five year housing land supply, as the trajectory showed, and as the Inspector was entitled to conclude. So, benefiting their development was a further aspect of the integration of the allocations. I do not accept Mr Harwood's submission. Mr Kimblin made a similar point in relation to Blackwell Farm which I consider under Issue 3, but a railway station is relevant in an area of transport difficulties.

102. Nor do I accept Mr Harwood's submission that business needs were not relevant to exceptional circumstances at the former Wisley airfield, because it was not an employment-led site. The employment land there served a variety of purposes: the allocation itself, advancing the sustainability of the new settlement, both on the site and as part of a sound strategic distribution of new employment land. I also accept Mr Findlay's point about the extent of Green Belt and AONB constraining development opportunities, the restrictions on further development in the urban areas, and the need for work to the A3, an important road for infrastructure in Guildford BC.

103. He next attacked IR84: the Inspector erred in law in saying, in the Green Belt context, that the housing requirement figure was a "minimum not a target." Policy S2 expressed it as a requirement for "at least" 10678 dwellings. The error of law was that an opportunity to provide more than the requirement was not a "need", such as was required to constitute "exceptional circumstances." There was nothing "exceptional" about a desire to provide housing additional to any need. The NPPF did not call for the requirement to be exceeded at the expense of the Green Belt.

104. Again, I do not think that Mr Harwood is grappling with IR84 read as a whole, in which context that particular sentence has to be read. The real thrust of IR84 is that the Plan has to be robust and capable of meeting unexpected contingencies: reliance on large sites made that particularly important, and there were various uncertainties about them. In those circumstances, the Plan ought to provide more than the bare minimum of supply in allocations; if that led to more than the minimum, that was not a reason not to make the provision; see also IR79. Besides the headroom meant that safeguarded or reserve land did not have to be provided; its provision would still have meant that land would "almost certainly" have been removed from the Green Belt. I do not accept that submission of Mr Harwood either.

105. Moreover, the prospect that a level of housing in excess of the OAN might be achieved can contribute to exceptional circumstances. I have set out under Issue 1, the pressing nature of the housing problems in Guildford BC. This is not just a question of totals. There would plainly be significant benefits, as the Inspector was well aware in this context, in terms of affordability, and affordable housing if more were provided. Taken as part of the whole group array of exceptional circumstances, there is nothing unlawful about that being seen as a useful even significant advantage, in line with NPPF housing policy, and as a contributor to exceptional circumstances. I accept that the OAN figure makes some allowance for those problems, but recognises that the problems are of a degree and scale that they cannot be resolved to a large extent. However, that does not mean that the advantage of a higher level of housing supply cannot contribute to exceptional circumstances. Once land is to be removed from the Green Belt for housing allocations, and a suitable buffer, the exceptional

circumstances for their capacity can include the planning soundness of choosing sites which contribute most to the other requirements of the Plan.

106. Mr Harwood's third point relied upon reading IR85 as envisaging that the allocations would endure well beyond the plan period, perhaps for decades. The reference to the timespan of the larger sites covering a number of plan reviews is, in context, a reference to the reviews during the plan period rather than to the review towards the end of or after the plan period. This trajectory also shows that the larger sites were expected to be built out within a couple of years of the end of the plan period.

107. Accordingly, I reject the Claimants' submission on Issue 2.

**Issue 7 Sustainability Appraisal.**

108. I take this issue here, because it concerns the overall approach to the housing allocations. The essence of the point is closely related to Issue 2. The Claimants contended, through Mr Harwood, that once the OAN was reduced from 12426 to 10678 as a result of the publication in September 2018 of the 2016 household projections, there should have been a further SA examining reasonable alternatives which matched allocations to the OAN figure of 10678, with the Wisley airfield allocation in mind in particular however. There was no challenge to any aspect of the SAs which actually were carried out.

109. SAs are governed by the Environmental Assessment of Plans and Programmes Regulations 2004. SAs include the Strategic Environmental Assessment which those Regulations require. An environmental report is required for an environmental assessment, by Regulation 12. By Reg 12(2), the report has to:

> "identify, describe and evaluate the likely significant effects on the environment of (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme."

110. There are various consultation obligations. There is no specific provision dealing with when an updated SA is required, or when material changes of circumstances require an update. The question will always be whether the likely significant effects on the environment of the adopted Plan had been evaluated, and whether reasonable alternatives have been evaluated. Whether the work done is sufficient is for the reasonable judgment of the decision-maker, here Guildford BC; that judgment is reviewable on normal public law grounds, and indeed was also assessed by the Inspector.

111. By the time of the SA with the original submission local plan of 2016, the former airfield at Wisley had featured in five of the eight options for meeting a range of OAN between 13844 and 18594, brought in, when considering an OAN of 15844, or more, as a key supply variable. In the 2017 version of the SA, submitted to the Secretary of State, Wisley airfield was present in all eight options, with OANs ranging from 13,600 to 15680 dwellings. There was an Addendum Report SA in 2018, produced to deal with the fact that it was then thought that sites for a further circa 550 homes would be required to meet needs in the first five years of the plan after adoption.

112. In the 2017 SA, with the 2017 submitted version of the Plan, various plan objectives were set out: these included sufficient sustainable development to meet all identified needs, expressed later as providing sufficient housing of a suitable mix taking into account local housing need, affordability, deliverability, the needs of the economy and travel patterns. The plan objectives were described similarly in the 2018 SA update.

113. The 2017 SA also described how the spatial strategy alternatives were arrived at in 2016. The 2016 growth quantum options were considered: the OAN for the Borough was increased by the need to plan for a buffer, and the possibility of planning to meet Woking's unmet needs was considered. The distribution options were then considered, using a ten tier hierarchy of places with the most suitable, Guildford town centre at the top and development around Green Belt villages at the bottom. From that work, the eight reasonable spatial strategy alternatives were arrived at, leading to the 2016 preferred option, 4, OAN plus buffer, with high growth at Wisley airfield, enabling low growth elsewhere, 15844 dwellings.

114. The possibility of meeting unmet need from Woking was considered. The reasonable alternatives ranged from 13,600 – 15680, which all represented OAN+ buffer, ranging from 9.4% to 26.2%. The unreasonable options rejected were any lower or higher figure outside that range, at each end. An option involving no Green Belt release would be unreasonable as it would involve very low growth. While a smaller buffer than in the 2016 SA was reasonable at the lower end, as the delivery assumptions for two large sites had been revised downwards, any lower option would be too small. The preferred option then emerged, Option 1: 13,600, OAN +9.4% buffer. This had been described in the SA as "a reasonable low growth option." A buffer needed to be planned for "given the likelihood of some sites (particularly large sites) not delivering or delivering at a slower rate than anticipated." The advantages and drawbacks of Option 1 were then discussed at some length.

115. I do not need to deal with the 2018 SA update which was undertaken to deal with the anticipated release of four further sites to meet the then increase anticipated in OAN.

116. The Inspector's December 2018 Note for the resumed PE in February 2019, following publication of the 2016-household projections, and Woking BC's acceptance that it now had no unmet need, identified five issues which needed to be addressed. These included the overall housing requirement in the housing trajectory. But the Inspector noted that he would not be discussing the spatial strategy, strategic sites and constraints, which had already been thoroughly discussed.

117. His January 2019 Note, accompanying the Agenda, reiterated that consideration of the merits of allocated sites was not being reopened. The sole purpose was to look at whether there should be a change to the OAN or to the housing requirement. He had however read all the material submitted for the hearing.

118. Guildford BC opened its comments at the resumed hearing by pointing out that it accepted there was a genuine housing crisis in the Borough. It had not sought to reduce the number of sites originally proposed, "notwithstanding ostensible changes in circumstances which might have given scope for such an approach. It has not advocated the necessary minimum approach."

119. Guildford BC produced a Note ("Initial Submission Whether Further Consultation and Sustainability Appraisal Is Necessary") for the second day of the resumed hearings of the PE. Guildford BC's position was that the OAN should be reduced to 10,678 and that the additional Green Belt sites in the proposed main modifications to assist with early delivery were no longer required. It disavowed a reduction in overall housing supply. It asserted that the buffer remained necessary to take account of the need for flexibility to adapt to rapid change, "to boost significantly the supply of housing", uncertainty as to the future position in relation to Woking's need, the need for infrastructure improvements because of development, ensuring the longevity of the plan, and other factors. It concluded that no further consultation was required, because all those affected by the reduction in OAN or the deletion of the four additional sites had had every opportunity to make representations as part of the additional hearing sessions. That specific point is not at issue.

120. The Note also expressed Guildford BC's view that no update to the SA was required. It referred to Planning Practice Guidance, PPG, from the Department for Housing, Communities and Local Government, which advised that SAs should only focus on assessing likely significant effects of a plan. An update was to be considered only "where appropriate and proportionate to the level of change being made to the Local Plan." A change to the plan was only likely to be significant, if it involved a substantial alteration to the plan, or was likely to have significant effects, or if the changes had not previously been assessed and were likely to have significant effects. Changes that were not significant would not usually require further SA work.

121. The Note stated:

> "GBC has not considered further alternatives, but has maintained the approach of providing OAN with a "buffer". Whilst the size of that "buffer" has varied throughout the process (SA2017 9.4%, 14% at submission and at 26% on main mods in respect of which the Inspector was content but now at 37%) that does not constitute a different alternative. Our understanding of the Inspector's comments [informally made at the end of the summer and on the first day of the resumed PE] (and in GBC's view) it would not be sound or reasonable to have a buffer that was materially lower. GBC are not advocating any growth option. We are maintaining the approach of meeting OAN with an appropriate buffer."

122. The changes, reducing the housing requirement figure and deleting proposed additional Green Belt sites, could not give rise to likely significant effects which had not already been considered. Eight different housing delivery scenarios had been considered as reasonable alternatives catering for the range of 13,600 to 15,680 dwellings over the plan period; the likely significant effects of each been evaluated. It would be inappropriate and disproportionate for further SA to be undertaken.

123. Mr Findlay also pointed out that participants such as Compton PC and Guildford Green Belt Group had made further written representations to the Inspector, among those responding to his specific questions for the resumed hearings in February 2019, to the effect that one or more strategic sites released from the Green Belt could be omitted from the allocations.

124. The Inspector, in the final section of his Report, assessed the legal compliance of the Plan. One issue was compliance with the legal requirements for SA. He concluded that what had been done was adequate. No further SA was required in relation to MM2, since the level of housing provision was within the range of options already tested by the SA, and the housing sites were the same as those in the submitted Plan; IR219. MM2 was the modification providing for 10,678 new homes during the plan period 2015-34, or 562 dpa, reduced from 12,426 in the 2017 submitted version of the Plan. The allocations to provide a supply of 14,602 dwellings were not reduced, although a modification, proposed before the 2016 household formation figures became available in September 2018, and introducing a further 4 sites with a capacity of 550 dwellings, was not proceeded with. I have set out IR 44 above in which the issue is also considered.

125. Mr Harwood submitted those paragraphs in the IR were wrong, although the error that mattered was that of Guildford BC. It was required by the Regulations to assess reasonable alternatives to the plan, taking into account the objectives of the plan, which by the time of adoption included 10678 dwellings. Alternatives which it was obviously reasonable to have considered were meeting that need and no more, and meeting a lesser need than 14602. The reasonable alternatives were not only in the range of 13600 to 15680 dwellings, with the supply figure in the middle. Reasonable alternatives to the 14602 figure had to be considered, since the dwellings requirement was 4000 fewer. There had also been material changes in circumstance, with Woking BC announcing that it had no unmet need, and Waverley taking some 82 dpa of Woking's need. In 2017, the option preferred by Guildford BC had provided headroom 9.4% above the then OAN, but it was now 37% above the present and final OAN. It was not possible to say what the outcome of an assessment of reasonable alternatives might have been. Indeed, he went so far as to submit that there had been no SA of the requirement finally adopted, 10,678, or anything like that number, or of an "overprovision", as he put it of 4000. Guildford BC and the Inspector had simply refused to consider a housing figure at or near 10678, which refusal had fed into the decision that no further SA was required.

126. I cannot accept these arguments. No complaint is made of the SA process before the effect of the 2016 household projections was considered. First, the objectives of the Plan had not changed; the objective was not the provision of 10,678 dwellings; it was not simply the provision of the OAN plus an appropriate buffer. I have set out how the objective was phrased in the earlier versions of the SA. An updated SA, confining itself to the provision of 10,678 dwellings, omitting any buffer, would not have been a reasonable alternative, as previous SAs concluded, and would have been for an objective other than that of the Plan.

127. The judgment that an OAN without any buffer was not a reasonable alternative, was a reasonable judgment for Guildford BC to make. It could only be attacked on rationality grounds; see *Spurrier and Others v Secretary of State for Transport and Others* [2019] EWHC 1070 (Admin) at [434]. That would be untenable.

128. Second, whether the effective increase in the headroom or buffer, but without change to the level of housing allocation, was a significant change or one likely to have significant effects was a matter for the judgment of Guildford BC, as the decision-maker. It is clear that the overall level of housing supply was within the range already considered. All the housing allocations had already been evaluated. The judgment that

the change was not significant or likely to have significant effects which had not already been considered, was reasonable.

129. Third, the only point in considering further alternatives would have been whether one or two large sites should be removed from the allocations. The smaller, sequentially less preferable Green Belt releases around villages, totalling 945 dwellings, could not have been omitted from any reduced buffer because of their importance in meeting the five-year housing supply in the early years of the Plan after adoption. Guildford BC and the Inspector did in fact consider whether the increased level of buffer in the same total supply, with a reduced OAN, was appropriate. They each concluded that it was, and that no large Green Belt site allocation should be now omitted. The arguments for deleting one or more of the 3 large sites were raised; indeed there was an obvious issue about whether that would be an appropriate response. Guildford BC and the Inspector considered it. Guildford BC was entitled to conclude that a further round of SA was quite unnecessary. The Inspector agreed, in his Report. There was no misdirection as to the law; it was for Guildford BC to judge whether there had been a change in circumstances or in the plan which warranted a further SA. This judgment can only be challenged on public law grounds; the only one available would be irrationality. There was no irrationality in the decision.

130. The history of the extensive SAs and updates make it impossible to say that there had been no SA of the effect of the allocations, or of the OAN plus buffer. There were no further reasonable alternatives to be discovered; the alternatives would have involved the omission of one or more of the three large sites released from the Green Belt. In reality it had already been considered.

131. Even if there had been an error, and assuming that the omission of one or two of the large sites would have been a reasonable alternative to consider, it is perfectly obvious that the allocations in the adopted plan would have been the preferred choice. That issue was considered by both Guildford BC and by the Inspector. Omission of a further SA would have been a procedural error causing no prejudice, let alone substantial prejudice to anyone. Even if one going to vires, I would have exercised my residual discretion to take no action, given that it is perfectly obvious that it could have had not the slightest effect on the outcome of the Plan.

132. I reject this basis of challenge.

**Issue 3: unlawful finding that exceptional circumstances existed.**

133. Mr Kimblin submitted, focussing on Blackwell Farm, but making a wider point, that at IR165, the Inspector had included the "important contribution towards meeting housing, employment and educational needs" that the site would make, among the Local-level exceptional circumstances justifying the release of the site from the Green Belt. Mr Kimblin submitted that as any residential allocation anywhere would meet housing needs, meeting them could not be an exceptional circumstance. This is wrong. This was not an example of a site being released simply because it was suitable for housing. First, as I have already explained, meeting a general housing need by the release of land from the Green Belt, is not legally irrelevant to the concept of "exceptional circumstances." Second, meeting any housing needs beyond a figure somewhat below the OAN would entail the release of land from the Green Belt. Third, the release would be an effective contribution to meeting that housing need, but

it would do so in a way which enabled other needs to be met, creating a sustainable pattern of development. This supports both meeting the need, and meeting it through the release of that particular allocation.

134. Mr Kimblin also submitted that housing needs were counted both in the strategic and Local-level exceptional circumstances, which he contended was illegitimate double counting. It is not surprising that, given the way in which the Inspector considered the strategic level exceptional circumstances and the local-level exceptional circumstances, both of which he needed to consider, that housing need would be referred to in both. The former focused on the strategic level need but the Inspector also had to consider the overall impact of the various Green Belt releases as a matter of strategy; the Local-level circumstances dealt with the practical nature of the contribution to housing and other needs which such a site allocation would yield, and the spatial distribution of development which the particular sites allocate would achieve. I cannot see that there is some flaw in logic, or that he has counted a factor twice in such a way that he has given the same factor, in reality but unconsciously, weight twice over.

135. In so far as the "double-counting" alleged was of the existence of a need, and the ability of a site to meet that need, they are different though related aspects of the "exceptional circumstances." The way in which a site can meet the need, not just in numbers but in location, and as part of a sound spatial distribution, with other uses, and help bring forward infrastructure, can all fall within the concept of "exceptional circumstances."

136. Mr Kimblin also took issue with IR165 over the inclusion, as part of the exceptional circumstances which Blackwell Farm offered, of its contribution to sustainable transport, including a new station. He submitted that these financial contributions were "necessary to meet the impact" of development, and legally irrelevant; contributions necessary to make a development acceptable were either immaterial or not exceptional. This echoes the earlier argument I dealt with in relation to the contributions which development at Wisley airfield would make to sustainability at other sites. In principle, I accept that mitigation measures are not a reason for granting permission, and would not be factors adding to the exceptional circumstances favouring the release of land from the Green Belt, other than as a means of choosing between competing sites where the potential for mitigation affected the choice. That can be important where, as here, Guildford BC and the Inspector had to undertake a comparative exercise in choosing which combination of allocations would constitute a sound spatial distribution of development, contributing also to more widely beneficial infrastructure.

137. In my judgment, Mr Kimblin's submission has not fully taken on board the significance of the contribution to the infrastructure. This is clearer from IR137. As with other forms of infrastructure, the contribution assists the achievement of a facility, here a new station, which is obviously of wider importance than simply providing for the allocation site users. It can provide for existing users in its vicinity. That wider aspect is plainly material. But there is a more general point: this is a sustainable site on which various needs can be met. The overall qualities of the site can contribute to local exceptional circumstances.

138. I do not know if Mr Kimblin is right to say that the contribution would be seen as "necessary" to make the development acceptable, but the contribution would still be a material consideration favouring development, even if it were not necessary for acceptability. His point is not made out in relation to this Plan; he is substantially taking issue with a reasonable and lawful planning judgment.

139. I turn now to the grounds relating to the individual sites, starting with the former Wisley airfield.

**Issue 4: the Wisley airfield appeal decision and the way in which the Inspector dealt with it**.

140. I have set out above what the Local Plan, LP, Inspector said about this decision. Mr Harwood contended that, although Guildford BC had refused permission for the development on the former airfield, on a site smaller than the allocation, and had opposed the appeal, it had sought to do so in a way which protected its allocation, but in reality has failed. The refusal had been on the grounds that there were no "very special circumstances" to justify this inappropriate development in the Green Belt, even though Guildford BC lacked a 5 year housing land supply, and there would be harm to the character of areas to the north and south of the site. This, Guildford BC had contended, would be avoided by the inclusion of the areas in the allocation which lay to the south of the appeal site, but which were not part of the appeal site. There was no strategic highways objection.

141. The Inquiry lasted 21 days in 2017; the decision was dated 13 June 2018, coming out during the PE. Mr Harwwod submitted that the appeal Inspector's conclusions and recommendations, and the Secretary of State's decision accepting them, went rather wider than the issues raised at the appeal by Guildford BC. His submissions to me were very similar to those sent to the Secretary of State dated 18 April 2019, by Ockham PC after publication of the LP Inspector's Report. Ockham PC asked the Secretary of State to prevent Guildford BC adopting the Plan until he had been able to decide whether to call in the Plan or to direct its modification. The letter complained in strong terms about the extent of land removed from the Green Belt. It contended that the Plan reversed key findings made in the appeal, without recognising it was doing so, or providing any reason for doing so. The decision, it was said, condemned, in reality, not just the appeal proposal but also the allocation.

142. The Secretary of State refused either that request, or more probably another request to the same effect, in a short letter to the Leader of Guildford BC. The Secretary of State said that the LP Inspector "has taken the issues raised into account when considering the allocation of the former Wisley Airfield site for development, and that the plan provides appropriate mitigation of the impacts of development on this site." He was pleased that the Plan contained a requirement for a master plan for the site; he would also consider calling in applications in relation to the development of Wisley airfield, on their individual merits.

143. The appeal Decision Letter, DL, agreed that the development was inappropriate for the Green Belt and that it could only be permitted in very special circumstances. It would conflict with two of the five purposes of the Green Belt: it would not assist in safeguarding the countryside from encroachment nor in the regeneration of urban land. It would reduce the openness of this part of the Green Belt. The harm to the

Green Belt would be "very considerable", in conflict with the development plan and paragraph 79 of the NPPF. The DL went on to consider whether there were very special circumstances which clearly outweighed the harm.

144. The DL gave limited weight to the Wisley airfield allocation in the emerging Local Plan. It was the development plan policies which were of most relevance. Significant weight was given to the significant shortfall in the 5 year housing land supply, which then amounted to only 2.36 years. Significant weight was also given to the affordable housing, 40% of the proposed total.

145. The DL agreed that a suitable quantity and quality of SANG would be provided, and that subject to conditions and a planning agreement, "the development would not have an unacceptably likely significant effect on the SPA." There would be a severe and harmful strategic highway impact to which significant adverse weight was given, although unacceptable harm to the local road network was unlikely, with certain works being undertaken. On transport sustainability, the DL agreed that "…overall, the proposals go a long way towards making the location more sustainable…[ but] the proposal would not be in full accord with [the] emerging Policy A35… as it would fail to provide the required cycling improvements…" Limited weight was given to that, as it was to the concerns of the local education authority that the site was not suitable for an all-through school for the wider community. Although some of the harmful impacts on the appearance of the area could be partially mitigated by extensive landscaping, "this would not disguise the basic fact that a new settlement in a rural area would, inevitably, cause substantial harm to both its character and its appearance." This would be irreversible, contrary to development plan policy, and carried significant adverse weight. Other factors were considered as well. The Secretary of State agreed that many of the purported benefits were little more than mitigation, while the benefits for the wider community, outside the appeal site, were rather more limited. The loss of some 44ha of best and most versatile agricultural land was accorded considerable weight. The harm to heritage assets was less than substantial.

146. On 13 June 2018, the Secretary of State rejected a request from Wisley Property Investments Ltd to delay issuing his decision on the appeal, concluding that:

> "in view of the range of factors remaining to be resolved, the most satisfactory approach is to decide this appeal in the context of the current development plan. This reduces the uncertainty for all parties and leaves the way open for further applications to be considered (by the Council in the first instance) once there is an up-to-date planning framework for the Borough."

147. Mr Maurici QC for Wisley Property Investments Ltd submitted that this showed that the Secretary of State did not regard the appeal decision is ruling out the allocation or a further application. That is true, but its significance can be overstated. He also drew my attention to the decision of the Inspector, accepted by the Secretary of State, to refuse an application for costs against the developer after the appeal. The application was made on the grounds that the pursuit of the appeal was unreasonable in view of the absence of any solution to the highways issues, and the unmet housing need was "unlikely" to outweigh harm to the Green Belt and provide very special

circumstances. The emerging local plan could not add sufficient weight to amount to very special circumstances. The appeal Inspector found that the appellant had always intended to pursue a plan-led scheme, and had done so in the reasonable expectation that the emerging Local Plan would have been adopted in July 2016 in time for the decision on the application lodged in December 2014. But it had been delayed; the allocation boundaries had varied. The highways issue turned on the slip roads; it was not an objection in principle but went to whether they could in fact be provided. On Green Belt, the appeal Inspector said that the lack of suitable housing sites remained acute and some land would probably need to be released from the Green Belt to meet any identified need. He continued:

> "I do not consider that it is inevitable that this appeal would fail on Green Belt grounds or that its location within the Green Belt, in advance of any determination on whether it should be taken out of the Green Belt, made the appeal hopeless. The Appellant put forward a credible case for the development in the Green Belt including a raft of matters that were, when taken together, considered to comprise the necessary VSC."

148. It is worth noting, in the context of the arguments which I have heard, that neither the appeal Inspector nor the Secretary of State regarded the scope of "very special circumstances" as limited to individual circumstances which were, taken by themselves, not very special, in the sort of language which Mr Kimblin deployed in relation to the concept of "exceptional circumstances." The need for general housing was capable of contributing to those circumstances.

149. I note these further points from the appeal Inspector's Report, AIR. Guildford BC's Green Belt and Countryside Study, part of its Local Plan preparatory work, recognised that any large non-urban site in a Borough where 89% of the land lay within the Green Belt, would conflict with the Green Belt purpose of assisting in the regeneration of urban land; and it was only being contemplated because there was insufficient suitable urban land within the Borough. At 20.71, AIR, the appeal Inspector considered transport sustainability. Without changes, the appeal site was not in a sustainable location, with little public transport in the immediate vicinity, and narrow winding lanes, without footways or lighting, which were not conducive to walking or cycling. The proximity of the A3 and the strategic road network would encourage travelling by car. Various significant interventions were proposed to deal with this. The maintenance of the level and cost of the bus services would be "quite challenging", but would go "some way to improving the public transport options." The off-site cycle network required, by the emerging Local Plan, to key destinations including railway stations at Ripley and Byfleet was not provided; the roads were of insufficient width and rather demonstrated that they were not conducive to cycling other than by experienced and confident cyclists. The long linear shape of the site did not assist sustainability as buses would be needed by some residents to reach the village centre, notably from the housing which could be up to 1500m, as the crow flies, from the centre. The scheme failed to meet even the minimum requirements for cycling in the emerging Local Plan. However, AIR20.81, the proposals went a long way towards making the location more sustainable but fell short of the full cycling improvements required by the emerging Local Plan. Weight would be given to that

shortfall because that was the plan which Guildford BC intended to submit for examination.

150. The appeal Inspector accepted, AIR20.87, that some landscape and visual harm was inevitable with development in the countryside: the character and appearance of the site would change significantly; the character of the wider area would also be affected. Guildford BC accepted some harm was inevitable, wherever new housing was provided in the Borough, given the severe constraints it faced. But there would still be a very substantial change to the character of the area; the form of the proposed settlement would be wholly at odds with the loose, informal nature of the settlements that had grown up organically in the area over the years. The site was on a long east-west ridge, rising to the east, so "any development on the site would inevitably stand out in the surrounding landscape making it prominent and potentially dominating." The inclusion of the additional land in the allocation to the south of the appeal site, with the same amount of development, "would allow a less dense and linear development, as envisaged in the eLP." As it was, AIR 20.94, all the development was squeezed from the north, by the SPA, and the south:

> "forcing the development upwards and resulting in a highly urban character this is partly a consequence of the site being considerably smaller than the site that GBC intends to allocate in eLP Policy A35. While any development of this scale on this site would appear out of keeping with its surroundings, the additional constraint imposed by a smaller site seems to exacerbate the harm to the character of the area."

151. The overall impact "would result in substantial harm to the character of the immediate area", eroding the historic pattern of the settlements to the detriment of their character. He agreed with residents that this impact "would be catastrophic on their rural way of life."

152. The impact on the appearance of the area would be rather less severe than on its character, as much of the site was quite well screened from off-site public viewpoints. The existing runway was a stark concrete feature that failed to make a positive contribution to the appearance of the area; but there would be a harmful impact on public rights of way. There would be a change from travel through an open largely agricultural landscape to an urban walk, with urban sights and activity. Off-site views would be fairly long distance as the site was quite well screened by existing trees and, from nearby, but the ridge would be visible from as far afield as the AONB. It would appear as a linear, urban feature, although careful use of materials would soften its visual impact. Its impact would be exacerbated by its village location, with 3- to 5-story buildings along the central spine road making the full 2.4km of the development visible from highly sensitive locations on public rights of way in the AONB. In time, some of the impacts on the appearance of the area could be mitigated by extensive landscaping.

153. The appeal Inspector also considered nitrogen and nitrous oxide levels in the SPA. He rejected the extreme position put forward by Wisley Action Group and Ockham Parish Council, for whom Mr Harwood appeared at the appeal Inquiry, that because the critical level for NOx and the critical load for nitrogen were already being exceeded, not one single vehicle movement could be generated without infringement

of EU law, so planning permission would have to be refused. He summarised the detailed assessment carried out by the Appellant, AIR 20.140:

> "This shows that the part of the SPA where the 1% increase is exceeded is limited to strips of land adjacent to the A3 and M25….Surveys show that beyond 200m there is no discernible effect; the impacts are thought to be greatest within the first 50-100m but the area where the appeal scheme makes a greater than 1% contribution is much more limited. …20.141 [M]ost of the SPA that falls within even 200m of the A3 and M25 comprises woodland; there are only small areas of heath. It also shows that by 2031 none of the heathland would fall within an area exceeding critical levels for NOx with the appeal scheme and other future development….This woodland provides a shelter belt and possibly nesting opportunities for the Woodlark but does not offer ground nesting sites. This type of buffer is advocated in DBRM as best practice. The evidence, which was not challenged, shows that some Nightjar territories have been within the 200m distance but none within the 140m distance from these roads."

154. Natural England had raised no objections on air quality grounds. There was no evidence demonstrating that changes in air quality, individually or in combination with other developments, were likely to have significant effects or undermine the conservation objectives for the SPA; an Appropriate Assessment was not required.

155. The appeal Inspector accepted that the runway and hard standings, amounting to almost 30ha, was the largest area of previously developed land in the Green Belt in the Borough, and its beneficial reuse contributed to very special circumstances, and to Guildford BC's justification for seeking to release it from the Green Belt. This had to be tempered by the fact that a larger area of agricultural land including well over 40ha of the best and most versatile would be lost.

156. In his overall conclusions, the appeal Inspector said that the proposals were "largely, but not completely, in accordance with the eLP but, for the reasons set out above, it carries only limited weight as there are unresolved objections to the relevant policies. The unresolved objections are significant in content and quantity and this limits the weight that can be accorded to the eLP." He understood the frustration of the Appellant who could reasonably have expected the eLP to be more advanced and therefore weightier than it was.

157. The proposals did not fully accord with the eLP, seeking to accommodate roughly the same amount of development as sought by the eLP, on a smaller site. Other requirements in Policy A35, such as the provision of an off-site cycle network to key destinations and sensitive design at site boundaries would only be partly met by the appeal scheme. The failure to provide adequate infrastructure, in the form of north facing slip roads at Burnt Common, was a major and fatal failing of the scheme. The proposals would not protect or enhance the natural, built or historic environment and could result in a high level of car-dependency. The inevitable harm from such development in a rural setting would be particularly noticeable in the midst of a cluster of hamlets. Its linear form, in part a consequence of the smaller site, and its

location on a ridge meant that there would be longer views of the proposals; from the AONB, the new settlement would be seen to impose itself on the landscape without regard to the established settlement pattern or form.

158. Mr Kimblin's contention was that the LP Inspector had not grappled with the thrust of the reasons which led the Secretary of State to accept the appeal Inspector's recommendations for the dismissal of the appeal. They reached different decisions on the same issues, and it was not possible to understand why he differed from the appeal decision. Mr Kimblin highlighted the contrasting language about the harm to the Green Belt, the loss of best and most versatile agricultural land, the degree of prominence and visual self-containment, the sustainability of the location, including the provision of bus services and the difficulty of accommodating facilities for the average cyclist.

159. Mr Kimblin made some complaint, without alleging any separate error of law, that the Inspector had sought a note from Guildford BC on the appeal Decision but had refused to accept written representations from other participants, on whatever side of the Wisley airfield allocation debate. The Note pointed out that an appeal decision and the decision on a Local Plan allocation were decisions of a different nature, with different statutory tests. The approach to development in the Green Belt necessarily differed. It has always been the intention of Guildford BC that the site should come forward via the plan-making process. There would be no substantial harm to the Green Belt if the site were removed from it. The important highways objection had largely been resolved and Highways England expected to be able to withdraw its objection. The harm alleged to the character and appearance of the landscape had been considered, in that process, in the context of longer -term housing need, and where else the need could be met with less harm. The allocation in the emerging Local Plan had been given limited weight. The residue of the allocation outside the appeal site, could have come forward for further housing, had the appeal succeeded. The appeal Inspector accepted that the difference between the allocation and the appeal site had exacerbated the harm caused by the development.

160. First, in my judgment, this issue is different from some cases where an appeal decision has been prayed in aid of an objection to an allocation, but has not been dealt with by the LP Inspector. This appeal decision concerned the larger part of an allocated site, rather than a calculation of some more generally applicable nature, or some unallocated site. It was contemporaneous. Here, the LP Inspector did treat the appeal Decision as relevant in considering the soundness of the allocation, as it obviously was; and he set out to deal expressly with its significance for his Report. If he had not done so, there could have been a lively debate as to whether he ought to have done so, but that is not the case here.

161. Second, the decision on the appeal was not a decision on the soundness of the allocation, nor vice versa. It would not have been for the appeal Inspector to trespass on the functions of the LP Inspector and the former, and the Secretary of State, would have been well aware of the need not to do so. The framework for the respective decisions was markedly different, as IR 181, the subsequent discussion, and the earlier discussion of strategic Green Belt exceptional circumstances in IR86, showed.

162. The appeal was concerned with whether the proposal was consistent with the existing development plan; the PE was concerned with whether the emerging Local Plan was

sound, in making changes to the Green Belt boundary, and in making housing provision for the period to 2034. "Very special circumstances" had to be shown for this inappropriate development in the Green Belt, as opposed to "exceptional circumstances", a lesser test, for varying Green Belt boundaries.

163. Third, the Local Plan was emerging but the appeal Inspector was aware of the objections to the Wisley allocation and did not afford it much weight on that account; the LP Inspector had the task of judging its soundness, and not its weight as an emerging Plan. The LP Inspector also had not just the immediate housing land supply shortfall, but also the future allocations to meet the OAN with a buffer to deal with. He had to deal with a long-term plan, covering the whole of Guildford BC's area, so that a coherent strategy for that period was provided, within which development control and infrastructure decisions could be made. He necessarily had to consider whether there were any non-Green Belt sites which could be released instead, and, if Green Belt sites were to be released, which were the best locations overall, including not just their effects on the Green Belt, but also their ability to form a coherent spatial distribution strategy, meeting other needs, and being made sustainable, as a whole. This was a comparative exercise, and not a decision about a single site. This was all part of the LP Inspector's consideration of "soundness". The consideration of "soundness" was no part of how the appeal Inspector had to approach his Report, and the Secretary of State, his decision.

164. Fourthly, there were also more development/allocation specific considerations: one of the most important was the sustained highways objection to the absence of practical solution to the necessary north-facing A3 slips, which was sufficiently resolved by the time of the LP IR for that major objection not to be a factor against the allocation's soundness. The second was the difference between the appeal site and the allocation, with the implications which that had, whether for further development on the residue of the allocation, or on the way in which the height of the buildings, particularly with the ridge running west-east, would make development prominent. Necessarily, the detail of the boundary treatment would be different. These are all part of IR186, and the way in which the allocation is analysed by the LP Inspector.

165. I do not consider that it was necessary for the LP Inspector to take the AIR and analyse all its views against his views on the various topics. There is perhaps a difference in emphasis in the LP IR comments on the Green Belt releases in general "relatively limited impacts on openness" and their not causing "severe or widespread harm", and the AIR comment that there would be "very considerable harm" to the Green Belt from the Wisley allocation. However, as IR 182 makes clear, on a comparative basis, the Wisley site was of medium sensitivity. Its development would avoid putting pressure on other Green Belt areas of greater sensitivity. This comparative exercise, underpinned by the Green Belt and Countryside Study, was not a task which the appeal Inspector could undertake or attempted to undertake; but was essential for the LP Inspector. The same applies to the assessment of the degree of visual prominence: the LP IR comments on the allocation as "fairly self-contained visually," being on a plateau and not prominent, whereas the AIR thought it visible along its length to highly sensitive receptors, though quite well screened in certain respects. But the sites they consider differed in an important respect and with an adverse effect for the appeal scheme. It is obvious from the AIR that the narrowness of the appeal site exacerbated the prominence of the appeal development. The LP

Inspector also considered that specific design objectives, should be in the Plan, via a Main Modification, Policy A35.The effect on the character of the area is referred to in IR 181, but is a factor outweighed by the compelling strategic-level exceptional circumstances. The LP Inspector obviously considered the appeal decision, but found the circumstances he had to deal with, compelling.

166. At the strategic level, the allocation can support sustainable modes of travel. It was not necessary for the LP Inspector to point out how the comments of the appeal Inspector in relation to the cycle network in the appeal scheme could be varied so as to provide what the allocation envisaged. The Secretary of State had already agreed that the appeal proposals went a long way towards making the location sustainable. The appeal Decision could not and did not conclude that the cycle network could not be provided or provided with a larger site, or that the bus services could not be provided. The shortcoming was only given limited weight. The LP Inspector was not required to deal with best and most versatile agricultural land explicitly in order for adequate reasons to have been given for his conclusion on the soundness of the allocation of this site; limited weight was given to that aspect by the Secretary of State.

167. Accordingly, I reject the contention that it is not possible to see why the LP Inspector reached the conclusion he did, having considered, as he obviously did, what the AIR and Secretary of State had to say. In the circumstances known to all participants about the differing tasks, the reasons are sufficient. There was no need to identify, issue by issue, where the LP Inspector did or did not, to some degree, agree or disagree with the appeal Inspector. Such differences as there may be are explained by the different focus of their tasks and the different cases they were considering. I have referred earlier to the authorities on reasons which are most to the point. The instant case calls for no further elaboration of the law. I add *Dylon 2 Ltd v Bromley LBC* [2019] EWHC 2366 (Admin) to the authorities on reasons, already referred to because it deals with reasons and their relationship to earlier appeal decisions, though in a different set of circumstances.

**Issue 5A: the "white land" at the former Wisley airfield**

168. This relates to the allocation at the former Wisley airfield. There are three areas where land around the allocation was taken out of the Green Belt but left unallocated, termed "white land". That expression is convenient in this context even though other policies applied to restrict development on the areas in question, and it is not reserved or safeguarded for future development, as would normally be the purpose of "white land". The major area of white land lies between the Wisley allocation and the new Green Belt boundary to the north along the SPA; it is part of the buffer zone for the SPA. The second is to the south with allocated land on three sides. The third is at the south-east corner of the allocated site, and was removed from the Green Belt in the 2017 changes to the Plan.

169. Mr Kimblin submitted that, once it had been accepted by the Inspector that there was no need for land to be safeguarded for development or treated as reserve land, there was no need for land to have been removed from the Green Belt, and left as white land. His complaint was that the Inspector, though no longer it appeared Guildford BC, had provided no justification for those areas to have been removed from the Green Belt.

170. The reasons for exclusion from the Green Belt of the area north of the allocation were the establishment of new defensible Green Belt boundaries, and because some development, such as small car parks, board walks and the like, which would or could be inappropriate in the Green Belt, was proposed in connection with the new SANG, as essential mitigation for the development on the allocation, as agreed with Natural England. It was not included in the area allocated because it was not suitable for development in general. The need for that land to be excluded from the Green Belt so as to create a suitable Green Belt boundary was raised in the Green Belt and Countryside Study, part of the evidence base for the Local Plan. IR115 referred to the buffer between residential development and the SPA boundary. Policy P5 resisted a net increase in residential units within 400m of the SPA boundary and sought avoidance and mitigation in respect of residential development between 400m and 5km from the boundary.

171. The test of "exceptional circumstances" cannot simply be applied to the whole of the area of change to the Green Belt boundary without acknowledging that the new boundary has to follow defensible lines. The rather wavy line bounding the north of the Wisley allocation was plainly not as defensible a boundary as that adopted. It is not necessary for separate exceptional circumstances to be shown. The necessary exceptional circumstances justify the Wisley allocation; defensible boundaries to the Green Belt may not always align with the allocation boundary, but defensible boundaries have to be provided as a necessary consequence; see NPPF 85, above.

172. The second area was near the Bridge End Farm. This was not available for development so it was not allocated. But the need for defensible boundaries to the Green Belt make its exclusion from the Green Belt clear. This was also explained in the Green Belt and Countryside Study.

173. The third area, at the south east corner of the site, was not included in the allocation because it is not available; the owner is opposed to the allocation. Yet the boundary of the Green Belt, if it followed the allocation boundary hereabouts would not follow defensible features. The previously redrawn boundary followed the airfield boundary and a field boundary. It was now to follow the two roads, Ockham Lane and Old Lane, which bounded the south-east corner site on the south and east sides. This was explained in the "Summary of key changes to the Proposed Submission Local Plan: strategy and sites (2017)". The airfield is no more; defensible boundaries are permanent hard features, of which roads are a paradigm. Field boundaries are not so permanent. This is a simple matter of planning judgment.

174. The explanations by Guildford BC are sufficient. This is a matter of planning judgment for Guildford BC. It was not necessary for the Inspector to address each area where the proposed new Green Belt boundary was contentious between Guildford BC and others making representations. He had the local authority evidence base. He had to consider the allocations for soundness, but not their precise boundaries, unless in some way a boundary issue itself went to the major issues on soundness, legal compliance and policy consistency. That is not alleged here. As I have said, there was no further test of "exceptional circumstances", at least not normally, to be applied to such areas of land as might lie between an allocation and a defensible new Green Belt boundary, where they are not reserved or safeguarded sites and simply result from a sensible boundary drawing exercise. The exceptional circumstances come from the very allocation of the site.

**Issue 5B and the consultation on the 2017 version of the submitted Plan**

175. This point is of no real moment according to Mr Harwood who fashioned it: it was a technical but readily correctable error, on his analysis. The 2017 changes to the allocation area and Green Belt deletions could not be made without the Inspector determining that the 2016 plan was unsound if they were not made, which he did not do. So, there was no power to make them on the part of either Guildford BC or the Inspector.

176. This is how his argument proceeds. The 2016 proposed submission version of the Plan was published for representations to be made under Regulation 19 of the 2012 Regulations. Representations were received in large number. That version was not however submitted to the Secretary of State. The 2016 version proposed the removal of the Wisley allocation from the Green Belt, along with the land to the north of the allocation which was a buffer to the SPA, and the southern part of the unallocated land.

177. The Plan was altered in 2017. So far as the Wisley area was concerned, three fields towards the south-east of the centre of the allocation were included for the first time, and the area to the south-east corner was removed from the Green Belt but not placed in the allocation.

178. A further round of representations was sought, but this was confined to the changes from the 2016 version, and it was only representations on the 2017 Plan about the changes which would be passed on to the Inspector. He would however also receive all the representations on the 2016 version. General comments about the changes could be made, and Guildford BC was also seeking specific comments on legal compliance, the duty to cooperate and soundness. Guildford BC described this as a "targeted Regulation 19 consultation".

179. The 2017 version was submitted to the Secretary of State and was the subject of the PE, and proposed modifications. None of the changes to the 2017 version from the 2016 version were themselves the subject of any modification proposed by Guildford BC to the Inspector or by him directly.

180. Mr Harwood submitted that regulation 19 required the consultation in 2017 to have been on the whole plan and not just on the changes. Regulation 19 states:

> "Before submitting a local plan to the Secretary of State under section 20 of the Act, the local planning authority must-(a) make a copy of each of the proposed submission documents and a statement of the representations procedure available in accordance with regulation 35….

181. By regulation 20(1): "Any person may make representations to a local planning authority about a local plan which the local planning authority propose to submit to the Secretary of State." It is those representations which have to be submitted to the Secretary of State. "Proposed submission documents" are defined in regulation 17: they include "(a) the local plan which the local planning authority propose to submit to the Secretary of State." By s20(2) of the 2004 Act, no development plan document can be submitted by a local authority to the Secretary of State, unless the requirements

of various regulations have been complied with, and the submitting authority thinks that the document is ready for independent examination for, amongst other matters, its soundness. The examining Inspector must recommend that a plan that is not sound or which does not satisfy statutory requirements should not be adopted, unless he considers that there are modifications that would make it sound and satisfy the statutory requirements, provided that the duty to cooperate has been met, and the submitting authority asks the examining Inspector to make the necessary modifications.

182. The powers of the Court under s113 of the 2004 Act extend beyond a quashing of the document, and by s113(7A) and (7B), permit it to remit the document to the planning authority with directions as to the action to be taken. Directions may require specific steps in the process to be treated as having been taken or not taken, and require action of unspecified scope to be taken by the plan-making body. Those powers can be exercised in relation to the whole plan or part of it.

183. Mr Harwood submitted, as had the Wisley Action Group in its response to the 2017 submission draft, that the plan intended to be submitted was the 2016 version; the changes in the 2017 version could not lawfully be made until the Inspector had found that the Local Plan was unsound without them, and modifications had been sought by the Council or recommended by the Inspector to make the plan sound. The 2017 changes were no different in law from any other changes intended to remedy unsoundness; this was all because there had not been consultation on the 2017 plan as a whole. He submitted however that the consequence was that it was only the inclusion of the changes made in the 2017 draft which were unlawfully included in the Plan.

184. I did not find this persuasive at all. I note that Planning Practice Guidance, PPG, contemplates that there can be such a targeted consultation, though that cannot be determinative of the law. The PPG states that the Inspector should consider whether the changes resulted in changes to the plan's strategy, whether there had been public consultation and a SA where necessary. If those points were satisfied, the addendum could be considered as part of the submitted plan. If not, he would usually treat those proposed changes as any other proposed main modifications, which would need to satisfy the statutory terms of s20(7B) and (7C). I regard that as practical advice, which does not assist Mr Harwood's rather technical legal submission. But I do not necessarily accept that the PPG is a complete statement of the circumstances in which, before submission, modifications can be made, with a targeted consultation, to a plan which had already been consulted on. It may not be necessary for the plan to be regarded as unsound before the changes can be made, in view of the obligation to submit what the local authority considers to be a sound plan.

185. It starts with Regulation 19. I see nothing in that Regulation on its own or with Regulation 20 which prevents a Local Plan being amended before submission so that in the judgment of the local planning authority it is sound when submitted. The contrary is not contended. There has to be consultation on the submitted Plan, and all the representations have to be submitted to the Secretary of State. All aspects of the Plan submitted in 2017 were the subject of consultation and all the representations were submitted. That is all that the language requires. The authority must submit a plan which it believes is sound. If it considers that changes are necessary after consultation but before submission, Mr Harwood would require that the whole Plan is

subject to further consultation. I cannot suppose that all those who had previously made representations would realise that they had to repeat them, even if they merited no change, for them to be forwarded to the Secretary of State, or would have the stamina to do so. Were they not to repeat themselves, it is hard to see on what basis their consultation responses to an earlier plan should be forwarded to the Secretary of State.

186. I cannot see what language or purpose of the Regulations means that amendments cannot be the subject of a targeted or restricted consultation at all. The opportunity to provide further comments would be pointless. I can see that if a further round of consultation was limited in its scope with the result that an aspect of the Plan, or some interaction between the various parts or some discontinuity arising from the fact that the alterations came later in time, was not consulted upon, that would be a breach of the Regulations, but that is not contended here. Mr Harwood was unable to point to an aspect of the 2016 Plan which was affected by the alterations in 2017 from which further representations were excluded. His point had no substantive contention behind it. If it did, he would have been able to argue that the Regulations had been breached, not because of form but because of the substance of the consultation.

187. If Mr Harwood is right about a breach of a procedural requirement, falling short of the submission of the wrong plan, it is difficult to see what useful remedy there should be. The alleged breach of a procedural requirement prejudiced no one and had no effect on the Plan at all. I could require the consultation step to be treated as having been taken in relation to the whole plan, but that is not the purpose of his argument. I was unable to follow his submission that, if a procedural remedy were required, some limited solution confining itself to the Wisley allocation would suffice.

188. I agree with Mr Findlay that the essence of Mr Harwood's argument is that the consultation requirement was breached, and unless it is repeated on the Plan as a whole, and the 2017 version recognised as not having been submitted and examined, no useful remedy can be granted. If the consultation process had to be repeated, the flaw could not be remedied without a repeat of the whole consultation exercise, with updated representations and the whole PE starting again. Yet that was what Mr Harwood disavowed.

189. I find it impossible to see how Mr Harwood's submission that it was in fact the 2016 version which was must be treated as having been submitted to the Secretary of State for examination can possibly be right. But, if right, I can see no sensible basis upon which the whole Plan could avoid reversion to a pre-submission stage. Mr Harwood, understandably, did not wish to go so far. It rather illustrated the lack of merit in this whole submission.

190. I reject this ground of challenge.

**Issue 8: The air quality impact of the allocation at the former Wisley airfield**

191. The Inspector considered this issue under Issue 7, sub-heading "Biodiversity." The SPA consisted of fragments of dry and wet heath, deciduous wood land, gorse scrub, acid grassland and mire, and conifer plantations. The public had access to about 75% of it, as common land or designated open country. It supported populations of European importance of nightjar, woodlark and Dartford warbler during the breeding

season. These species nested on or near the ground, which made them susceptible to predation and disturbance. A Special Area of Conservation, SAC, overlapped the SPA, but did not feature separately in the submissions to me.

192. Regulation 105 of the Conservation of Habitats and Species Regulations 2017 SI No.2012 requires an appropriate assessment to be made of the implications of a land-use plan, on its own or in combination with other projects or plans, "likely to have a significant effect" on an SPA. The assessment examines the implications for an SPA in view of its conservation objectives. The appropriate nature conservation body, in this case Natural England, had to be consulted, and the opinion of the general public was also to be taken. However, the land-use plan could only be given effect in the light of the assessment, if the authority had ascertained that the plan would "not adversely affect the integrity of the" SPA. Were it to do so, the plan could only be given effect, if there were no alternative solutions and there were "imperative reasons of overriding public interest;" reg. 107.

193. Guildford BC's Local Plan Habitats Regulations Assessment, HRA, in November 2017, and updated in June 2018, considered first the likely significant effects of the Plan on the SPA, and then carried out an appropriate assessment, at which stage mitigation was considered. The "pathways of impact" included air quality. This approach accorded with the later CJEU judgment in *"People over Wind v Coillete Teoranta* C323/17 [2018] PTSR 1668*"*, the *"Sweetman"* case. The 2018 HRA was updated specifically to address this case. This case held that mitigation should only be taken into account at the appropriate assessment stage, and not at the earlier stage of considering whether the plan was likely to have significant environmental effects; the approach of the November 2017 HRA update had in fact accorded with the law as pronounced in the *Sweetman* case. Certain of the language of that update, in relation to appropriate assessment, had been made more precise but without changes in substance.

194. The guideline annual mean level of NOx concentrations, for the protection of vegetation, is 30 ug/m3 (micrograms per cubic metre), the Critical Level. Above that level, nitrogen deposition should be investigated. Appendix D to the 2018 update to the HRA, taking 2033 as the year for comparing the positions with and without the Local Plan development, showed that that Critical Level would be exceeded with development somewhere in the range of between 1 and 50 m from the M25, (the range of concentrations was from 40.5 reducing to 23.4 over that distance). The Local Plan development would have contributed between an additional 2.5ug/m3 and 1 ug/ms to that figure again reducing over that distance. With or without the Local Plan development, there would be an exceedance for part of the band within that distance; the width of the area of land in which there was an exceedance would be increased with Local Plan development. On the A3 link, the levels of NOx concentrations, with Local Plan development, reduced from 29.7 to 20.2 over 1 to 50m from the road, and the increase brought about by Local Plan development, was between 2.5-1ug/ms, so that there would be an exceedance over part of that band with the Local Plan development.

195. The annual mean deposition Critical Load for nitrogen, which varies with the habitat at issue, in (kN/ha/yr-(kilos of nitrogen per hectare per year) was 10. That figure was exceeded with Local Plan development in 2033 in the area 1-50 m back from the edge of the M25, at levels of 10.42 reducing with distance to 9.64. Without the Local Plan

development, there would still have been more than 10 kN/ha/yr close to the M25. The position on the A3 was similar though the exceedances were a little less.

196. The assessment in the 2018 update said:

> "10.4.4. Within 50m of the M25 NOx concentrations are still forecast to be above the critical level 'in combination' (the only link for which this is forecast to be the case) but the main role of NOx is as a source of nitrogen and the improvement compared to the baseline is forecast to be substantial enough to bring nitrogen deposition rates down by 5kgN/ha/yr even with the Local Plan in place. Since nitrogen deposition rates are predicted to decline to the critical load, NOx concentrations in themselves are less important because the primary role of NOx is as a source of nitrogen. As NOx exceedances alone is unlikely to result in a significant adverse effect on vascular plants except possibly at very high annual average concentrations of 100 ugm3 or more, which is not predicted by the end of the plan period along any link."

197. In reality a substantial improvement in NOx concentrations and nitrogen deposition rates was expected by 2033, which would be barely affected by the development proposed in the Plan. Even where slowing down of improvement was at its highest, within 50m of the M25, nitrogen deposition rates would still be considerably better than now.

198. Guildford BC produced an Addendum HRA in January 2019 in the light of the CJEU rulings in November 2018 in *Holohan v An Bord Pleanala C-46/17*, and in *Cooperatie Mobilisation for the Environment and others v College van gedeputeerde staten van Limburg* C293/17, C294/17, the *Dutch Nitrogen* case. It had been submitted by Mr Harwood that reliance on anticipated reductions in background air quality was wrong in principle because those improvements were entirely independent of the Local Plan. It was not in the end at issue but that improvements to the baseline against which likely significant or adverse effects would be measured were relevant, if sufficiently certain. Those later CJEU decisions made that clear. The Addendum HRA demonstrated why there was sufficient certainty for the baseline to be adjusted, along with the April 2019 response updated HRA.

199. The 2019 Addendum described the specific habitats required by woodlark, nightjar and Dartford warbler. Their foraging areas were close to their nesting territories. Key habitats were heathland and early stage planation, not dense bracken, mature plantation or permanent deciduous woodland. All three species were highly sensitive to disturbance. Surveys indicated that the nearest SPA bird territories to the M25 and A3 were approximately 300m from the roadside. Even where suitable habitat was present, Dartford warbler territories were not found within 70m of the motorway; nightjar and woodlark territories were even more distant, the closest were 200m away, with the majority more than 500m away, even when ample suitable habitat existed much closer. The 2019 Addendum continued:

> "3.1.3 There is therefore strong reason to conclude that nightjar, woodlark and Dartford warbler (particularly the first

> two species) would be unlikely to successfully establish nesting territories, will undertake much foraging activity, within at least 50m of either the A3 dual carriageway or M 25 motorway. This is probably partly a function of habitat distribution (since the majority of the habitat within 200m of the A3/M25 junction is mature plantation, bracken and permanent deciduous woodland which are generally unsuitable for nesting or foraging) and partly a noise -related displacement effect of the very large volume of traffic movements in this area meaning that the birds settle in more tranquil locations.
>
> 3.1.4 The parts of the SPA closest to the A3/M25 junction still serve an important function through buffering and protecting those areas of the SPA which do support bird territories and foraging habitat. However, the low likelihood of SPA birds actually using the area closest to the dual carriageway and motorway is clearly an important factor when determining the likelihood of roadside atmospheric pollution negatively affecting the ability of the SPA to support the relevant bird species and thus the integrity of the SPA. The modelling undertaken for the Local Plan in 2016 clearly indicates that the area that will be most subject to elevated nitrogen deposition due to the presence of the A3 and M25 is also the area least likely to be used for nesting or foraging by the birds for which the SPA is designated....
>
> 3.1.7 Even with RHS Wisley included therefore, the modelling forecasts total nitrogen deposition rates to have fallen to the critical load at the roadside and below the critical load by15-30m from the roadside by the end of the plan period. This would mean that the atmospheric nitrogen (irrespective of source) would cease having an influence on vegetation composition/structure except possibly within a narrow band along both the A3 and M25 which, as has been established, is the area of the SPA least likely to be functionally used by SPA birds. Moreover, the NOx critical levels and nitrogen critical loads are based primarily on protecting floristic vegetation characteristics such as species-richness and percentage grass cover. The ability of the…SPA to support nightjar, woodlark and Dartford warbler is based far more on habitat structure and appropriate management. It is the broad structure of the vegetation that is relevant to the ability of the area to support SPA birds…."

200. The presence of heathland and traditionally managed plantation within and beyond the SPA boundary was important as nesting and foraging habitat for the birds species which had led to the designation of the SPA. It had not been designated for the habitats in their own right. The impact of the allocation on those habitats was considered but as none of the proposed development sites would cause the loss of

significant areas of those habitats outside the SPA and no adverse effect on integrity was expected, the *Holohan* case required no change to the HRA.

201. This Addendum was criticised by Ockham PC and Wisley Action Group. They contended that the HRA was deficient because any additional nitrogen deposition above the critical load should inevitably lead to a conclusion that there were adverse effects on the integrity of the SPA, a contention no longer pursued. It was also contended that the foraging value of roadside habitat to SPA birds had been ignored.

202. It was clear that Guildford BC had not simply relied on the reduction of nitrogen deposition, with and without the Local Plan development, to support the conclusion that there would no adverse effect on the integrity of the SPA. Its response to the further contentions was to point to [3.1.7], from the 2019 Addendum, which I have set out above. It commented:

> "The information in [3.1.7] is fundamental to the overall conclusion of no adverse effects on integrity because it indicates that a) the critical load for heathland is not projected to be breached and b) even if the improving trends in nitrogen deposition were slower than predicted in [the] modelling (such that deposition rates at the roadside remained above the critical load for heathland) the affected area consists almost entirely of common and widespread habitats of low value to the SPA birds for nesting or foraging, and this is highly likely to remain the case.
>
> 3.1.7 …the strip of habitat within 15-30m of the roadside of the A3/M25 junction will <u>not</u> be of high significance as foraging habitat [for SPA birds] because … it consists primarily of habitat that is of relatively low foraging value for the three species…and which is abundant in the wider area within and outside the SPA… Moreover, it is very unlikely to be reverted to heathland as this would remove the useful buffer the woodland currently provides between the A3 and M25 and the SPA. Therefore this band of vegetation is of very limited significance to sustaining or increasing the SPA population… Invertebrate diversity and abundance… is certainly not expected to decline. As such, it is considered that effects in this 15 to 30m zone will not 'affect the ecological situation of the sites concerned' (in the words of the European Court of Justice) or materially retard the ability of the SPA to achieve its conservation objectives. This is reflected in the fact that Natural England has never objected to the Local Plan or its HRA."

203. The Inspector concluded that the Plan was based on a lawful and adequate HRA and Appropriate Assessment. The Inspector set out the air quality position in IR113:

> "The air quality modelling shows that NOx concentration and nitrogen deposition rates within 200m of the…SPA are expected to be better at the end of the plan period than they are at the moment, due to expected improvements in vehicle

> emissions and Government initiatives to improve background air quality. The Design Manual for Roads and Bridges [DMRB] guidance for air quality assessments recommends reducing nitrogen deposition rates by 2% each year between the base year and assessment year. [The Inspector then set out the actual annual average rate of improvement over the 10 years to 2014]. This reduction occurred despite increased housing and employment development and traffic growth, and is most likely to be attributable to improvements in emissions technology in the vehicle fleet. Consequently, allowing only a 2% year improvement in nitrogen deposition rates represents a precautionary approach. The approach taken towards improvements in baseline NOx concentrations and nitrogen deposition rates is in line with [DMRB] guidance for air quality assessment and does not conflict with the "Dutch Nitrogen" CJEU ruling. "

204. Mr Harwood did not pursue his original contention that the HRA was unlawful because it relied on improvements to the background level of emissions, and did so although the outcome with development would be worse than if there were no development. It was rightly pointed out that what Guildford BC and the Inspector were considering was not related to mitigation of the Local Plan development but related to the accurate and soundly based future changes to the baseline against which the impact of the development had to be considered. The scientific reliability of the future emission reductions was not at issue.

205. Instead Mr Harwood relied on the fact that the development would add to exceedances of critical levels which meant, therefore, that the development was bound to have an adverse effect on the integrity of the SPA. A contrary conclusion, as reached by Guildford BC and the Inspector, was unlawful. He submitted that the LP Inspector had relied on the benefit of anticipated reductions in vehicle emissions to offset those from additional traffic generated by development. This was wrong in principle because it ignored the fact that the outcome would still be worse with the development than without. There was no headroom for further development, because there would still be exceedances of the critical level and load for NOx and nitrogen respectively. The increase would still be harmful.

206. Mr Harwood also submitted that as the critical level for NOx emissions, and the critical load for nitrogen deposition, would still be exceeded at the SPA, Guildford BC and the Inspector ought to have but failed to consider whether the effect of the increased pollution due to the development comprised in the Local Plan would, individually or in combination with other sources, have no adverse effect on the integrity of the SPA.

207. It is perfectly clear, in my judgment, that Guildford BC, whose task it was to undertake the HRA, did consider whether significant adverse effects were likely from the development proposed in the Local Plan; it then undertook an appropriate assessment to see whether there would be no adverse effect on the SPA. That could not be answered, one way or the other, by simply considering whether there were exceedances of critical loads or levels, albeit rather lower than currently. What was required was an assessment of the significance of the exceedances for the SPA birds

and their habitats. Guildford BC did not just treat reductions in the baseline emissions or the fact that with Plan development, emissions would still be much lower than at present, as showing that there would be no adverse effect from the Plan development. The absence of adverse effect was established by reference to where the exceedances of NOx and nitrogen deposition would occur, albeit reduced, and a survey based understanding of how significant those areas were for foraging and nesting by the SPA birds. The approach and conclusion show no error by reference to the Regulations or CJEU jurisprudence. I have set out the 2019 HRAs at some length. The judgment is one for the decision-maker, as to whether it is satisfied that the plan would not adversely affect the integrity of the site concerned; the assessment must be appropriate to the task. Its conclusions had to be based on "complete precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the proposed works on the protected site concerned"; *People Over Wind*. But absolute certainty that there would be no adverse effects was not required; a competent authority could be certain that there would be no adverse effects even though, objectively, absolute certainty was not proved; *R (Champion) v North Norfolk District Council* [2015] UKSC 52 at [41], and *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 at [78]. The same approach applies, following the *Dutch Nitrogen* case, to taking account of the expected benefits of measures not directly related to the plan being appropriately assessed.

208. This is how it was approached. Guildford BC's conclusion was reasonable, and was based on a lawful approach. Both the 2019 update and response were considered by Guildford BC before the Plan was adopted. I reject this ground of challenge.

**Issue 6:** T**he access road at Blackwell Farm and major development in the AONB**

209. NPPF [116] states:

> "Planning permission should be refused for major developments in [AONB] except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of: the need for the development, including…the impact of permitting it, or refusing it, upon the local economy; the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

210. The PPG, applicable with the 2012 NPPF, offered this help: whether or not a development was "major development" was for the decision-maker, taking into account the proposal and the local context. Great weight had to be given to conserving the landscape and scenic beauty of AONB, whether development was "major development" or not. The 2019 version of the NPPF added that the nature of a development, its scale, setting and the significance of its impact on the purposes of the designation as AONB were relevant. I do not read *R(JH and FW Green Ltd v South Downs National Park Authority* [2018] EWHC 604 (Admin) at [27] as supporting a proposition that whether development was "major" should be determined solely by its

degree of impact on the qualities of the AONB. That is obviously an important factor, and it may be decisive. But the PPG and 2019 version of the NPPF are correct in their approach to the meaning of "major development.".

211. It was not disputed but that NPPF [116] only applied in terms to development control decisions, but Mr Kimblin submitted that that did not mean that it had no ramifications in plan-making when assessing the deliverability of allocations. The soundness of the Plan required the allocations to be deliverable. The Inspector needed to recognise that Guildford BC or the Secretary of State might take the view that the access road was "major development" and conclude that the harm did not warrant the road or therefore the development allocation. Mr Kimblin pointed to the £20m cost of the link, what he described as the "very challenging topography" which the road had to cross; it was not simply a development access road but was intended to provide relief to the A31/A3 junction. (Perhaps this was an example of the wider benefits of the infrastructure brought by the allocations).

212. The issue before me was whether the Inspector reached a conclusion on whether the access road was "major development" in the AONB, to which NPPF [116] applied; a contrary conclusion was said to be irrational. If he had reached no conclusion, he ought to have considered the risk to the allocation, and hence to its deliverability, which would arise when a planning application was made, and a decision could be reached that it was indeed "major development", with all the weight, adverse to the development, which would have to be given to such a conclusion.

213. The Inspector expressed some of his views under Issue 7 headed "Whether the Plan's approach towards the protection of landscape and countryside, biodiversity, flood risk and groundwater protection is sound." At IR107, he referred to the Blackwell Farm site's proposed access "which passes through a small part of the AONB… But the allocation would not have a significant impact on [this area]." Policy P1 aims to conserve the AONB, "and contains a presumption against major development within it except in exceptional circumstances where it can be demonstrated to be in the public interest." Subject to a modification, immaterial for these purposes, "the plan's approach to the AONB is sound." The spatial strategy successfully accommodated substantial development whilst avoiding significant landscape harm; the impacts in relation to the needs met did not justify accepting a lower level of development. Indeed Policy P1 adopts the language of NPPF [116]. Its reasoned justification at 4.3.6 adopts as relevant factors the essence of those in NPPF [116].

214. He elaborated on the access when dealing with the site-specific allocation under Issue 10. There was no issue before me about the effect of the development itself, because the Inspector had concluded that it would have very little impact on the character of the AONB or its setting. He said at IR167:

> "However, the access road from the site to the A31 would pass up the hill through part of the AONB. Cutting and grading together with junction and vehicle lighting would have some visual impact. With carefully designed alignment, profiling and landscaping, the effect is capable of mitigation, but the submitted Plan does not allow for adequate land to find the best road alignment in highways and landscape terms or to mitigate its impact through landscaping. [Accordingly, Main

> Modification 37 was required, which introduced a new allocation for the access road; Policy 26a.] This is a site allocation which seeks the best landscape and design solution, taking into account the topography, the existing trees, the need for additional landscaping, and the needs of all users, including walkers and cyclists as well as vehicles entering and leaving the site. It also requires mitigation measures to reduce the landscape impact including sensitive lighting and buffer planting. This modification allows for an appropriate design solution to be developed. Subject to MM37, the scenic beauty of the AONB would be conserved."

215. I reject this ground of challenge.

216. I can see the force in the argument from Mr Findlay and Mr Turney that the Inspector has in substance concluded that, with the Main Modifications, the means have been provided for the access road to be constructed in such a way that it would not constitute "major development." However, he has not expressly so concluded, and it would not have been for him to express the decisive view on the point, or to do so in advance of the detailed design of the road. He has reached the view that the road would not inevitably be "major development", and that it could be designed and landscaped so that the risk of a significant hurdle to the delivery of the allocation is minimised. I do not consider that he needed to go further. In effect, the degree of risk, with the modification, was not such that it made him find the allocation to be unsound. He considered the issue; his language makes his view clear that he sees no significant risk, and is adequately reasoned.

217. But it cannot be ignored that he has included an extent of headroom, complained of by the Claimants, in part because he recognised the difficulties which larger sites face. This issue was not expressly part of his consideration of the justification for the headroom, but hurdles and delays in the way of approving infrastructure would have been well within his contemplation of the sort of problems which larger sites face.

**Overall conclusion**

218. I reject all the grounds of challenge. The three claims are dismissed.

Appendix 4

Case No: CO/3983/2011

Neutral Citation Number: [2012] EWHC 344 (Admin)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2012

**Before** :

**MR JUSTICE OUSELEY**

- - - - - - - - - - - - - - - - -

**Between**

**HEARD** **Claimant**

**- and -**

**BROADLAND DISTRICT COUNCIL**
**SOUTH NORFOLK DISTRICT COUNCIL** **Defendants**
**NORWICH CITY COUNCIL**

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(Transcript of the Handed Down Judgment of
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**Mr R Harwood** (instructed by **Richard Buxton Solicitors**) for the **Claimant**
**Mr W Upton** (instructed by **Sharpe Pritchard Solicitors**) for the **Defendants**

Hearing dates: 6th and 7th December 2011

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# Judgment

**MR JUSTICE OUSELEY:**

1. The Claimant, Mr Heard, challenges the adoption by the Defendants of their Joint Core Strategy on 22 March 2011, a development plan document created under the Planning and Compulsory Purchase Act 2004 for their areas. The challenge is brought under s113 of that Act, on the grounds that the Joint Core Strategy, JCS, was not within the powers of the Act, or there had been a procedural failing which had prejudiced the Claimant.

2. The three Defendants are district councils: Broadland DC and South Norfolk DC which surround Norwich City Council's area to the north and south respectively. The three have co-operated to produce a Joint Core Strategy for their areas. This includes the Norwich Policy Area, NPA, which covers the whole of the City Council's area and, putting it very broadly, the parts of the other two Councils' areas which lie closer to the City.

3. Part of the JCS involves meeting the growth requirements for the NPA laid down in the Regional Spatial Strategy, RSS, as adopted in 2008; it is now the Regional Strategy. The JCS, in order to meet its statutory obligation to conform generally to the RSS, had to provide for the stipulated levels of growth; but it was for the JCS to decide where that should take place. The JCS includes, as part of its provision for the RSS requirement, major growth in an area to the north east of Norwich known as the North East Growth Triangle, predictably, NEGT.

4. Mr Heard is a resident in that area north east of Norwich which is earmarked for major growth in the JCS. He is the chairman of an action group, Stop Norwich Urbanisation, SNUB. Although opposed to urbanisation generally, Mr Heard contends that the JCS is unlawful because the Strategic Environmental Assessment, SEA, which the Councils had undertaken, did not comply with two requirements: first, that it explain which reasonable alternatives to urban growth in the North East Growth Triangle they had selected to examine and why, and second, that it examine reasonable alternatives in the same depth as the preferred option which emerged. It was not said that the examination of the preferred option was itself inadequate, nor that changes in circumstance required a further examination of previously discarded alternatives. The Defendants contended that the work they had done was sufficient for these purposes.

5. His second ground was that the Strategic Environmental Assessment was further unlawful since it did not assess the impact of a proposed new highway, the Northern Distributor Road, the NDR, or of alternatives to it. The NDR was fundamental to the achievement of the full development of the North Eastern Growth Triangle, though there was a case for it even without that development. The Defendants contended that the NDR had been adequately assessed in documents prepared by the highway authority, Norfolk County Council, and that although the JCS supported and in some ways promoted the NDR, it was not for it to assess it or to consider alternatives to it. The County Council was part of the informal Greater Norwich Development Partnership, GNDP, with the three District Councils.

**The legislative framework**

6. A plan such as the JCS has to be subject to what is called Strategic Environment Assessment, by virtue of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment." This has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 SI no.1633. Regulation 8 prohibits a plan being adopted until regulation 12, amongst others, has been complied with. Regulation 13 requires the plan, when in draft, and its accompanying environmental report to be subject to public consultation. Regulation 8 prohibits the adoption of a plan before the environmental report and the consultation response have been taken into account. These reflect requirements of the Directive. Environmental assessment is thus, as Mr Upton submitted, a process and not merely a report.

7. Regulation 12 (2) (b) requires an environmental report "to identify, describe and evaluate the likely significant" environmental effects of implementing the plan, and of "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme". The report has to include such of the information set out in Schedule 2 as is reasonably required although it can be provided by reference to relevant information obtained at other levels of decision-making. Item 8 in the Schedule is "an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties…encountered in completing the information." Mr Upton for the Defendants emphasised the word "outline". It is not, he said, a requirement to give reasons for selecting the option eventually pursued; but one would normally expect them to emerge reasonably clearly from the assessments.

8. European Commission has provided guidance on Article 5(1) of the Directive, the equivalent of regulation 12 of the UK Regulations, as to what level of assessment is required for alternatives. Alternatives to the option being promoted should be evaluated on the same basis and to the same level as the option promoted in the plan:

> "In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen."

9. Mr Upton suggested that it was too simplistic to say that all alternatives had to be assessed to the same degree throughout a process in which, as the Directive and Regulations envisaged, options were progressively narrowed and discarded as successive stages moved towards a preferred option. Those options discarded at earlier stages did not have to be revisited at every subsequent stage; see *City and District Council of St Albans v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin), Mitting J para 14.

10. The guidance also deals with what constitutes a reasonable alternative: it must be realistic, fall within the legal and geographic competence of the authority, but it otherwise depends on the objectives, and geographical scope of the plan. Alternative areas for the same development are an obvious example. The longer term the plan, the more likely it will be that it is alternative scenarios which are examined.

11. Article 1 of the Directive is relevant because it makes clear that the objective of the Directive in providing for environmental assessment is to protect the environment and integrate environmental considerations into the adoption of plans with a view to "promoting sustainable development". This, with Article 4, which permits a national authority to integrate compliance with the Directive into national procedures, has led to the practical implementation of the Directive through the requirement in s19(5) of the 2004 Act that a plan be subject to a Sustainability Appraisal, SA, rather than through a separate document entitled an environmental report. Article 4(3) also recognises that there may be a hierarchy of plans, and that the assessment will be carried out at different levels.

12. To avoid duplication in this process, Article 5(2) permits the decision as to what information is reasonably required to take account of "the contents and level of detail in the plan …, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process…." This is reflected in regulation 12 of the domestic Regulations. Mr Harwood for the Claimant submitted, and I accept, that while options can be rejected as the plan moves through successive stages, and do not necessarily require to be re-examined at each stage, a description of what alternatives were examined and why had to be available for consideration at each stage, even if only by reference back to earlier documents, so long as the reasons there given remained sound. But the earlier documents had to be organised and presented in such a way that they could readily be ascertained and no paper chase was required to find out what had been considered and why it had been rejected; see *Save Historic Newmarket Ltd v Forest Heath District Council* [2011] EWHC 606 (Admin), Collins J, paras 17 and 40.

13. At para 40, he said, and it provides a useful summary of the test:

> "40. In my judgment, Mr Elvin is correct to submit that the final report accompanying the proposed Core Strategy to be put to the inspector was flawed. It was not possible for the consultees to know from it what were the reasons for

rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements for the Directive and so relief must be given to the claimants."

**The facts**

14. The plan-making process is rather convoluted and the sequence of documents constituting it needs to be set out. I could not readily discern it from the parties' submissions.

15. Although the way in which the NDR was treated is the subject of a separate ground, the Northern Distributor Road and the North East Growth Triangle are closely linked and it is convenient to deal with them together chronologically, though it must be noted at the outset that it is Norfolk County Council which bears statutory responsibility for the transportation strategy, and not the Defendants.

16. The County Council consulted on various Norwich Area Transportation Strategy, NATS, options in 2003. An SEA was carried out in 2004 for the NATS, voluntarily since it preceded the coming into force of the Directive; it was not itself subject to public consultation. A number of options, sieved from a larger variety, were fully considered including three which involved differing lengths of NDR, and three which involved no NDR, but improved public transport and other measures to reduce car usage instead. The preferred strategy included what then was called the three quarter NDR; the NATS had been designed to help deliver the growth that would occur in the Norwich area with or without a supportive transport infrastructure, and to address the problems it would create. The NDR was identified as an important element to enable growth within and around Norwich; without it, developer led schemes to provide accessibility to individual developments would lead to a disjointed network. The NDR was "the only feasible solution for dealing with growth and transport problems and issues on a long-term basis."

17. Policy 2 of the NATS, adopted in 2006, provided that an NDR would be developed for implementation in conjunction with other measures. Its precise alignment was not for decision at that stage.

18. The County Council adopted its Second Local Transport Plan in 2006 as required by the Transport Act 2000. A Strategic Environmental Assessment was undertaken for this purpose, published in 2006, and summarised in the LTP itself. It assessed the overall environmental effect of the LTP, the impact of the two potential major schemes, one of which was the NDR, and the environmental effect of the LTP with and without those major schemes. An Environmental Report was consulted on with the Provisional LTP in 2005, but it did not deal with the NDR. The rather longer SEA of 2006, which was not itself consulted on, did not assess the LTP without the NDR alone, nor alternatives to the NDR. The LTP promoted

the NDR as a major scheme, describing its purpose, advantages, position in the development plan framework, and its financing status.

19. Meanwhile, other parts of the development plan process were under way. The revised Regional Strategic Strategy, RSS, had been going through its draft stages, themselves informed by a Sustainability Appraisal at two stages which incorporated a Strategic Environmental Assessment. This was adopted in May 2008, as the East of England Plan, EEP, by the Secretary of State for Communities and Local Government. It became part of the statutory development plan framework under the 2004 Act, and local development plan documents such as the JCS had to conform generally to it. It covered the period 2001-2021.

20. The EEP dealt with transportation; Policy T15 identified the Norwich area as one which was likely to come under increasing transport pressure as a result of underlying traffic growth and the RSS development strategy. Appendix A listed the NDR as one of the regionally significant investments currently programmed for the region, a Major Local Transport Plan Scheme.

21. Policy NR1 dealt with Norwich as a "Key Centre for Development and Change", a regional focus for housing, employment and other activities: 33000 additional houses were to be provided in the NPA between 2001-2021, facilitated by LDDs prepared jointly by the three Defendants; requirements for consequential transport infrastructure "should be determined having regard to" the NATS. Policy H1 elaborated the housing strategy, setting district totals conforming to that total for the NPA parts of the three involved here.

22. During the preparation of the revised RSS, the three Defendant Councils had begun work on their Joint Core Strategy. In November 2007, the Councils issued, for public consultation, an "Issues and Options" paper. This identified the housing requirements for the NPA in the then draft EEP. The three strategic options for dealing with the required growth were dispersing growth across a large number of small scale sites, medium concentration on large estate size sites of 15-3000 units, or Larger Scale Urban Extensions and new settlements in the range 5,000-10,000 dwellings. An initial assessment of the broad locations for major growth, including the north east sectors inside and outside the NDR, was appended; a full sustainability appraisal was promised at the preferred options stage, but early indications on a comparative basis were provided under the heading "Some issues relating to potential growth locations". Comments were sought on which broad strategy should be preferred, (Q11) and on the various major growth locations outlined, (Q12). Potential combinations for large scale growth were identified and comments sought as to which were preferred (Q13):

> "As well as identifying smaller urban extensions and growth in villages, the main pattern of large-scale growth could be:
>
> a) concentration on the north east and south west of Norwich and at Wymondham
>
> b) as a) plus a fourth location for large scale growth

c) as a) plus two or more locations for medium scale growth

d) a different combination for major growth options

e) a more dispersed pattern of growth (perhaps an average of 1,500 dwellings in ten locations)."

23. This document also dealt with strategic infrastructure priorities. The NDR had been identified as essential to managing the demand for travel arising from the levels of growth planned in the EEP, providing access to the potential growth areas on the north eastern fringes of Norwich and enabling traffic to be removed from the city centre and improvements to non–car based transport.

24. The Sustainability Appraisal for the Issues and Options paper assessed the different strategies for locating growth, (Q11 above). There was also an appraisal of the growth locations identified in the appendix, (Q12): north–east sector inside NDR, north–east sector outside NDR, east sector outside NDR, and south and south west sectors; 12 sectors in all, including some combinations. The potential combinations for large scale growth, (Q13), were grouped for appraisal under two heads, which represented a concentrated option and a more dispersed option; option C was regarded as middle ground between the two and option D, a different combination of major growth areas, was not assessed at all. The responses were reported at length.

25. In August 2008, there was a technical consultation with statutory bodies on the practicalities of various major growth options in the NPA. It proposed that the planned housing should be in large scale developments concentrated in particular locations with a mixture of small scale development dispersed around the area: it put forward three options of combinations of large scale development, totalling 24000, allied to options for smaller scale development. No large scale site exceeded 6000, most were between 2-4000. The large-scale options were set out in Policy 5; no decision had yet been made on which was to be favoured. Appendices described them in more detail. Each involved development in the north-east sector with a NDR. (The 33000 units over the period 2008-2026 for the NPA included allocations and permissions as yet unbuilt, so the figure for new allocations was 24000, reduced later to 21000.)

26. In February 2009, the four authorities in the GNDP agreed on a favoured growth option as the basis for public consultation. The reports analysing why that option emerged were not before me, and are not part of the Sustainability Appraisals or Strategic Environment Assessments. Regulations requiring the production of a preferred options report had been changed.

27. The statutory public consultation did not begin until March 2009. The document included as Policy 2 what was required by the EEP for the NPA, and as Policy 5 what was by now the favoured option for providing for that growth in the NPA, a variant of the third option in the technical consultation paper, with 21000 in the larger locations, in Norwich, and in the North East Growth Triangle on each side

of the NDR, moderate growth broadly to the south west of Norwich, with some sites elsewhere identified for small scale development.

28. The commentary to Policy 5 said that there was no significantly different public preference for the locations for major growth, but that the technical consultation included three more detailed options for larger growth in the NPA which were described in appendices. All required the NDR, and all involved major development in the NEGT. The favoured option, said the commentary, drew upon the consultation response and evidence, but was not specific as to what that was.

29. A draft Sustainability Appraisal was produced in April 2009. It dealt with the three original growth options in the technical consultation document of 2008, plus a variant, and with the newly favoured option. These all included the north-east sector with NDR. It appraised the various locations for major growth in Policy 5. It did not deal with the responses to the technical consultation.

30. In August 2009, a report on both statutory consultations was published.

31. Before the JCS was submitted to the Secretary of State for examination, a Sustainability Appraisal report and the pre-submission JCS were issued for yet further public consultation in November 2009. This SA was intended to fulfil the role of the SEA under the Directive and transposing regulations.

32. This SA makes the point that it was not the first stage of SA. However, the summary of the appraisal findings states that a key task of the JCS is to develop a "spatial strategy for distributing" the housing targets set for the area by the EEP. One component was a "major urban extension to the North-East of the city, based around two or three centres either side of the proposed" NDR. The summary noted the "broadly positive sustainability effects" of this element. Another element, because it included major development at Long Stratton, had some local benefits but strategic drawbacks.

33. The SA said that it set out the legal requirements of the SEA Directive and explained how they were or would be met. Chapter 5, (it meant 3), would provide "an outline of the reasons for selecting the alternatives dealt with …."

34. Chapter 3 entitled "Developing the Options" set out the requirement that "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme are identified, described and evaluated." Paras 3.3.2-3.3.3 read:

> "3.3.2 The Pre-Submission JCS sets out the GNDPs current preferred approach in a series of draft policies. These policies represent the GNDPs preferred options, which have been selected and refined following consultation on alternative options that has occurred in the past. In particular, options were published and consulted during the 'Issue and Options' consultation in 2007. All options presented in the Issues and Options

consultation document were also subjected to SA to establish the relative merits of options in sustainability terms and inform the identification of preferred options. The findings of the Issues and Options SA were summaries in a brochure, which is available to download from the GNDP website.

3.3.3 Following the Issues and Options consultation the GNDP were able to identify many of their preferred options. However, it transpired that there was a need to consult further on options for the spatial approach to growth. Identification of a spatial approach to growth is the single most important decision to be made by the JCS, and the decision with the most wide ranging and potentially significant sustainability implications. The section below gives further details as to how the preferred approach was developed."

35. The "Options for the spatial approach to growth" summarised the process by which the preferred option had been arrived at. It started with the three broad strategies from the Issues and Options paper, and the five options for their spatial distribution. The three new distribution options at the technical consultation stage were then set out as above; the NEGT was common to them all. Subsequent tables briefly rehearsed the relative sustainability merits of those three options. The preferred option was then set out; paragraph 3.3.8 said that after the technical consultation, the GNDP "were able to identify their preferred option" for the spatial distribution of growth, which had been published for public consultation. It had not changed since then, when it had been the subject of SA. It had been re-appraised as part of this SA in the "light of further clarity about its implementation".

36. Although the later SEA checklist says section 3.2 is where the alternatives are considered along with chapter 5, the relevant passages on alternatives for this case are those which I have cited, save for the introduction to chapter 4 which refers to the directive obligation to provide an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken. Chapter 5 concerns the preferred options themselves.

37. The appraisal in the annexe to the SA is an appraisal only of the preferred options against a comprehensive array of polices. It is not an examination of alternatives.

38. It included this on Policy 8 "Access and transport", which both sides put some reliance on:

"Recommendations

- One key area of concern relates to whether the NDR, which is promoted through this Policy, would preclude sustainable patterns of travel and transport

> associated with the North East Growth Triangle. It will be of great importance to ensure that the NDR does not have this effect. It will be important to design in ambitious measures that encourage residents to meet more of their needs locally by sustainable modes of travel, and that also allow ease of access to Norwich by rapid public transport. When considering the necessity for the NDR it should be possible to assume minimal use of this road by residents of the Growth Area."

39. Policy 8 said that the transportation system would be enhanced to develop the role of Norwich as a Regional Transport Node, particularly through the implementation of NATS, including construction of the NDR. Implementation of NATS was fundamental to the strategy, enabling the capacity which it would release in Norwich to be used for non-car modes of transport, and providing the access necessary to key strategic employment and growth locations. A corridor, 100m either side of the centre line of the current scheme, was protected and would be shown on the Broadland DC adopted Proposals Map. The NDR "is recognised" in the EEP, is a major scheme in the Local Transport Plan and is in the Department of Transport's Development Pool. This policy was to become Policy 6 in the adopted JCS.

40. Certain changes were made to the JCS which warranted further SA on these "focussed changes". The only point of relevance is that it is clear that the only purpose of the SA was to appraise those specific changes and not alternatives more generally.

41. The JCS was submitted in March 2010 for examination by Inspectors appointed by the Secretary of State. This was held in November and December 2010; their report to the Councils was published in February 2011, and concluded that the JCS was sound and in conformity with the EEP, but certain changes were required.

42. Issue 6 examined whether the JCS provided an appropriate and deliverable distribution of the planned growth required by the EEP for the NPA, coupled with a sustainable pattern of transport infrastructure. One of the issues was whether the distribution was sound given its asserted dependence on the NDR, which might not be built. The NEGT and NDR were closely linked in this argument; the Inspectors rejected a non-NDR package of transportation interventions in para 51:

> "It has been argued that a non-NDR package of NATS interventions has not been modelled and that this could conceivably produce a better overall solution. However, we are not convinced that such an option would be realistic and place weight on the DfT's favourable 'in principle' assessments and the judgements which led to the NDR's acceptance into 'Programme Entry' and the 'Development Pool', as discussed above."

43. The Inspectors nonetheless saw the NDR as uncertain and particularly uncertain in timing. They asked whether suitable changes could be introduced to increase the resilience of the JCS in the face of this uncertainty. They thought that the JCS tended to portray the situation in terms which were too stark: no NDR, no development in the NEGT. Changes were proposed which provided "an appropriately qualified partial alternative approach to development in North East Norwich". Essentially, some development could take place in certain parts without an NDR, but were it not to have happened by the time that threshold had been reached, an Action Area Plan, AAP, would investigate whether any additional growth could take place in the NEGT without it, and subject to any further development which that AAP might show to be satisfactory, there would be a complete review of the JCS proposal for the NEGT.

44. The Inspectors rejected the argument that there should be no growth in the NEGT with or without the NDR, but concluded, para 59:

> "The AAP is the proper mechanism for carrying out the site-specific investigations, considering the alternatives and undertaking the public consultations necessary to establish the point at which non-delivery of the NDR may, or may not, become a 'showstopper' for further development in the growth triangle. The JCS should not go beyond its strategic role and fetter the necessary thorough investigation through the AAP by making premature commitments based on untested scenarios."

45. They then turned to the NEGT. After some comments about how the scale of development came to be in the EEP, the Inspectors dealt with the merits, para 72:

> "Moreover, there are strong reasons to support the selection of this area as a location for a major urban extension. Fundamentally, if development is to take place at the overall scale proposed by the GNDP constituent authorities (which we have found sound), the pattern of small towns and villages in Broadlands offers no realistic alternative 'dispersal' options capable of accommodating such numbers in ways likely to be sustainable and capable of respecting the characters of the host settlements. There is no evidence that Norwich could accommodate more than already reflected in the JCS account of existing commitments, and it appears (from our consideration of the South Norfolk options) that redistribution from the north of the NPA to south is not a viable option. Concentrating the proposed development at this major growth location is the most effective way of maximising its contribution to the NPA's sustainability and providing infrastructure economically."

46. After dealing with the arguments for and against other parts of the proposed distribution of growth, the Inspectors identified the next sub-issue as "Does the JCS distribution represent "the most appropriate plan when considered against reasonable alternatives?"". The question is drawn from PPS12. They said, para 90:

> "With regard to the North East Norwich growth triangle, we have already concurred with GNDP's judgement that from a relatively early stage in the evolution of the JCS there has been no reasonable sustainable alternative to a substantial urban extension in that location if this scale of growth is to be accommodated."

47. They then referred to the 5 options for South Norfolk, including Long Stratton, which had been developed between May 2008 and February 2009. These had been subject to a comparative SA in February 2009. More evidence was now available. Para 94 contained this conclusion:

> "We therefore conclude that South Norfolk's view that the JCS distribution represents the best overall 'political fit' is not inconsistent with judgements that it (a) represents the most appropriate plan when considered against the reasonable alternatives and (b) broadly fulfils GNDP's duty under S39 of the 2004 Act to exercise its DPD-making functions with the objective of contributing to the achievement of sustainable development."

48. Their overall conclusions on Issue 6 were in para 95:

> "Our broad conclusion is that the major principles of NATS, as reflected in the JCS, represents a sound and sustainable transport strategy for the NPA. The implementation of these measures would enable the JCS to proceed with a pattern of growth which is justified, effective and consistent with national policy. This conclusion is subject to a number of necessary changes that have been discussed above. Together, these give the JCS greater resilience and effectiveness in the case of delay to, or non delivery of, the NDR by indicating a mechanism for transparently establishing the maximum extent to which development at the growth triangle could proceed before triggering the need for review of the JCS in that respect."

49. They recommended various changes as their analysis had foreshadowed.

50. The JCS, with the incorporation of the required changes, was adopted in March 2011. An Environmental Statement was required to accompany it by the 2004 Regulations. It had to set out, among other matters, the reasons for choosing the

plan as adopted, in the light of other reasonable alternatives. It said this on that topic:

> "5.1 The iterative plan making process set out above, informed by SA and consultation throughout, involved consideration of a number of reasonable alternatives.
>
> 5.2 This is particularly the case in relation to the spatial location of growth. At the Issues and Options stage ten potential growth options were put forward (plus brownfield sites in the city & suburbs). The Sustainability Appraisal was used to select options to take forward along with other evidence such as the water cycle study, public transport modelling and discussions with children's services.
>
> 5.3 The former preferred options document considered alternatives for growth options and area-wide policies. The alternatives were assessed and captured in the SA document and remain in it as evidence of considering reasonable alternatives.
>
> 5.4 The strategy submitted to the Secretary of State has a relatively concentrated pattern of growth in Broadland, based on sustainable urban extensions and a more dispersed pattern in south Norfolk, with growth focussed on a number of existing settlements. Earlier plan drafts, supported by the SA, included options that had promoted a somewhat less dispersed pattern of growth in south Norfolk, with more limited development at Long Stratton.
>
> 5.5 Having regard to the technical evidence and public comment, the strategic preference of the GNDP was to promote growth in Long Stratton to achieve the consequent environmental improvements to the village.
>
> 5.6 The strategy has been adopted subsequent to a formal Examination in Public. The independent Inspectors concluded that the plan is sound, subject to a number of required changes. These changes have been incorporated into the adopted strategy."

51. The rest of the section summarised the support given by the Inspectors to the adopted strategy.

52. Policy 9 covers the growth strategy for the NPA: new allocations for a minimum of 21000 houses are to be identified across a number of locations against which the minimum number of houses in each was noted. This would be supported by construction of the NDR. Policy 10 identified the locations in the NPA for major new or expanded communities, including the NEGT on both sides of the NDR, the complete development of which required the NDR, but the scope for partial delivery, as required by the Inspectors is also reflected in the policy.

**Ground 1: SEA and alternatives**

53. Mr Harwood's Skeleton Argument for the Claimant contained a number of what seemed to me to be rather carping criticisms of the SEA and JCS, but he refined and improved his submissions in oral argument. He focussed wisely on the appraisal of alternatives to the NEGT, the Claimant's area of interest.

54. None of the high level options for growth in the Issues and Options Paper, (Q11), were actually chosen. The initial assessment of growth options, (Q13), did not cover two of the five options for the location of growth: 3 and 4 in the JCS SA, also denoted as C and D. D did not include growth in the NEGT. Three more specific options were put forward in the statutory technical consultation paper, but the Councils were not relying on the SA accompanying that paper. There was no analysis of why the alternatives selected at that stage only included ones with growth in the NEGT. The preferred option emerged from that process as a mixture of options 2 and 3, and the Environmental Report/SA of September 2009 dealt with it. There was no comparable assessment of reasonable alternatives considered by the three Defendants in it; the assessment of the options from the technical consultation paper was not done on the same basis as that of the preferred option. There was no explanation of the alternatives selected. It contained no cross-reference to any other paper where the identification and equivalent appraisal of alternatives could be found. Its summary was silent on that topic. It was possible that the options considered in the Issues and Options SA were reasonable options, even the only reasonable ones considered, but the SA did not say so, and it was not obvious why every combination of options included a north east sector, especially as the NDR on which it depended was uncertain. There was no comparable assessment of reasonable alternatives against the one preferred, nor could there be one until the preferred option had been identified. It was not his argument that there was some topic of assessment which those options had failed to consider, nor did that meet his argument.

55. Mr Upton, for the Councils, took me through the evolution of the planning documents, placing considerable weight on the April 2009 SA accompanying the public consultation document, and the September 2009 SA. It was for the three Councils to decide what were reasonable alternatives in the light of the SA scoping report of December 2007 and the requirements of the RSS. A range of reasonable alternatives had been identified and assessed, in a way appropriate for the level at which the JCS was operating in the plan-making hierarchy. Many alternatives supported by SNUB were not alternatives which conformed to the RSS, and so could not be considered as alternatives at all. A wide range of options had been assessed on a comparable basis; the later document of September did not have to continue to examine so wide a range as at earlier stages as the *St*

*Albans* case held. There really was only one sensible way to meet the growth requirements, as the Inspectors found.

**Conclusions on Ground 1**

56. I accept much of what Mr Upton said as a description of the way in which the JCS had been arrived at. It could not be stigmatised as unreasonable. The JCS had been the subject of frequent public consultation. The preferred option had been properly assessed itself. A number of alternatives had been assessed.

57. I did not find it easy, however, to discern from Mr Upton's submissions how he answered the essential factual contention at the heart of Mr Harwood's submissions. Certainly it was not by showing me any document in which the outline reasons for the selection of alternatives at any particular stage were clearly being given. This is not the failing of the advocate, but in the factual material which he had to present. Nor was there any discussion in an SA, in so far as required by the directive, of why the preferred options came to be chosen. Nor was there any analysis on a comparable basis, in so far as required by the directive, of the preferred option and selected reasonable alternatives.

58. The Issues and Options Paper and its Sustainability Appraisal are in themselves perfectly sensible papers. However Option D, the different combination of growth areas, was not assessed, and the SA itself did not explain why not. There was therefore no assessment of an alternative which did not include development in the NEGT, nor an explanation of why that was not a reasonable alternative, even though one which might have been identified as an option. This was not unimportant in the light of uncertainty over the NDR and its significance for the full development of the NEGT.

59. The statutory technical consultation produced three more options but did not itself consider any option which did not include development in the NEGT, with an NDR. It did not describe the selection of those options.

60. There was an important report to the Councils in February 2009 which led to the selection of the preferred option; it explains why it was preferred, and could contain information as to why the options examined had been selected. But that was not produced before me, and more importantly, it was not cross-referred to or publicly available as part of any SA. By the time of public consultation in March 2009, the preferred option had been selected.

61. The April 2009 SA did not explain what alternatives had been chosen for examination; it explained the ones which had been considered but not why it was those ones which had been considered and not others. It did not explain why the preferred option had been selected. Again, the only options considered involved development in the NEGT, and the NDR.

62. The crucial stage was the SA submitted in September 2009 in connection with the pre-submission JCS, which the Councils intended as the fulfilment of their directive obligations. It would have been open to the Councils to describe here the process of selection of alternatives for examination at each stage. They could

have done this by reference to earlier documents, if earlier documents had contained the required material. But the earlier documents do not contain the required information as to why the alternatives considered had been selected. If the outline of the reasons for the selection of alternatives was not dealt with in the earlier documents, the Councils had to provide them in this document. But that is missing from the SA.

63. The SA itself only describes what has been done. It contains no further analysis of the selection of alternatives for consideration at various stages, nor for the choice of the preferred option. It contains only a brief assessment of the alternatives, and does not itself contain the explanation which it implies is in the earlier documents, but, which in fact, on this particular aspect is simply not covered in them. Crucially, it is not possible to tell from the SA itself or from earlier documents what the Councils' answer is to the Claimant's question: were the only alternatives it was thought reasonable to select ones involving development in the NEGT, and if so -in outline- why so, especially in view of the uncertainty over the NDR, and the importance attached to the NDR in achieving the JCS with development in the NEGT. The SA is wrong in saying that all the options in the "Issues and Options" paper were assessed.

64. I accept that the Inspectors' report contains much which is supportive of the JCS, including the statement that there was no reasonable alternative to a substantial urban extension in the NEGT, notwithstanding problems with the NDR. But although their report evidences a view about alternatives, it is not itself part of the SA. They may be required to consider alternatives by the Secretary of State in PPS12, but that is not in fulfilment of the directive obligation or of those in the regulations. It is possible of course, as well, that such a view is affected by a lack of examination of an alternative; and it is also possible that the answer to why no non NEGT growth scenario was considered is so obvious to a planner that it needs no explanation; it could not have been considered a reasonable alternative. But I did not receive such an explanation either from the Councils, nor does the Inspectors' conclusion suffice to answer it.

65. The final ES with the final JCS does not take matters further.

66. I conclude that, for all the effort put into the preparation of the JCS, consultation and its SA, the need for outline reasons for the selection of the alternatives dealt with at the various stages has not been addressed. No doubt there are some possible alternatives which could be regarded as obvious non-starters by anyone, which could not warrant even an outline reason for being disregarded. The same would be true of those which obviously could not provide what RS required, or which placed development in an area beyond the scope of the plan or the legal competence of the Defendants. But that is not the case here on the evidence before me, in relation to a non NEGT growth scenario, with or without NDR, and especially with an uncertain NDR. Without the reasons for the earlier selection decisions, it is less easy to see whether the choice of alternatives involves a major deficiency.

67. I accept that the plan-making process permits the broad options at stage one to be reduced or closed at the next stage, so that a preferred option or group of options

emerges; there may then be a variety of narrower options about how they are progressed, and that that too may lead to a chosen course which may have itself further optional forms of implementation. It is not necessary to keep open all options for the same level of detailed examination at all stages. But if what I have adumbrated is the process adopted, an outline of the reasons for the selection of the options to be taken forward for assessment at each of those stages is required, even if that is left to the final SA, which for present purposes is the September 2009 SA.

68. The reasons for the selection of the preferred option, as distinct from the reasons for the selection of the alternatives to be considered, have not been addressed as such either in the SA, although some comparative material is available. The parties dispute the need for these reasons. It was very surprising to me that the reason for the selection of the preferred option was not available as part of the pre-submission JCS or the accompanying September SA, nor readily available in a public document to which the public could readily be cross-referred, with a summary.

69. This is not an express requirement of the directive or regulations, and I do not regard European Commission guidance as a source of law. However, an outline of reasons for the selection of alternatives for examination is required, and alternatives have to be assessed, whether or not to the same degree as the preferred option, all for the purpose of carrying out, with public participation, a reasoned evaluative process of the environmental impact of plans or proposals. A teleological interpretation of the directive, to my mind, requires an outline of the reasons for the selection of a preferred option, if any, even where a number of alternatives are also still being considered. Indeed, it would normally require a sophisticated and artificial form of reasoning which explained why alternatives had been selected for examination but not why one of those at the same time had been preferred.

70. Even more so, where a series of stages leads to a preferred option for which alone an SA is being done, the reasons for the selection of this sole option for assessment at the final SA stage are not sensibly distinguishable from reasons for not selecting any other alternative for further examination at that final stage. The failure to give reasons for the selection of the preferred option is in reality a failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage. This is what happened here. So this represents a breach of the directive on its express terms.

71. There is no express requirement in the directive either that alternatives be appraised to the same level as the preferred option. Mr Harwood again relies on the Commission guidance to evidence a legal obligation left unexpressed in the directive. Again, it seems to me that, although there is a case for the examination of a preferred option in greater detail, the aim of the directive, which may affect which alternatives it is reasonable to select, is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination along side whatever, even at the outset, may be the preferred option. It is part of the purpose of this process to test whether what may start out as preferred should still end up as preferred after a fair and

public analysis of what the authority regards as reasonable alternatives. I do not see that such an equal appraisal has been accorded to the alternatives referred to in the SA of September 2009. If that is because only one option had been selected, it rather highlights the need for and absence here of reasons for the selection of no alternatives as reasonable. Of course, an SA does not have to have a preferred option; it can emerge as the conclusion of the SEA process in which a number of options are considered, with an outline of the reasons for their selection being provided. But that is not the process adopted here.

72. Accordingly, the Claimant succeeds on this ground.

**Ground 2: the absence of an assessment of the NDR in the JCS SA**

73. Mr Harwood submitted that there was a duty on the councils to have regard to the LTP under regulation 15 (1)(b) and (c) of the Town and Country Planning (Local Development)(England) Regulations 2004 SI No. 2204. The RSS required regard to be had to the NATS. It did not require the NDR. Since the NDR was part of the JCS, and was said to be "promoted" through it, the JCS SA had to include an environmental assessment of the NDR. Instead, it had been taken as part of the baseline for the assessment of other development, colloquially as a given and not as a JCS proposal; Mr Doleman, a transportation planner with the County Council, made as much clear in his witness statement. The County Council was part of the GNDP, which as a partnership would promote the NDR, with the JCS supporting its provision and protecting its alignment, opposing inconsistent development. The NDR and NEGT went together: there may have been a case put forward by the County Council for the NDR without the NEGT, but there was no case for the full NEGT without the NDR. If the NDR were undesirable, it would affect the whole growth strategy, or at least the distribution of the major growth areas. The JCS protected an alignment corridor for the preferred three-quarter length NDR, yet that had not been assessed. However, his real concern was not with alternative alignments but with alternatives to the NDR altogether. Nothing in the Inspectors' report showed that there were no reasonable alternatives to the NDR. Given that there remains uncertainty over whether the NDR will be built, and the effect which that would have on the NEGT, there had to be alternatives to the NDR and NEGT. Those had not been considered.

74. The JCS did not cross-refer to other documents, notably the voluntary SA which accompanied the NATS, or the SA which accompanied the LTP. The NDR was not dealt with as a discrete option in them either. The voluntary NATS SA could not be equivalent to a statutory SA since the SA had not been subject to public consultation, unlike NATS itself, nor could any decision have been made in the light of consultation responses to it.

75. Mr Upton's essential contentions were that the NATS and LTP determined what infrastructure was required to support the level of development and its location. The RS explicitly required account to be taken of the NATS, of which NDR was part. The LTP had taken the general level and distribution of growth in the draft EEP into account. Mr Upton took me through the various planning documents which showed that the NDR had been part of the baseline since at least 2007. His submission was supported by PPS 12: "Local Spatial Planning"; para 4.10 said

that "the outcome of the infrastructure planning process [here the NATS and LTP] should inform the core strategy and should be part of a robust evidence base". It recommended that those responsible for delivering infrastructure and those responsible for the core strategy align their planning processes. Para 4.28 emphasises the importance of not advancing a core strategy which depended on others for its implementation when those others had not agreed it. No challenge had been made to the adequacy of its SEA. Incorporation into the JCS did not require a separate SEA. There was no need to duplicate or to repeat SEAs.

76. Those two plans were also the statutory responsibility of the County Council as highway and transportation authority. There were no reasonable alternatives for the District Councils to consider in promoting the JCS, since transportation was not within their statutory competence. So it had rightly been treated as part of the baseline, though the various levels of development in various locations on the NDR and on the roads leading to it would be relevant. Besides, the Inspectors had concluded that there was no reasonable alternative to the NDR. The reference in the SA of September 2009 to the NDR being promoted through the JCS was no more than a reference to its being relied on in the JCS. The detail of the route would be dealt with in the Broadland DC AAP.

**Conclusions on ground 2**

77. The starting point to my mind is that proposing or planning the NDR is not within the remit of the JCS. It is for the highway authority to plan and promote the NDR through its plans. The NDR is outside the Defendants' legal competence. There is no substance in the suggestion that the existence of the informal GNDP alters the allocation of statutory responsibility because it includes the Defendants, and all four Councils are in harmony on this issue.

78. Of course, there are references in the JCS to the role of the NDR, and there is a relationship between the policies for accommodating growth in the JCS, and the infrastructure to support it. The promotion of the NDR, its status in the EEP, NATS and LTP, and its budgetary status, make it a relevant factor in the judgment of where growth should be. It would be unwise, if not impossible, to create a coherent strategy for any plan if the proposals for major infrastructure were ignored. It may make it unreasonable to consider alternative means of providing for growth which do not use that proposed infrastructure. That may be very relevant to how the defendants approached, albeit not explicitly, the selection of reasonable alternatives for examination. Their uncertainty may have to be planned for as well, as the Inspectors' recommended amendments showed. But none of that, including reliance on it for the selection of the preferred option, makes the NDR part of the JCS in the sense that the environmental effect of the NDR has to be assessed, growth in the NEGT or not, as a proposal of the JCS. That does not turn the JCS into a plan or proposal for the infrastructure on which it relies.

79. True it is as well that the land use plan has to provide for safe-guarding of the corridor for the NDR, since to fail to do so could prevent its development, but that safe-guarding does not make the NDR a proposal of the plan for which alternatives and impacts have to be assessed. The fact that the JCS talks of promoting the NDR, a safeguarding and supportive role, does not amount to its

adoption by another authority or create an obligation to assess it and alternatives. It merely reflects the importance which another public body's infrastructure proposal has.

80. In so far as the concern was with alternatives to any NDR rather than with alternative NDR alignments, that did not fall within the scope of the JCS. The alignment corridor itself is not a choice made within the JCS; the corridors were assessed in the 2006 LTP. Nor is the corridor a matter of concern to the Claimant who seeks an alternative to any NDR. The effect of different alignments within the protected corridor would be for assessment when the precise line came to be chosen.

81. The Defendants were right in my judgment to treat it as part of the baseline against which the environmental effects of the growth strategy were assessed. Of course the effects of the growth may be additional to the effects of the NDR which are part of the baseline in the assessment of the strategy, but the NDR is not itself a proposal for assessment in the JCS.

82. The second reason why this ground fails is that the NDR has been subject to environmental assessment as part of the adoption of the NATS, albeit voluntarily, and as part of the LTP. Those plans have been adopted. This challenge cannot review any inadequacies in that assessment. The time for such a challenge is long past. It is not the function of the JCS to remedy any deficiencies in earlier assessments undertaken for the purposes of other plans.

83. Accordingly this ground of challenge fails.

**Discretion**

84. Mr Upton submitted that no relief should be granted were he to lose on either of these grounds. A great deal of work had been done; the claims were in reality that the SEA had not been expansive enough on one topic. A number of alternatives had clearly been examined on a comparable basis as required. The reasons for selection and choice between alternatives and the preferred option were spelt out in a publicly available report, even though it was not part of the SEA. The Inspectors' Report gave reasons justifying the selection of the preferred option over the alternatives. The Directive had been substantially complied with. The Claimant had not been prejudiced by any procedural failings; he had put forward no realistic alternative which had been ignored.

85. Mr Harwood submitted that the failings he identified went to substance and not to procedure, and so questions of substantial compliance with procedural requirements did not arise. The obligation was to identify and explain the selection of reasonable alternatives, to assess them on a comparable basis, to consult the public about the plan and SA, and to reach a decision in the light of their responses. That was the essence of the process of environmental assessment. *Berkeley v Secretary of State for the Environment* [2000] UKHL 36, [2001] 2 AC 603 also showed that a disparate collection of documents, a paper chase through which the public might find its way, did not constitute substantial compliance with Directive requirements on environmental assessment. This case was to be

distinguished from *Younger Homes (Northern) v First secretary of State and Calderdale District Council* [2004] EWCA Civ 1060, Laws LJ at paras 42-47.

86. S113 of the Planning and Compulsory Purchase Act 2004, as amended by the s185 of the Planning Act 2008, gave a wide variety of powers, short of quashing the whole JCS and starting again, which should be exercised here if relief were to be granted.

**Conclusions on discretion**

87. I am satisfied here that I should not exercise my discretion against the grant of any relief. There has been a series of failings in relation to the directive obligations. The Defendants may well be right that the option of no NEGT growth is unrealistic. But I cannot regard there as being substantial compliance with the directive. I will hear submission on the precise form of relief, in the light of the powers in s113 of the 2004 Act, as amended.

Appendix 5

Neutral Citation Number: [2020] EWHC 3204 (Admin)

Case No: CO/1290/2020

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2020

**Before** :

**THE HON. MR JUSTICE HOLGATE**

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**Between :**

| | |
|---|---|
| **Flaxby Park Limited** | **Claimant** |
| **- and -** | |
| **Harrogate Borough Council** | **Defendant** |
| **-and-** | |
| **(1) Secretary of State for Communities and Local Government**<br>**(2) Oakgate Yorkshire Limited**<br>**(3) CEG Land Promotions III (UK) Limited** | **Interested Parties** |

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**Christopher Katkowski QC & Richard Moules** (instructed by **Town Legal LLP**) for the **Claimant**
**Paul Brown QC** (instructed by **Harrogate Borough Council**) for the Defendant
**Christopher Young QC & James Corbet Burcher** (instructed by **Walker Morris LLP**) for the 2nd Interested Party
**James Strachan QC** (instructed by **Walton & Co**) for the 3rd Interested Party
The 1st Interested Party did not appear and was not represented

Hearing dates: 27-29 October 2020

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# Approved Judgment

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII.*
*The date and time for hand-down is deemed to be 10:00am on 25.11.2020*

**Mr Justice Holgate**

## Introduction

1. Policy DM4 of the Harrogate District Local Plan ("the Local Plan") provides for a new settlement within a "broad location for growth" in the Green Hammerton/Cattal area, lying to the east of the A1(M). The claimant, Flaxby Park Ltd ("FPL") brings this challenge under s. 113 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") to quash that policy and other references in the Local Plan to that location for the new settlement. The local planning authority for the district is the defendant, Harrogate Borough Council ("HBC"), which adopted the Local Plan on 4 March 2020.

2. The Local Plan covers the period 2014 to 2035. Policy GS1 makes provision for a minimum of 13,377 new homes over the Plan period. To help meet this requirement, Policy GS2 states that growth will be focused in the district's main settlements, settlements on the key public transport corridors and "a new settlement within the Green Hammerton/Cattal area". Policy GS2 adds:-

> "A broad location for growth is identified in the Green Hammerton/Cattal area, as shown on the key diagram. Within this area a site for a new settlement will be allocated through the adoption of a separate Development Plan Document (DPD). The DPD will be brought forward in accordance with the development principles outlined in policy DM4."

3. Policy DM4 states *inter alia*:-

> "Land in the Green Hammerton/Cattal area has been identified as a broad location for growth during the plan period and beyond. The boundary, nature and form of a new settlement within this broad location will be established in a separate New Settlement Development Plan Document (DPD)."

Policy DM4 also requires the DPD to address a number of principles for the design, development and delivery of the new settlement, including the provision of at least 3,000 dwellings of an appropriate mix to provide a balanced community (A), about 5 hectares of employment land (B), and appropriate public transport services and infrastructure to serve the new settlement including the improvement of two existing rail stations (F).

4. FPL is the owner and promoter of land focused on the former Flaxby Golf Course, Harrogate, which broadly lies along the western side of the A1(M). FPL has promoted the development of a new settlement on this site since 2016, through the Local Plan process and an outline planning application, submitted in November 2017 and refused by HBC on 14 October 2020.

5. Oakgate Yorkshire Limited, the second Interested Party ("IP2"), is a property development company that is promoting land in the vicinity of Cattal which forms part of the Policy DM4 location. It has been promoting a new settlement here since 2016.

6. CEG Land Promotions III (UK) Limited, the third Interested Party ("IP3"), is a property development company that is promoting land in the vicinity of Green Hammerton which forms part of the Policy DM4 location. It has been promoting a new settlement here since 2013.

7. FPL, IP2 and IP3 have all participated actively in the preparation and examination of the Local Plan by making written and oral representations throughout the process. It is important to record at this point that the issues raised in these proceedings do not involve any challenge to HBC's decision that the Local Plan should contain a policy promoting a new settlement with at least 3,000 houses. The issues are solely concerned with the lawfulness of the decision to include policies identifying Green Hammerton/Cattal as a broad location for that new settlement.

8. FPL's claim mainly relates to the requirements of Directive 2001/42/EC ("the Directive"), as transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633) ("the 2004 Regulations"), for what is often referred to as strategic environmental assessment ("SEA"). The three grounds of challenge may be summarised as follows:-

    (1) The Council's Members failed to consider the reasonable alternative of allocating a new settlement in the broad location of Flaxby in breach of the Directive as implemented by the 2004 Regulations. The Inspector had required assessment of that alternative, but the fruits of that additional sustainability work were never put before Members. Instead Council officers decided whether the further sustainability work justified any change to the "finely balanced" decision regarding the location of the proposed new settlement;

    (2) The Council failed to assess the reasonable alternative of a new settlement in the broad location of Flaxby on an equal basis as it was required to do by the 2004 Regulations as interpreted by the English courts; and

    (3) The Council and the Inspector had insufficient evidence about, and made insufficient enquiry into, the viability and deliverability of the Green Hammerton/Cattal broad location despite FPL expressly putting those matters in issue and providing evidence calling the viability and deliverability of this proposed broad location into question.

9. Grounds 2 and 3 are concerned with whether there was a failure to address particular considerations in the SEA process and the examination of the draft Local Plan. On the other hand, ground 1 is concerned with identifying which body or person was required to consider the comparison of broad locations in the SEA, irrespective of the outcome of grounds 2 and 3. In the circumstances it is convenient to deal with grounds 2 and 3 before going on to consider ground 1.

10. I would like to express my gratitude for the way in which this case was presented by all parties, both in their skeleton arguments and at the hearing. There was good co-operation in the production of an agreed statement of facts, the refining of the issues needing to be decided and the production of electronic bundles complying with the protocols and guidance on remote hearings. Such good practice greatly assists the work of the Planning Court for the benefit of its users.

11. The remainder of this judgment is set out under the following headings:

**Witness statements**

12. FPL relied upon a lengthy witness statement by Mr. Neil Morton of Savills, who acted as their planning consultant in the Local Plan process. This document set out the history of that process and FPL's involvement in it. However, for the most part, it simply duplicated material which was already contained in the claimant's Statement of Facts and Grounds. There were a few short sections in the witness's evidence which added to that Statement, but there appears to be no reason why that additional material could not have been set out in the latter document. A Statement of Facts and Grounds is required to set out the facts relied upon and be verified by a statement of truth (CPR 8.2, 22, 54.6, and PD54A paragraph 5.6). Ultimately, FPL's case at the hearing did not depend upon Mr Morton's witness statement except for a small section relevant to ground 3.

13. Similar criticisms apply to much of the material contained in the witness statements of Mr Procter and Mr McBurney on behalf of IP2 and IP3 respectively. Fortunately, HBC did not find it necessary to submit a witness statement.

14. It is necessary to add a few observations about witness statements in proceedings in this court.

15. First, I should re-emphasise the principle that witness statements should not provide a commentary on documents exhibited or make points which are essentially a matter for legal submission or argument (*JD Wetherspoon plc v Harris* [2013] 1 WLR 3296; *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government* [2020] PTSR 993 at [66]-[70]).

16. Second, "evidence" of this kind is also objectionable because firstly, costs are incurred unnecessarily, not only by a claimant but also by opposing parties in having to consider whether to respond to that material and secondly, court time is taken up in considering that material needlessly. It is also a waste of time to have to compare such a witness statement with the statement of facts and grounds to identify the extent to which, if at all, the statement adds anything of substance.

17. Third, a defendant and interested party may feel under pressure to file a witness statement responding to the claimant's "evidence" in order to avoid a forensic point, as was made in this case, that the material has gone unchallenged. So the unnecessary proliferation of material continues. The simple point is that in so far as the claimant's evidence offends the principle in *Wetherspoon*, it should not call for an answer in the form of an opposing witness statement. In general, the defendant and interested

parties should respond to legal argument and submissions advanced by a claimant in the Summary Grounds of Defence and in the Detailed Grounds of Defence, supplemented by any additional documentary evidence upon which they rely, together with any witness statement to cover points which could not be addressed in, or are not apparent from, those documents. Factual matters may be dealt with in an Acknowledgment of Service but must be verified by a statement of truth (CPR 22.1(1)(d) and 54.1(2)(e)).

18. Fourth, lengthy witness statements are normally unnecessary because of the general principles governing the admissibility of fresh evidence in judicial or statutory review. Except for certain cases of procedural error or unfairness or perhaps irrationality, judicial or statutory review generally proceeds on the basis of the material which was before the decision-maker together with the decision itself (*R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584; *Newsmith Stainless Limited v Secretary of State for the Environment* [2017] PTSR 1126 at [9]; *R (Network Rail Infrastructure Limited) v Secretary of State for the Environment, Food and Rural Affairs* [2017] PTSR 1662 at [10]).

19. In *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [37]-[41] the Divisional Court discussed the limited circumstances in which expert evidence may be admissible in a public law challenge based upon irrationality to explain technical matters which the court *would not otherwise be able to understand*. But the court sounded a warning that if that material "is contradicted by a rational opinion expressed by another qualified expert, the justification for admitting *any* expert evidence will fall away" ([41] emphasis added). The resolution of disputed factual or expert evidence generally falls outside the proper scope of proceedings for judicial or statutory review.

20. Fifth, it must be borne in mind that a party is not entitled to rely upon expert evidence without the court's permission (CPR 35.4) and that that rule cannot be circumvented by presenting evidence of expert opinion in a witness statement as to fact.

**Statutory Framework**

*Planning and Compulsory Purchase Act 2004*

21. Section 13(1) of PCPA 2004 requires the authority to keep under review matters which may be expected to affect the development of their area or the planning of its development. Those matters include the principal physical, economic, social and environmental characteristics and the size, composition and distribution of the population of the area (s.13(2)).

22. Section 17(3) of PCPA 2004 requires a local planning authority to set out its policies relating to the development and use of land in their area in local development documents, such as the Local Plan in this case. The authority must keep under review their local development documents having regard to the results of any reviews under s.13 (s.17(6)). In general, a local development document must be adopted by resolution of the local planning authority (s. 17(8)).

23. Section 19(1A) to (1C) provide as follows:-

> "(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.
>
> (1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.
>
> (1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole)."

24. Section 19(2)(a) requires that in the preparation of a local development document the local planning authority must have regard to "national policies and advice contained in guidance issued by the Secretary of State".

25. Section 19(5) provides that:-

> "The local planning authority must also-
>
> (a) carry out an appraisal of the sustainability of the proposals in each development plan document;
>
> (b) prepare a report of the findings of the appraisal."

In this case the Local Plan is a "development plan document" (s.37(3) and s.38(3)).

26. PCPA 2004 does not say any more about what a sustainability appraisal and report ("SA") is required to address. The Act received Royal Assent on 13 May 2004. The 2004 Regulations were made on 28 June 2004 and came into force on 20 July 2004. I agree with Ouseley J in *Heard v Broadland District Council* [2012] Env.L.R. 23 at [11] that s. 19(5) integrates the requirements of the Directive and the 2004 Regulations with the statutory process for the preparation and examination of development plan documents. This solution is authorised by Article 4(2) of the Directive. In practice the sustainability appraisal produced for s 19(5) must satisfy the requirements in the 2004 Regulations for an "environmental report".

27. The local planning authority must submit a draft development plan document to the Secretary of State for independent examination (s.20(1)) before adoption may be considered under s.23. Before submitting a draft plan, the authority must comply with a number of requirements in The Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012 No. 767) ("the 2012 Regulations"), including consultation on proposals for a draft plan, publicity for the plan submitted for examination, and the procedure allowing representations to be made on that submitted version. Any such representations must be forwarded to the Secretary of State with the submitted plan and must be taken into account by the Inspector who carries out the examination under section 20(4) (regulations 18 to 23 of the 2012 Regulations).

28. The authority must not submit a draft development plan document to the Secretary of State unless "they think the document is ready for independent examination" (s.20(2)(b)).

29. The purpose of the examination is *inter alia* to determine whether the submitted plan satisfies the requirements of s.19 and the 2012 Regulations (s.20(5)(a)) and "whether [the plan] is sound" (s.20(5)(b)).

30. The legislation does not define what is meant by "soundness". However, paragraph 182 of the National Planning Policy Framework ("NPPF") 2012 (which applied to this Local Plan pursuant to the transitional arrangements in paragraph 214 of the NPPF 2019) set out a number of criteria which included a requirement for a plan to be:-

> "Justified – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on *proportionate* evidence" (emphasis added)

31. If the examining Inspector considers that the authority has complied with the duty under s.33A of PCPA 2004 to co-operate with other planning authorities and the requirements referred to in s.20(5)(a) and that the plan is "sound", he must recommend that the document be adopted by the authority (s.20(7)). Where he considers that one or more of those requirements is not satisfied, he must recommend to the authority that the plan is not adopted (s.20(7A)). However, subject to being satisfied that the authority has complied with the duty to co-operate under s.33A, the Inspector must recommend "main modifications" to the draft plan so as to make it "sound" or otherwise compliant, if requested to do so by the plan-making authority (s.20(7B) and (7C)).

32. The Inspector must give reasons for his or her recommendations (s.20(7) and (7A)). The authority must publish the Inspector's "recommendations and the reasons" (s.20(8)).

33. By virtue of s. 23(2) to (4) the local planning authority may adopt a local plan only if the Inspector has recommended that outcome, whether in relation to the plan as submitted for examination or with any main modifications to make that plan sound and/or satisfy the requirements referred to in s.20(5)(a). If the authority wishes to adopt the plan, it can only do so in accordance with the terms of the recommendations made by the Inspector, along with any other modifications that do not "materially affect" the policies in the plan (sometimes referred to as "minor modifications"). However, if the Inspector has recommended against the adoption of the plan (s.20(7A)) the authority cannot adopt that plan.

34. If the Inspector recommends adoption, the authority has only a binary choice as to whether to adopt the local plan in accordance with the terms of that recommendation, or to withdraw the plan. After the examination of a local plan has been concluded by the production of the Inspector's final report, the local planning authority cannot seek to adopt the plan with any modifications which the Inspector has not recommended (other than ones which do not materially affect those policies already set out in the plan together with any main modifications). I therefore accept the submission of Mr Katkowski QC that the motion put forward by one councillor at the meeting of the full Council on 4 March 2020 that the Local Plan be *adopted* with the new settlement

policy but without endorsing the broad location at Green Hammerton/Cattal was not something which HBC could lawfully agree to.

35. Section 23(5) provides that a development plan document can only be adopted by "resolution of the authority", which Mr Brown QC accepted refers to the full Council.

36. It follows from this analysis of the 2004 Act, that if the Inspector decides that it would not be reasonable to conclude that the requirements of s.19(5) have been satisfied, which in effect refers to the SEA requirements in the 2004 Regulations, he must recommend that the local plan is not adopted, unless he is asked by the authority to recommend main modifications which would satisfy the relevant requirements. This procedure reflects the general principle in the case law that SEA is an iterative process, which may allow a defect at one stage to be cured by steps taken subsequently (see e.g. *Cogent Land LLP v Rochford District Council* [2003] 1 P & CR 11; *No Adastral New Town Limited v Suffolk Coastal District Council* [2015] 1 Env LR 551; *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [144]).

37. It also follows that it is a pre-requisite for the adoption of a plan that the Inspector should judge it to be sound. In *Barratt Development Limited v City of Wakefield Metropolitan District Council* [2011] J.P.L 48 at [11] Carnwath LJ (as he then was) said that although local authorities and Inspectors must have regard to NPPF policy on "soundness", that is only advisory and not prescriptive. Ultimately it is they who are the judges of "soundness". At [33] he said:-

> "soundness was a matter to be judged by the Inspector and the Council, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law." (emphasis added).

38. Section 113(3) enables an "aggrieved person" to apply to the High Court for statutory review of *inter alia* a development plan document on the grounds that (a) it is not within the powers conferred by Part 2 of PCPA 2004 or (b) a "procedural requirement" has not been complied with. The High Court may only intervene if either (a) the document "is to any extent outside the appropriate power" or (b) "the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement" (s.113(6)). It is common ground that non-compliance with the 2004 Regulations is a ground upon which the court may intervene under s. 113.

*The SEA Directive*

39. Directive 2001/42/EC deals with 'the assessment of the effects of certain plans and programmes on the environment'. Recital (4) states:

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and

> programmes are taken into account during their preparation and before their adoption."

40. Recital (9) states that the Directive "is of a procedural nature".

41. Article 1 provides: -

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment"

42. Article 2b, defines "environmental assessment":-

> "'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9."

43. Article 3(1) provides:-

> "An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects."

44. Article 4(1) provides:

> "The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure"

45. Article 5(1) addresses the content of an environmental report:-

> "Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

The information required under Annex 1 includes in paragraph (h) "an outline of the reasons for selecting the alternatives dealt with".

46. Article 5(2) provides-

> "The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

47. Thus, the information to be included is that which may "reasonably be required", taking into account *inter alia* "the contents and level or detail in the plan" and "its stage in the decision-making process" and "the extent to which certain matters are more appropriately assessed at different levels in that process". In the present case, the new settlement policies in the Publication Draft and Submission Draft of the Local Plan were of a strategic rather than detailed nature, based upon high-level analysis, even at the stage when HBC was proposing to identify a "site" rather than a "broad location" in the plan.

48. Articles 6 and 7 deal with the consultations required to be carried out. Article 8 deals with decision-making:-

> "The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure"

49. Article 9 requires the publication of information when a plan is adopted including:-

> "(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, ……"

*The 2004 Regulations*

50. It is common ground that the Local Plan was a plan for which SEA was required under the 2004 Regulations (see regulation 8(1)).

51. Regulations 8(2) and (3) provide:-

> "(2) A plan or programme for which an environmental assessment is required by any provision of this Part shall not be adopted or submitted to the legislative procedure for the purpose of its adoption before–

> (a) ……;
>
> (b) in any other case, the requirements of paragraph (3) below, and such requirements of Part 3 as apply in relation to the plan or programme, have been met.
>
> (3) The requirements of this paragraph are that account shall be taken of–
>
> (a) the environmental report for the plan or programme;
>
> (b) opinions expressed in response to the invitation referred to in regulation 13(2)(d);
>
> (c) opinions expressed in response to action taken by the responsible authority in accordance with regulation 13(4); and
>
> (d) the outcome of any consultations under regulation 14(4)."

Regulation 8(3)(b) and (c) refers to the responses to the consultations required with specified agencies and with the public.

52. Regulation 12 deals with the preparation of an "environmental report". Sub-paragraphs (1) to (3) provide:-

> "(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and

> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

53. For most purposes, the term "responsible authority" is defined as "the authority by which or on whose behalf [a plan or programme] is prepared" (regulation 2(1)).

*Delegation of functions for the preparation of plans*

54. Section 101(1) of the Local Government Act 1972 ("LGA 1972") contains a general power for a local authority to delegate any of its functions to one of its committees or officers, subject to any express provision in that Act or any statute passed subsequently. It is under this provision that authorities have delegated many planning functions.

55. Part 1A of the Local Government Act 2000 ("LGA 2000"), which was inserted by the Localism Act 2011, introduced revised arrangements for the governance of English local authorities. In broad terms, s.9B requires such authorities to operate under either "executive arrangements" or "a committee system". The latter expression applies where the authority does not operate executive arrangements. Those "arrangements" provide for the creation and operation of the authority's executive and for certain of the authority's functions to be the responsibility of the executive (s.9B(4)). By s.9C an executive comprises the elected mayor of the authority or a councillor elected as leader of the executive, plus two or more councillors. In effect, the executive forms what is generally referred to as a cabinet. HBC operates an executive or cabinet system with an elected leader, and not a "committee system".

56. Sections 9D and 9DA, together with the regulations made thereunder, are central to defining the extent to which the functions of a local authority are made the responsibility of its executive or remain with that authority (see ss. 9D(1) and 9DA(1)).

57. Section 9D(3) authorises the Secretary of State to make regulations to define any function of a local authority which:-

> (a) is *not* to be the responsibility of its executive; or
> (b) *may* be the responsibility of its executive under the arrangements made by the authority (and which must therefore be addressed by the authority's "executive arrangements" - see s.9D(4)); or
> (c) *to the extent* specified by the regulations, either is or is not the responsibility of its executive.

There is a fourth category. Section 9D(2) provides that any function of a local authority which is *not* specified in such regulations is to be the responsibility of the authority's executive in accordance with the "executive arrangements" it makes.

58. Section 9DA(2) provides that any function which is the responsibility of an executive of a local authority is to be regarded as exercisable on behalf of that authority. Section 9DA(3) prevents any such executive function from being exercisable by the authority itself and disapplies s.101 of LGA 1972 so that that function may not be delegated by the authority to a committee or to an officer. Instead, the functions which are the

responsibility of the executive may be delegated (e.g. to a committee or an officer) by the executive, or by the leader or a member of the executive, in accordance with s. 9E.

59. The effect of section 9DA(4) is that any function which is not made the responsibility of an authority's executive is to be discharged in any way which would otherwise be permissible or required. So those functions may be exercised by the authority or delegated under s.101 of LGA 1972 to a committee or officer, subject to any regulations made under s.9DA(5).

60. The relevant regulations are the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (SI 2000 No. 2853) ("the 2000 Regulations"). These regulations were made under s.13 of the LGA 2000, before that part of the statute was replaced in England by the relevant provisions of the Localism Act 2011. However, the 2000 Regulations continue to have effect as if made under ss.9D and 9DA (see s.17(2)(b) of the Interpretation Act 1978).

61. Regulation 2 and schedule 1 of the 2000 Regulations set out functions which are *not* to be the responsibility of an authority's executive. Part A of schedule 1 lists a wide range of planning functions, including the determination of planning applications. Such functions are therefore to be discharged by the authority itself, unless delegated under s. 101 of LGA 1972 to a committee or to an officer.

62. Regulation 3 and schedule 2 of the 2000 Regulations deal with the functions which *may be*, but need not be, the responsibility of an authority's executive, and therefore are to be addressed under the authority's executive arrangements. Although schedule 2 identifies some planning and environmental functions, none relate to any aspect of the local plan process.

63. Regulation 4 and schedule 3 deal with functions which are *not* to be the sole responsibility of an authority's executive.

64. By regulation 4(1), the formulation or preparation of a development plan document is not to be the responsibility of the executive as regards any of the "actions" described in regulation 4(3). Those actions are therefore matters to be dealt with by the local authority, subject to any permissible delegation under s.101 of LGA 1972. They include the approval of a draft local plan for submission to the Secretary of State for examination under s.20 of PCPA 2004 and the adoption of the plan, with or without modifications. As we have seen, s.23(5) of PCPA 2004 precludes delegation by an authority of the decision to adopt. By virtue of regulation 4(8)(a), the decision on whether or not to approve the draft of the local plan for submission to examination cannot be delegated under s.101 of LGA 1972.

65. However, by regulation 4(2) the function of formulating or preparing a development plan in all respects other than the approval of a draft plan for submission to examination and the adoption of the plan is made the responsibility of the authority's executive.

66. The effect of regulation 4(4) (so far as is material) is that an authority's executive is expressly made responsible for the specified functions of amending, modifying, revising, varying, withdrawing or revoking a local plan, in so far as the taking of such action is recommended by the Inspector in his or her report on the examination. The

executive's responsibility would therefore include a decision on whether to accept a recommendation that "main modifications" be made to a local plan (see s. 23(2A) of PCPA 2004). But the responsibility for those specified functions in all other respects lies with the authority, not the executive (regulation 4(4)(b)). In the present case, it was the responsibility of HBC's Cabinet's to decide whether to modify the local plan in accordance with the Inspector's report before the full Council could decide whether to adopt it as so modified.

67. Regulation 4(8)(b) has the effect of disapplying s.101 of LGA 1972 in relation to any function described in regulation 4(4) to the extent that it is *not* made the responsibility of the executive. So, the functions described in that provision of amending, modifying, revising, varying, withdrawing or revoking a local plan, in so far as they are the responsibility of the authority, may only be exercised by the full Council and cannot be delegated.

68. The position may be summarised as follows:-

(i) The effect of regulation 4(1) to (3) of the 2000 Regulations is that any function in connection with the formulation and preparation of a development plan document, including a local plan, is the responsibility of the executive, save for the approval of a draft plan for submission for examination and the adoption of the plan following that examination, both of which are the responsibility of the local planning authority;

(ii) The functions in (i) above of the *authority* cannot be delegated (regulation 4(8)(a)), but those functions of the *executive* may be (s.9E);

(iii) The functions of amending, modifying, revising, varying, withdrawing, or revoking any development plan document is the responsibility of the executive in so far as that action is recommended by the Inspector carrying out the examination under s.20, but are otherwise the responsibility of the local planning authority (regulation 4(4) and see also s.9D(4)). The executive, but *not* the authority, may delegate the functions referred to in this paragraph for which it is responsible (s. 9E of the 2000 Act and regulation 4(8)(b));

(iv) Any other function involved in the statutory process leading to the adoption of a local plan which is not expressly specified in the 2000 Regulations is the responsibility of the executive (s.9D(2)) and may be delegated under s.9E. These functions would include a request to the Inspector under s. 20(7C) of PCPA 2004 to consider recommending "main modifications". That "request" does not itself amount to a variation or modification of the plan. Any such alteration would only come about if firstly, the Inspector were to recommend in his report on the examination that it be made and secondly, the executive were then to accept that recommendation when considering the report.

## Factual background

69. It is necessary to set out the evolution of the Local Plan policy for a new settlement in some detail.

70. HBC began its plan-making process in 2014. It issued a scoping report and made an initial call for interested parties to notify sites with potential to be allocated for development.

*The Issues and Options consultation document - 2015*

71. In July 2015 HBC published the Local Plan: Issues and Options consultation document. The accompanying Draft Sustainability Appraisal: Interim Report assessed 11 growth strategies, from which HBC selected 5 for consultation. Option 5 was for "creating a new settlement within the A1(M) corridor to accommodate up to 3,000 new homes", with the remaining housing requirement being met in the main urban areas of Harrogate, Knaresborough, Ripon, market towns and villages. The SA referred at p. 206 to an area of search running broadly north/south for about 3 miles either side of the A1(M).

72. The SA included a comparative assessment based upon 16 objectives, which was subsequently carried forward in later SA work during the local plan process. Under the heading "10. A transport system which maximises access while minimising detrimental impacts", HBC identified proximity to the motorway encouraging commuting by car as a disadvantage, while seeing the scope for improvements to public transport as an advantage, depending on the location of the site within the A1(M) corridor. It was also recognised from the outset that a new settlement would be a long-term option going beyond the plan period, given the need to secure land assembly.

*Consultation draft Local Plan - October 2016*

73. HBC published a Draft Local Plan in October 2016 for consultation between 11 November and 23 December 2016. Policy GS2 set out a growth strategy to 2035. The opening words of the policy stated:-

> "The need for new homes and jobs will be met as far as possible in those settlements that are well related to the key public transport corridors."

74. Paragraph 3.12 stated:-

> "Those settlements within, or located in close proximity to, the key public transport corridors have the best access to public transport and therefore also a wide range of jobs, services and facilities within the district but also further afield."

75. Because there were insufficient sites within existing settlements to meet housing needs in full, the plan proposed a "major new strategic allocation for housing with associated employment and supporting services and facilities" which would "take the form of a new settlement". This was intended to help meet housing needs during the plan period and beyond (paragraph 3.15).

76. Two potential locations were identified:-

- land at Flaxby, adjacent to the A59/A1(M), known as Site FX3; and

- land in the Hammerton area, Green Hammerton/Kirk Hammerton/Cattal, known as Site GH11.

FX3 had an area of 196.6 ha and GH11 an area of 168.1 ha. Paragraph 10.10 stated that the final version of the plan would include only one new settlement.

77. Paragraph 5.6 of the accompanying draft SA stated:-

> "An initial sustainability assessment of these two new settlement options is included in Appendix 8a. Further work will now be undertaken to inform which option for a new settlement is taken forward and included at the Formal Publication Stage consultation in July 2017."

78. The SA assessed 6 potential locations. One site at Cattal, referred to as CA4, was discounted at this point because, taken in isolation, it could provide only 1,000 homes and so was below what was considered to be the threshold for a new settlement. The SA noted that there are two rail stations near GH11 offering the potential for non-car journeys, whereas in the case of FX3 there were "significant transport/accessibility problems …", an "aspiration to deliver a rail station … no detailed work undertaken" and "limited scope for non-car travel from site". The relative proximity of FX3 to Knaresborough was also identified as a disadvantage. But at that stage the appraisal said that FX3 was an "option for further consideration".

79. During the consultation on the 2016 draft Local Pan two additional sites were put forward, one of which was also at Cattal, CA5. This site included part of CA4 and was larger than that site.

*Additional Sites Plan - 2017*

80. Between 14 July and 25 August 2017, HBC undertook consultation on an Additional Sites Plan dated July 2017. At this stage GH11 became HBC's preferred location for a new settlement. Paragraph 7.1 stated:-

> "….. a new settlement is being proposed which will help to meet the need within the plan period and beyond. Last year HBC consulted on two options, one at Flaxby and one in the Hammerton area. It was made clear in the consultation document that HBC would only identify one of the options for inclusion in the draft plan. Following a review of both of these options, together with options at Malt Kiln village (Cattal) and an option at Deighton Grange (Kirk Deighton) HBC has concluded that land at Green Hammerton is the preferred location for a new settlement. HBC has prepared a separate New Settlement Report that sets out the reasons for this choice".

Paragraph 7.2 identified HBC's objectives for the new settlement, including that it should "be designed to integrate into and enhance the local public transport network, maximising public transport use", "be designed to have its own identity and sense of place and create a new focus for growth" and "have the propensity to grow in the future".

81. The New Settlement Report was published in July 2017. Its purpose was explained at paragraph 1.5:-

> "to provide detail on HBC's rationale for including a new settlement as part of the Local Plan growth strategy and to make an assessment of a preferred new settlement location to be taken forward and included in the Publication Local Plan".

HBC's objectives for the new settlement remained as previously stated (paragraph 3.13).

82. The Report contained a like for like comparison of four sites, CA5, FX3, GH11 and OC5. In Chapter 5 "Constraints and Opportunities" FX3 was assessed for accessibility by rail as follows:-

> "there is currently no direct access to the Leeds-Harrogate-York line. As the rail line runs to the south west of the site there may be the potential to develop a new station stop, preferably to the north of the A59 so as to be within walking/cycling distance of the majority of the site. The former Goldsborough station site lies to the southwest of the site although outside of the site boundary shown in the draft Local Plan. The development promoter has undertaken initial investigations on the feasibility of reopening a station in this location to serve the new settlement. This could be a potentially complex solution and without certainty: as it currently stands, a station and rail service are not in place. Knaresborough and Cattal rail stations, the nearest existing stations, are outside of walking distances but potentially accessible by improved bus services."

By contrast the report's appraisal of GH11 on this subject was:-

> "the site benefits from two operational stations within walking distance of the whole site offering choice."

83. The "comparative analysis" was brought together in chapter 6. Under accessibility it was stated that "CA5 and GH11 have additional benefit of access to rail stations within or immediately adjoining the sites".

84. The conclusions of the Report were set out in chapter 7. Site OC5 was rejected because it lay outside all of the key transport corridors identified in the draft Local Plan (paragraph 7.2). the document then turned to address the three other sites:-

> "7.3 Of the remaining three sites, they all share similar constraints in terms of landscape, ecological and heritage impacts and the need to upgrade physical infrastructure (Junction 47, A1M) and utilities). However, the comparative assessment has not identified these to be showstoppers and the assessment indicates that these should be capable of site specific mitigation, although this may be more challenging for some sites.
>
> 7.4 *Maximising public transport use* is one of HBC's objectives for the new settlement and sites *CA5 and GH11 are best placed to achieve this with direct access to train stations. Whilst the promoters of site FX3 have indicated that provision of a new station is possible there is no evidence that this could be delivered during the plan period, if at all.* Sites CA5 and GH11 also offer a greater opportunity to grow in the longer term, beyond the current plan period and, therefore, have more potential to support a wider range of services and jobs whereas site FX3 is more restricted by virtue of its proximity to the A1(M) and Knaresborough to the west.
>
> 7.5 Sites CA5 and GH11 share many similarities. This is due largely to their close proximity to one another: indeed an area of land to the east of Station Road between the A59 and the rail line is included within the boundaries of both sites. However, the larger part of site GH11 is within reasonable walking distance (800m) of the services and facilities available in Green Hammerton (school, shop, GP) than is the case with site CA5, where only the very eastern edge of the site is within reasonable walking distance of the services and facilities in Kirk Hammerton (school). Accessibility to services that can meet the day to day needs of residents, and by sustainable modes, in the early stages of the development is considered to be a distinct advantage of site GH11.
>
> 7.6 On balance, it is concluded that site GH11 should be the preferred option for a new settlement location for inclusion in the Publication version of the Harrogate District Local Plan." (emphasis added)

85. Paragraph 7.3 indicates that in relation to general planning considerations there was not much to choose between the three sites. Nonetheless, HBC reached a clear conclusion about which site they preferred so that they could advance their Plan. At this stage they selected GH11. Paragraph 7.4 is of crucial importance to that judgment. Some two years after the Issues and Options consultation there was still no evidence that a new station to serve FX3 could be delivered within the plan period running to 2035, if at all. CA5 and GH11 were best placed to maximise public transport use because of their direct access to existing railway stations.

86. HBC also identified the "greater opportunity" offered by CA5 and GH11 to provide for growth in the longer term beyond the plan period. HBC's judgment was that FX 3

was more restricted because of proximity to the A1(M) (which according to the SA involved issues about the effect of noise from traffic) and proximity to Knaresborough to the west (which had raised issues about the need for separation and how far the settlement could expand in that direction).

87. Mr Katkowski QC rightly accepted that HBC's judgment was that GH11 was preferable to CA5, but both were preferable to FX3, for the reasons summarised in paragraph 7.5.

*New Settlement Background Paper and Publication Draft Local Plan - January 2018*

88. In January 2018 HBC issued its Publication Draft Local Plan for consultation under regulation 19 of the 2012 Regulations. In order to explain its "final preferred approach" in the draft plan on a new settlement, in November 2017 HBC had already published its New Settlement Background Paper (see paragraph 1.2).

89. On the subject of connections to the railway system, the Background Paper said this with regard to FX3:-

> "A new station at Green Hammerton could bring opportunities for an interchange and improved parking in a central location within the site. However, adding a new station anywhere is problematic and would present logistical issues (updating of signalling system and decommissioning of older stations) and would be costly with a long lead in time. As Flaxby is located on a fast section of the line, a new station in this location would impact on journey times. A case to limit stops elsewhere on the line could not currently be put forward without updating the signalling system (not currently scheduled or funding available) and increasing the number of stations on the line may make it more difficult to secure improvements. Improving existing stations would on balance be preferable to delivering a new station because of uncertainty over delivery."

90. In the summary and conclusions in chapter 8 HBC explained why it continued to prefer the Green Hammerton location over Flaxby, but considered that the local plan should identify a broad location comprising areas CA4/CA5 and GH11/GH12 within which a site would be identified in a subsequent Development Plan Document ("DPD") (see paragraph 8.8), rather than allocate a defined site in the Local Plan:-

> "8.3 The consideration of alternative locations in Section 7 has highlighted that, for the majority of the sites, the consideration between alternative sites is finely balanced and that there are few differences in the opportunities and constraints for each site and the performance of the sites when assessed against sustainability objectives. All of the sites, with the exception of Sites DF7 and OC5 'fit' with the Local Plan growth strategy being located in a key public transport corridor, although sites CA4/CA5, FX3 and GH11/GH12 have the additional advantage over Site OC11 of being located in the rail corridor to the east of Knaresborough.

8.4 Throughout the evolution of the Local Plan the council has considered the various options put forward. At the Draft Local Plan stage the council considered that, based upon a comparative consideration of the alternatives put forward, the preferred options were either Flaxby or Green Hammerton. At the Additional Sites Consultation stage, a preference was given for the Green Hammerton proposal. The council has now had the opportunity to review all the very latest evidence (including additional material provided by the various site promoters) alongside wider consultation feedback, and considers that the optimum approach to ensure the best possible place making solution for the future would be to continue to focus on the Green Hammerton option, but introduce additional flexibility to enable full consideration of adjoining land which has also been promoted as a new settlement (Maltkiln). The key reasons for the selection of this site over the other options includes:

- The area has direct and convenient access to the Leeds Harrogate York rail corridor providing opportunities for sustainable travel via two operational rail stations. The scale of development would support the improvement and enhancement of existing rail facilities and services, realising substantial positive environmental, social and economic benefits.
- The area is also located with convenient access onto the A59 for local bus services as well as providing accessibility to the highways network. It is sufficiently far enough away from the A1(M) to not suffer from noise or disturbance from that corridor.
- The area provides greater scope to deliver funding for infrastructure and wider planning obligations to support the creation of a quality place.
- A large area of land has been promoted for development providing scope to define the best possible site boundary and inclusion of necessary infrastructure through future comprehensive master planning.
- The site is located close to existing village settlements which provide some local services. These could assist in the very early phases of development to provide for day to day A362 New Settlement Background Paper 2017 Harrogate Borough Council 69 Summary and Conclusions 8 needs of new residents (albeit over time the new settlement will be expected to address its needs through the provision of a comprehensive range of new services and facilities).

8.5 A new settlement represents an unprecedented scale of development in the district and the council is mindful of the need to ensure the effective and successful planning and delivery of a new settlement including achieving a step change

> in the quality of place making. In considering the evidence and key issues raised during the Additional Sites consultation, the council considers that to achieve this, a broad location for a new settlement in the Green Hammerton area should be identified in the Local Plan rather than allocation of an individual site or landownership defined boundary that has been promoted to date. This approach offers a number of potential benefits:
>
> - Consideration of the optimum boundary for a new settlement taking account of all key factors including land ownership, infrastructure and masterplanning matters;
> - Provides for further consideration of the provision of key infrastructure, for example to ensure the most appropriate long term solution to improvements to the A59 and local rail facilities;
> - Provides a further opportunity to consult on the most appropriate spatial and place making approach (such as creation of a new settlement in accordance with Garden City principles), a site specific boundary, disposition of key land uses and relationship with existing neighbouring villages; and
> - It does not result in a delay to the adoption of the Local Plan or meeting local housing requirements within the plan period.
>
> 8.6 Map 8.1 is the broad area for growth. It generally includes Sites CA4/CA5 and GH11/GH12 previously considered albeit boundaries will be defined through subsequent planning policy development. The exact boundary will seek to best exploit the existing railway line and optimise the delivery of the necessary improvements to the A59 in the longer term. It will also further reflect on the relationship to existing communities."

91. Three points can be seen from chapter 8 of the Background Paper. First, HBC continued to take the view that for most of the planning considerations which had been assessed, there was little to choose between the majority of the sites, including Flaxby and Green Hammerton/Cattal. Second, HBC continued to identify as key reasons for preferring the Green Hammerton/Cattal location, its direct access to the rail corridor through two operational rail stations, the absence of significant noise constraints from the A1(M), and proximity to existing settlements providing local services assisting new residents in the early phases of development. Third, the paper also referred to the broad location as providing scope for selecting an optimum site boundary in the future.

92. At meetings in November and December 2017 HBC's cabinet and the full Council received a report by officers on the process which had been followed and an analysis of issues raised in consultation, as well as the Background Paper and what became published in January 2018 as the latest iteration of the SA. On that basis they

considered and approved the Publication Draft Local Plan. Paragraphs 5.15 to 5.18 of the officers' report stated:-

> "5.15 Whilst the housing and employment need figure has increased, it is still considered appropriate to identify a single new settlement in order to meet identified needs. At the Additional Sites consultation stage the Council identified the Green Hammerton option as its preferred location. Following submissions to this consultation, officers have reviewed all the very latest evidence (including material provided by the various promoters) alongside wider consultation feedback and consider that the focus should remain on the Green Hammerton option but introduce additional flexibility to enable a full consideration of adjoining land which has also been promoted as a new settlement (known as Maltkiln).
>
> 5.16 In order to achieve this it is proposed that a broad location for a new settlement in the Green Hammerton area should be identified in the Local Plan rather than allocation of an individual site or landownership defined boundary that has been promoted to date. This approach offers a number of potential benefits:
>
> - Consideration of the optimum boundary for a new settlement taking account of all key factors including land ownership, infrastructure and masterplanning matters
> - Provides for further consideration of the provision of key infrastructure, for example to ensure the most appropriate long-term solution to improvements to the A59 and local rail facilities
> - Provides a further opportunity to consult on the most appropriate spatial and placemaking approach, a site-specific boundary, disposition of key land uses and relationship with existing neighbouring villages and
> - It does not result in a delay to the adoption of the Local Plan or meeting local housing requirements within the plan period.
>
> 5.17 A New Settlement Background Paper is attached at Appendix 3 that draws together relevant information from the Local Plan evidence base, sets out the consideration of the alternative options and proposals, explains the decision making process and rationale behind the choices made including the final preferred approach, which has been included in the Publication Local Plan.
>
> 5.18 Whilst the District Local Plan will provide the strategic policy context for development of a new settlement the detailed site boundaries and detailed planning of the new settlement will

> be taken forward through the preparation of a separate Development Plan Document (DPD). ….."

93. It follows that the Cabinet and full Council approved the decision to discard alternatives to the Green Hammerton proposal and, having reached that decision decided that that proposal should be taken forward as a "broad location" extending to 604 ha, within which the optimum site boundary would be identified in a future DPD.

94. The Publication Draft Local Plan (dated January 2018) included draft policy DM4: Green Hammerton/Cattal Broad Location for Growth. It is common ground that this policy was in very similar terms to policy DM4 in the draft of the plan submitted by HBC in August 2018 to the Secretary of State for examination and in the version adopted on 4 March 2020. Paragraph 10.15 of the Publication draft relied upon the Background Paper to identify the "broad location" for the new settlement (ie. areas CA4/CA5 and GH11/GH12). The new settlement is to provide at least 3,000 homes, of which at least 1,000 are expected to be built by 2034/35 (paragraph 10.21).

95. The draft SA (January 2018) that accompanied the Publication Draft Local Plan did not assess any other broad location for growth. It compared the policy DM4 broad location with a number of *sites* including FX3. This provided a record for the public and consultees as to how those sites had been assessed as the SA continued to evolve during the local plan process. The SA plainly states that in the local plan documents produced in 2017 and 2018 FX3 was not identified as a new settlement option for further consideration, in contrast to the position in 2016. In other words, FX3 had been "sieved out". According to HBC, there continued to be significant transport/accessibility problems with FX3 (p. 223 of draft SA).

96. In March 2018 FPL made representations on the Publication Draft of the Local Plan objecting to the fact that the Draft SA had not assessed any other "broad locations" or areas of search for growth apart from the preferred location. All the comparisons made had been between the policy DM4 broad location and other *sites* such as FX3. The consultants said that Flaxby should be assessed in the SA as a broad location, that is as a wider area of search extending beyond the boundaries of FX3.

97. In June 2018, HBC's consultants, AECOM, prepared a Sustainability Appraisal Health Check. It appears that a number of consultees, and not simply FPL, had raised issues to do with "reasonable alternatives". AECOM advised that there were numerous approaches that could be taken. They then summarised four options with varying degrees of risk of legal challenge, acknowledging the delays to the local plan process that could occur and the constraints of the timetable for adoption of the plan. It was in this context that AECOM pointed out that, given the iterative nature of the SEA process and in accordance with case law, any deficiencies found to exist in the SA could be rectified during the examination. Specifically on the objections which had been raised by FPL on HBC's treatment of Flaxby, AECOM advised:-

> "The change in approach is not fundamental to the selection of a new settlement. The choice is still the same with regards to Green Hammerton or Flaxby. However, within Flaxby, there are no 'sub options' to consider. Appraisal of a broad area of search at Green Hammerton versus a broad area of search at

> Flaxby would reveal very similar findings to the appraisal of site options that have already been undertaken."

*Submission of Local Plan for examination - August 2018*

98. HBC submitted the Local Plan for examination on 31 August 2018. Policy DM4 retained the broad location for growth at Green Hammerton/Cattal. The SA continued to compare the merits of that broad location with other sites, not broad locations.

99. On 14 November 2018, HBC's Cabinet received a report from officers recommending the grant of delegated powers to deal with issues that were likely to arise in the course of the examination. It was explained that during the examination officers would be expected to provide information in response to requests from the Inspector and views on possible amendments to policies. The delegation would enable the examination to proceed efficiently, but any proposed modifications to the plan resulting from the process would require the agreement of the Council before adoption. The Cabinet approved the following resolution: -

> "That Cabinet delegates authority to the Executive Officer Policy and Place for the duration of the Examination, in consultation with the Cabinet Member for Planning to:
> a. provide formal responses to questions from the Inspector alongside other supporting statements and documentation as requested by the Inspector; AND
> b. to agree to modifications to the plan through the examination period in order to make the plan sound."

Mr Katkowski QC rightly accepted that the reference to "soundness" made it clear that the second part of the delegation related to potential "main modifications" (see ss. 20(7C) and 23(2A) of PCPA 2004). But it is also clear that the delegation was only to last for the duration of the examination and required the Executive Officer to consult with the Cabinet Member for Planning.

100. The examination hearings took place between 15 January and 13 February 2019. A number of documents were submitted by FPL and by HBC dealing with the SEA issues regarding the proposals for a new settlement. FPL submitted that the SA was flawed because HBC had not assessed any alternative "broad location" for the settlement, including Flaxby. FPL also claimed that such a defect could not subsequently be cured through the SEA/local plan process and that a fresh environmental report would have to be prepared before the examination commenced. FPL did not pursue that argument in the hearing before me.

101. In an undated document (but apparently supplied on 14 January 2019) HBC responded to FPL's submissions, stating that no further SEA was required comparing alternative broad locations. The Council's reasoning included the following extracts from Table 1 and paragraph 3.4:-

> "The change in approach is not considered to be fundamental to the decision making process with regards to the selection of a new settlement. All reasonable alternatives for a new settlement have been tested in the SA (as discussed at section 7 of the SA

> Report). Following this process, the Council identified that the new settlement option sites in the Green Hammerton / Cattal area were emerging as a preferred location for growth. However, it was considered that a broad area of search should be identified to allow for detailed issues and opportunities in this area to be explored in more detail (to help determine an appropriate boundary for a new settlement).
>
> *At this stage, other new settlement options had been discounted in favour of the options in the Green Hammerton/Cattal area. It was therefore considered unnecessary to identify additional 'broad areas of search' to compare to the Green Hammerton / Cattal location. The choice of location had been made but the exact boundary was to be determined.*" (emphasis added)
>
> "The legal opinion goes on to suggest at para 21 that the failure to do this meant that the Flaxby site was not treated equally. It is accepted that appraisal of a broad area of search is not exactly on a like-for-like basis with an assessment of individual site options (i.e. it allows for greater flexibility to address impacts). However, there had already been an assessment of new settlement options across the district which was carried out on a like-for-like basis and which provided an understanding of the issues and opportunities in key locations such as Flaxby, Green Hammerton/Cattal. *Flaxby was not taken forward as the preferred location based on that assessment and not as a result of a comparison with the assessment of the broad location. This process helped to inform the identification of a broad area of search, which is only necessary in order to determine the optimum boundary of the new settlement.*" (italics added)

FPL did not raise any issue about the factual accuracy of that italicised summary of the basis upon which HBC had reached its decision.

*Sustainability Appraisal Addendum 2 - 2019*

102. On 11 March 2019, the Inspector issued a letter to HBC stating:-

> "Having considered the submissions from Flaxby Park and Keep the Hammertons Green, along with HBC's additional submission in relation to Matters 1 and 12, it seems to me that the issue of whether additional SA work in relation to broad locations for growth for a new settlement is needed is finely balanced. This being so, I consider that it would be sensible for HBC to undertake additional work in this regard. In short, for it to assess broad locations around each of the proposed potential sites. I may comment further on the matter of the proposed new settlement in due course, if I deem it necessary in light of the additional work."

103. On 14 March 2019, HBC's Executive Officer Policy and Place wrote to the claimant's planning consultant referring to the Inspector's letter:-

> "As you will see he is asking the Council to undertake additional Sustainability Appraisal (SA) work, to assess broad locations around each of the new settlement options that had been promoted and considered by the Council.
> The broad location for growth around Green Hammerton/Cattal was identified on the basis of known available land. The Council will look to identify a broad location around the other new settlement options on the same basis, i.e. based on known available land. Where there is no additional land available the sustainability appraisal will be limited to the extent of the land that you have previously promoted as a new settlement. The reason for this is on the grounds of deliverability.
> You submitted the attached land for consideration (FX3). I would be grateful, if you could confirm the extent of land that you consider to be available. If you propose new land over and above that previously promoted then I would need you to provide confirmation from the landowners that they are willing to have their land considered and/or details of any option agreements that secure control of the land. *The Council is aware of other land promoted around FX3 (shown on the attached plan) and will be writing to those promoters separately to confirm availability.*
> In order that the Council can progress this work in a timely manner I would appreciate a response by Friday 22 March. Should I not hear from you by that date I shall proceed on the basis that the extent of land available is as you have previously promoted.
> If you have any questions then please get back to me." (emphasis added)

104. On 22 March 2019 the claimant's planning consultant responded as follows:-

> "…… I can confirm on behalf of Flaxby Park Ltd that all of the land identified as FX3 on your plan is available (it is all owned and controlled by FPL).
> In addition, your plan excludes land at the former Goldsborough Station which is owned by FPL (title plan attached) and forms part of their outline planning application. As you know, the outline planning application proposes to re-open the station alongside a park and ride and this should be added to the FX3 site.
> Please could you keep me informed on the progress of this work."

On the same date, HBC responded:-

> "Thank you for getting back to me. We will amend the area accordingly."

105. In May 2019 HBC produced a draft "Sustainability Appraisal 2: Broad Locations of Growth" dated May 2019 ("SAA2") which included an assessment of a broad location at Flaxby (site OC16), two other broad locations, Dishforth (OC18) and Kirk Deighton (OC19), and the DM4 broad location (OC12). The OC16 location significantly expanded FX3 by including additional land identified through the exercise in March 2019, ie. land extending northwards along the A1(M), westwards towards Knaresborough, to the south of the A 59 and to the east of the A1(M).

106. Paragraph 1.6 of draft SAA2 stated:-

> "Sites CA5, FX3 and GH11 lie within the public transport corridor to the east of Knaresborough. However, maximising public transport is one of the council's objectives for the new settlement and sites CA5 and GH11 were best placed to achieve this with direct access to train stations. Whilst the promoters of site FX3 indicated that provision of a new station was possible there was no evidence that this could be delivered during the plan period, if at all. Sites CA5 and GH11 also offered a greater opportunity to grow in the longer term, beyond the current plan period and, therefore, had more potential to support a wider range of services and jobs whereas site FX3 was more restricted by virtue of its proximity to the A1(M) and Knaresborough to the west. For these reasons FX3 was discounted in 2017."

This confirms that FX3 had been rejected not only on the grounds of accessibility to public transport, but also because it offered a lesser opportunity for growth in the long term, as had previously been explained in the New Settlement Report in November 2017.

107. Draft SAA2 was subject to a "targeted consultation" between 8 and 30 May 2019. HBC consulted 12 parties interested in the location of a new settlement, including FPL, landowners within the Green Hammerton/Cattal broad location, and an environmental amenity group (Keep the Hammertons Green) which was opposed to a new settlement at the DM4 broad location. FPL submitted representations in response to this consultation on 30 May 2019. They contended *inter alia* that there had not been a proper opportunity for landowners in the vicinity of the FX3 site to put forward additional land as part of a broad location or area of search. HBC resisted that contention in their response.

108. In July 2019 HBC published a revised version of the draft SAA2, taking into account comments received in the targeted consultation exercise. The scoring analysis was updated to correct errors which had been identified and accepted.

109. The overall conclusions were set out in paragraphs 4.2 and 4.3:-

> "4.2 Whilst the broad locations all produced a red score against one or more sustainability appraisal criteria, it should be acknowledged that any new settlement would have negative impacts mainly through development scale and the impact that scale has on, for example, the surrounding landscape or

existing settlement. From the above assessments it is clear that all the broad locations achieve similar ratings but there are key points of difference between them which are as follows:

- A key part of the Local Plan growth strategy is locating development in areas that have good public transport links. Maximising public transport is one of the council's objectives for the new settlement. Significant long term positive effects in relation to sustainability objectives transport (10), climate change (11) and local needs met locally (9) will be met in those locations where there is good access to public transport, especially where there are existing bus and rail services which can be enhanced. OC18 and OC19 do not sit in the defined public transport corridor, albeit that there may be scope to expand a bus service into OC19; this would be less likely in relation to OC18. OC12 includes within it two operational rail stations that allows direct and convenient access to the Leeds-Harrogate-York rail line, providing sustainable transport options from the earliest phases of development. Whilst OC16 includes the former Goldsborough Station, there is no substantive evidence to suggest that this can be delivered in the medium to long term, and certainly would not be available from the earliest phases of development. This leaves the provision of an operational rail station as uncertain and certainly as a less favourable position than a location that has within it operational stations that can be used by residents from day one.
- With the exception of OC19, all of the remaining options are of sufficient scale to deliver a minimum of 3,000 dwellings as required by Local Plan policy DM4. The propensity to grow in the future is limited in respect of OC18. In terms of known available land there is sufficient land within either OC12 and OC16, to enable future expansion. In respect of OC16, any expansion would limit effective place making by virtue of either linear expansion alongside the A1(M) and/or development crossing the A1(M). The extent to which any new settlement at this location could expand in a westerly direction is limited by the fact that Knaresborough lies only a short distance from the area

.

4.3 In conclusion it is considered that:

- OC12 should be selected as the preferred Broad Location for growth. It sits within the key public transport corridor and offers the added advantage of having two operational rail stations. The area of land promoted offers significant scope to define the optimum boundary and deliver effective place making, alongside delivery of necessary infrastructure

- OC16 should not be selected as it does not offer the same locational advantages as OC12. It is currently not served by a key bus service (albeit it is considered that there is scope to extend existing services), it does not have an operational rail station nor any surety that one can be provided and the extent of available land makes effective place making more difficult.
- OC18 should not be selected as it does not fit with the identified public transport corridor, and would deliver a limited amount of development within the Plan period.
- OC19 should not be selected as it is not of sufficient scale to deliver the minimum number of homes needed to meet policy DM4 and is not a best fit with the identified public transport corridor."

110. Thus, according to the authors of SAA2, the comparison of broad locations at the high level of analysis involved in this environmental assessment process, which (apart from the limited points raised under grounds 2 and 3) is not the subject of legal challenge, showed very much the same outcome as HBC's earlier comparison of *sites* using the same assessment criteria (which was considered by the full Council). The broad locations achieved similar overall ratings against HBC's 16 objectives subdivided into 58 headings. The authors then went on to distinguish the *broad locations* by relying on the same factors which had caused both the Cabinet and the full Council to decide to select GH11 and discard FX3, comparing the *sites* in the suite of documents in 2017 leading up to the Publication Draft Local Plan. Those factors continued to be regarded as decisive.

111. Between 26 July and 20 September 2019 HBC consulted on SAA2 and a schedule of Main Modifications to the Local Plan. It is common ground that the Main Modifications do not affect the issues raised by this challenge.

112. FPL made written representations on 20 September 2019. FPL advanced a number of detailed criticisms of some of the evaluations and scoring in SAA2, both in relation to OC12 and OC16. They also criticised what they considered to be the illogical boundary which HBC had selected for OC16, which had resulted in it being rejected as a broad location because effective place-making would be limited by linear expansion alongside the A1(M) and/or crossing that road. FPL referred to other landowners in the area who wished to promote their land as part of a new settlement, but who had not been aware of the additional assessment work being undertaken by HBC before the publication of SAA2. In response to the consultation on that document those parties had identified additional land at Flaxby in the order of 630 ha, which would result in a much more logical broad location. FPL also criticised SAA2 for failing to compare the relative deliverability and viability of the broad locations. They suggested that the infrastructure costs for OC12 had been grossly under-estimated and if corrected would make the scheme non-viable. FPL submitted that this should be addressed in an evidence-based, public examination along with the other issues raised. They also expressed "disappointment" that the conclusions of SAA2 and criticisms of that work had not been considered by elected members of the Council. I should record that although there were suggestions in the representations on behalf of FPL that the assessment by officers in SAA2 had been carried out in a

predetermined, biased or unfair manner, those allegations were rejected by the Inspector in his report (see below) and were not pursued in this challenge.

113. In October 2019 HBC provided a summary response explaining that it had not been able to include land in the broad locations which it had not known to be available. HBC said that there had been no unfairness because landowners in the vicinity of OC16 had been able to put forward additional land throughout the local plan process. They added:-

> "FPL has known throughout the process that the potential for expansion was one of the reasons why the Council had preferred OC12. If FPL considered there was additional land which should be considered as part of their proposal, it was at all times open to them to gather information from adjoining landowners as to their willingness to make land available."

114. With regard to the additional area of land at Flaxby of 630 ha HBC said this:-

> "The Council has assessed a broad location around Flaxby, thereby carrying out a like for like assessment with the broad location at Hammerton/Cattal. The additional land that has been submitted to the Council is largely agricultural land; in many ways very similar to the land already considered. The land in question may provide the opportunity to overcome some of the issues around place making and expansion, however it does not provide a better locational advantage to the Hammerton/Cattal option with respect to access to operational rail stations to the extent that this option would be chosen. Given the similarity of the land to that already considered it will perform in a similar way, the one area where it might perform differently is in respect of ecology where conceivably this new land may score red due to proximity to Hay-a-park SSSI in light of Natural England's recent request to discuss cumulative impact on the SSSI from development. In light of this a full and detailed assessment has not been undertaken."

115. HBC's representations concluded by saying that the preference in SAA2 for OC12 was in line with the decision taken by the full Council on 13 December 2017.

116. On 14 October 2019 the Inspector wrote to FPL refusing to re-open the hearing sessions.

*Inspector's report on the examination - January 2020*

117. On 30 January 2020 the Inspector issued his report.

118. In his assessment of the "soundness" of the Local Plan, the Inspector said at IR 16:-

> "I deal only, and proportionately, with the main matters of legal compliance and soundness. I do not respond to every point

> raised by the Council or by representors, nor do I refer to every policy, policy criterion or allocation."

119. The Inspector considered the proposal for a new settlement under Issue 1 at IR 24 to 28:-

> "24 The Council has made a balanced planning judgement (informed by both the SA and a, careful and considered, comparative assessment of potential new settlement locations) that a new settlement is an appropriate response to accommodating the borough's longer-term housing needs. The conclusion in relation to the most suitable (broad) location for that new settlement necessarily involves matters of planning judgement, including consideration of 'fit' with the overall Growth Strategy. The process is not just a box ticking exercise. I consider it to be sound.
>
> 25. This is not to say that there are no potential constraints to development in the broad location identified. These are recognised by policy DM4 and its supporting text (although in the interests of efficacy, MM161 is necessary to clarify that the nursery within the broad location may not need relocating).
>
> 26. Based on all that I have read, heard and seen, these constraints are not necessarily (individually or cumulatively) incompatible with new development. They may, however, restrict the number of dwellings which can appropriately be accommodated, particularly given the Council's fully justified expectations in terms of exemplary design and layout. Nonetheless, I conclude that there is a reasonable prospect that a new settlement in this broad location could make a significant contribution towards the delivery of homes by the end of the plan period and in the longer term. Should the case prove otherwise, the matter can be addressed during a plan review (notably as delivery from the new settlement is not needed to support the Council's five-year housing land supply).
>
> 27. Policy DM4 will provide an appropriate framework for the production of a New Settlement Development Plan Document (NSDPD), which itself will provide more detailed policy guidance in relation to the precise location, design and delivery of the new settlement. It will also need to address very carefully the implications of the new settlement for nearby villages, having regard to the degree to which the new settlement is just that, rather than being merely an extension of an extant settlement.
>
> 28. I do not consider that there is sufficient evidence at this stage for the plan formally to allocate specific pieces of land effectively. Indeed, such an approach could fetter the NSDPD's ability to ensure high-quality, comprehensive development,

> having regard to the key issues (as set out in DM4) that it will need to address."

120. Under issue 10 the Inspector considered "Whether or not the plan is soundly based in terms of economic viability issues and its delivery and monitoring arrangements":-

> "188. A whole plan viability assessment was carried out by the Council in line with the advice in national planning policy and guidance. It was scrutinised as part of this examination in relation to other policy matters, noted above. I am satisfied that a robust assessment of viability has been undertaken such that scale of obligations and policy burdens will not prevent development being delivered in a timely manner.
>
> 190. I find that the plan is soundly based in terms of economic viability issues and its delivery, monitoring and contingency arrangements."

121. The Inspector dealt with the lawfulness of the SEA process at some length in IR 191 – 206:-

> "191. An extensive body of Sustainability Appraisal (SA) work was undertaken in connection with the preparation of the plan and the formulation of the main modifications to it. A consistent framework of objectives has been used to assess the emerging plan throughout all of these documents. These are relevant and appropriate to the scope of the plan, local context and national policy.
>
> 192. The SA process was reviewed by independent and experienced assessors (EXOTH009a), who made a number of recommendations. These were addressed by the Council as deemed necessary. I am satisfied that this overall approach is adequate.
>
> 193. Some specific criticisms with regard to the legality of the SA were made by representors at various stages of the examination. The Council responded in turn, in detail, to such criticisms. Having considered the body of representations and responses, I address the substantive points arising below.
>
> 194. There is a legal duty set out in Article 2(b) of the SEA Directive, which requires (in this case) the Council to take into account in its decision making the results of the consultations. It may be that a summary of representations or an explanation of how they have been taken into account would be helpful, but neither is a requirement of law. Nor is there is any requirement that a summary or explanation is set out within the SA itself. Indeed, the only duty upon the Council is to summarise the main issues arising from the representations, not to deal with every point raised by every representor.

195. I am satisfied that the Council's Key Issues report (CD08) addresses this duty and that, in any case, there is sufficient evidence (EXOTH009b and EXOTH002 (Table 1)) that the Council took relevant representations into account.

196. It is suggested that the SA overall contains material errors of fact in relation to the Flaxby Park site, such that it is legally flawed, specifically in relation to ecology/biodiversity, noise, agricultural land classification, potential for expansion and provision of a railway station. I do not consider, however, that this argument withstands much scrutiny:

- The information relied upon by Flaxby Park in relation to ecology/biodiversity and railway station provision was supplied to the Council after the initial SA process was complete, in the context of a planning application. In any case, it did not (and still does not) appear to provide any greater certainty about future station provision (which contrasts with the presence of extant stations proximate to the Green Hammerton/Cattal broad area. There remains dispute between the Council and Flaxby Park on these matters but this is, ultimately, a difference of opinion and judgement, rather than any error of fact that would undermine the integrity of the SA process;
- Whether the site has potential for expansion, in an appropriate and logical direction, and to an appropriate and logical extent, is a matter of planning judgement;
- Flaxby Park is next to a major road and, as such, was scored appropriately in line with the approach taken to sites GH11 and CA5;
- The minor error in relation to the amount of the Flaxby Park site that is best and most versatile agricultural land is, in the grand scheme of things, neither here nor there (notwithstanding that it can be corrected, in any case). The Council's overall conclusion that Green Hammerton/Cattal would be a better location for a new settlement does not turn on this point. It is derived from consideration of a wide range of factors.

197. The argument that the SA did not assess broad areas of search as reasonable alternatives to that at Green Hammerton/Cattal was not without merit. To this end, although it maintains that it was not legally required to do so, the Council undertook, at my request, additional SA work. I am satisfied that this addresses any shortcomings in relation to broad areas of search, which may be perceived to have existed in the original SA.

198. Others disagree, suggesting that the outcome of the additional work, which still supports Green Hammerton/Cattal

as the broad location, was predetermined. It is difficult to see, however, how the Council could ever overcome such an assertion without going out of its way to reach a different decision about where the broad location for growth should be. I am also mindful that the broader locations in question are not so different from the more specific sites originally considered that one would necessarily expect a different conclusion to be reached.

199. Case law would also appear to support the Council's view that SA is an iterative process, such that any defect can be remedied, and that the ability to cure a defect is not limited to situations where that defect is simply the failure to explain, or to provide reasons for, a decision that has already been taken.

200. It was further suggested that in deciding to allocate sites, which it had initially rejected, in a second wave around extant settlements, the Council should have reviewed its decision that a new settlement was part of the most appropriate strategy for the area.

201. It does not seem to me, however, that the latter is a necessary corollary of the former. The Council took the view early on that a new settlement was an appropriate response to delivering the borough's housing needs over the long term. There is no compelling reason why that judgement should have been revisited when it became apparent that the borough's OAN had increased, and that additional sites were required. The only decision that needed taking was how best to accommodate the additional dwelling numbers within the spatial framework that had already been established.

202. There are sites around extant settlements, which were rejected as allocations, which the SA scores the same or less than the new settlement. I do not consider that they should have been allocated instead of the new settlement. This point fails to address the likely cumulative impacts of allocating such sites or to consider the implications of seeking constantly to grow existing settlements beyond the point at which it is feasible or desirable to do so, for a range of reasons.

203. In addition, it is reasonable for the Council to conclude that sites which are likely to have many positive impacts, but one significant adverse effect, should not be allocated in the plan, while one that has a number of adverse effects but one significant beneficial effect should be allocated. Furthermore, it is not unusual that some reasonable alternatives are found to have very similar effects as the chosen site allocations.

204. SA is intended to inform plan preparation, not to direct it or to provide definitive answers. In practise, there is an almost

> limitless number of combinations of comparative assessments that could be undertaken across the full breadth of options for a plan's overall spatial strategy, for broad locations for growth and for site allocations. That such appraisal work could, in theory, be undertaken does not mean that it is necessary in order for the SA to be legally compliant.
>
> 205. That people disagree with the assessment of specific effects, and decisions about specific sites (or, indeed, broad locations), is completely unsurprising. I would go so far as to suggest that it is inevitable given that, although supported by relevant technical or expert evidence, many of the SA conclusions involve a significant element of planning judgement. I am satisfied that the conclusions reached are reasonable ones and that any omissions, errors or inconsistencies that may exist do not result in the SA being fundamentally, or even substantially, flawed.
>
> 206. Overall, I conclude that the SA proportionately and adequately assesses reasonable alternatives to the policies and allocations included in the plan. The SA work undertaken in connection with the plan is adequate."

122. Thus, the Inspector concluded that the SEA carried out by HBC complied with the 2004 Regulations and therefore with s. 19(5) of PCPA 2004.

*Adoption of the Local Plan – March 2020*

123. HBC's Cabinet considered the adoption of the Local Plan on 3 March 2020. HBC formally adopted the Local Plan on 4 March 2020.

**Legal Principles**

*General principles for legal challenges to a local plan*

124. The Court's jurisdiction under s.113 is confined to conventional public law principles for judicial review and statutory review (*Solihull Metropolitan Borough Council v Gallagher Homes Limited* [2014] EWCA Civ 1610 at [2]; *Blyth Valley Borough Council v Persimmon Homes Limited* [2009] J.P.L 335 at [8]). The parties acknowledge that s. 113 does not provide an opportunity to re-run the planning merits on any issue before HBC or the Inspector.

125. In relation to an allegation that a decision-maker has failed to take a material consideration into account, the following principles are now well-established:-

> "In *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 the Supreme Court endorsed the legal tests in *Derbyshire Dales District Council* [2010] 1 P & CR 19 and *CREEDNZ Inc v Governor General*

> [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so . Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account."

See *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 at [8] and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 at [30]-[32].

126. Where the judgment is that of an expert tribunal such as a Planning Inspector, the threshold for irrationality is a difficult one for a claimant to surmount; it is "a particularly daunting task" (*Newsmith Stainless Limited v Secretary of State for Environment, Transport and the Regions* [2017] PTSR 1126). Furthermore, there is an enhanced margin of appreciation afforded to the judgments of such decision-makers on technical and predictive assessments (*R (Mott) v Environment Agency* [2016] 1 WLR 4338 ; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240; *R (Plan B Earth v Secretary of State for Transport* [2020] PTSR 1446 at [68], [71] and [176-7]).

127. The tests for the adequacy of the reasons given in an Inspector's report on the examination of a plan is that laid down in *South Bucks v Porter (No.2)* [2004] 1 WLR 1953. The crucial question is whether the Inspector's reasons give rise to a substantial doubt as to whether he has committed an error of public law. But such an inference will not readily be drawn. In a planning appeal the reasons need only refer to the main issues in dispute and not to every material consideration ([36]). Reasons are addressed to a "knowledgeable audience" familiar with the material before the examination and they may be briefly stated (*CPRE Surrey v Waverley Borough Council* [2019] EWCA Civ 1896 at [71]-[76]. In the CPRE case Lindblom LJ added at [75]:-

> "Generally at least, the reasons provided in an inspector's report on the examination of a local plan may well satisfy the required standard if they are more succinctly expressed than the reasons in the report or decision letter of an inspector in a section 78 appeal against the refusal of planning permission. As Mr Beglan submitted, it is not likely that an inspector conducting a local plan examination will have to set out the evidence given by every participant if he is to convey to the "knowledgeable audience" for his report a clear enough

> understanding of how he has decided the main issues before him."

*Public law challenges to SEA and the handling of "reasonable alternatives"*

128. In *Plan B Earth* the Court of Appeal held that the court's role in ensuring that an authority has complied with the requirement of Article 5 and Annex 1 when preparing an environmental report must reflect the breadth of the discretion given to it to decide what information "may reasonably be required", taking into account current knowledge and methods of assessment, the contents and level of detail in the plan, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at other levels in that process in order to avoid duplication of assessment. The authority is left with a wide range of autonomous judgment on the adequacy of the information provided ([136]) :-

> "The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review – as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court." (referring to *R (Blewett) v Derbyshire County Council* [2004] Env. L.R. 29)

129. In *Spurrier* the Divisional Court drew a distinction between the failure by an authority to give any consideration at all to a matter which it is expressly required by the 2004 Regulations to address, namely whether there are reasonable alternatives to a proposed policy, which may amount to a breach of those regulations, as opposed to issues about the non-inclusion of information on a particular topic, or the nature or level of detail of the information provided to or sought by the authority, or the nature or extent of the analysis carried out. All those latter matters go to the quality of the SEA undertaken and are for the judgment of the authority, which may only be challenged on grounds of irrationality (see *Plan B Earth* at [130] and [141]-[144]; *R (Khatun v Newham London Borough Council* [2005] QB 37 [35] and *Flintshire County Council v Jayes* [2018] EWCA Civ 1089; [2018] E.L.R. 416).

130. The consideration of alternatives under the SEA Directive is to be contrasted with the way in which that subject is treated under the Habitats Directive (92/43/EEC). In the latter case the tests in the legislation operate to determine the outcome of a proposal. There, the rules regarding alternatives are substantive in nature. But as the Divisional Court pointed out in *Spurrier* at [332] :-

> "……the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature. Thus, the requirement to address "reasonable alternatives" in the environmental report (or AoS under section 5(3) of the PA 2008) is intended to facilitate the consultation process under article 6 (and section 7 of the PA 2008). The operator of Gatwick and other parties

> preferring expansion at that location would be expected to advance representations as to why the hub objective should have less weight than that attributed to it by the Secretary of State or that, contrary to his provisional view, the Gatwick 2R Scheme could satisfy that objective. The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process"

(see also the Court of Appeal in *Plan B Earth* at [109]-[113] and Hickinbottom J (as he then was) in *R (Friends of the Earth England, Wales and Northern Ireland Limited) v The Welsh Ministers* [2016] Env. LR 1 at [88(i)]). Furthermore, the process of SEA is iterative. It is not confined to a single environmental report. There may well be several iterations as work on the plan progresses *(Cogent Land LLP v Rochford District Council* [2013] 1 P & CR 11)

131. The identification and treatment of reasonable alternatives is a matter of "evaluative assessment" for the authority *(Friends of the Earth* at [87]-[89] and *Ashdown Forest Economic Development LLP v Wealden District Council* [2016] PTSR 78 at [42] subject to review only on public law grounds. An enhanced margin of appreciation should be given to decisions which involve, for example, the expert evaluation of a wide variety of complex technical matters or scientific, technical, or predictive assessments (see [126] above).

132. Accordingly, the identification of reasonable alternatives and the nature of the assessment to be carried out are matters of judgment for the local planning authority, and in due course for the Inspector who conducts the examination of the draft local plan. It is in this context that the principle of equal or comparable treatment as between alternative options needs to be considered. As Ouseley J recognised in *Heard* at [71] the principle is not explicitly stated in the Directive, or in the Regulations. He said that although there may be a case for the examination of a preferred option in greater detail, the aim of the directive would more obviously be met by, and best interpreted as requiring, "an equal examination of the alternatives which it is reasonable to select for examination". But it should be noted that the lack of equivalence in that case was fundamental. It related to the absence of any reasons for the authority's selection of its preferred option and rejection of alternatives (see [68]-[71] and *Spurrier* at [426])

133. Although in his summary of legal principles in *Friends of the Earth* at [88(viii)], Hickinbottom J stated that reasonable alternatives have to be assessed in a "comparable way", that appears to have been derived from the decision in *Heard* (see [87]) and did not form the basis for the court's resolution of the issues in that case. The main part of the court's reasoning in *Friends of the Earth* was concerned with a complaint that the authority had failed to identify certain alternatives to the proposal, a challenge which was unsuccessful.

134. In *Ashdown Forest* the Court of Appeal referred at [10] to the proposition stated by Ouseley J in *Heard* at [71]. However, it was unnecessary for the Court to apply that principle. Instead, the case simply turned on the fact that the local authority had not applied its mind at all to the question of "reasonable alternatives" ([42]).

135. From a review of the authorities I do not consider that the equal or comparable treatment of alternatives is a hard-edged question for the court to determine for itself. It goes to the quality of an SEA. In so far as this subject is a matter for judicial review, the test is whether the approach taken by the plan-making authority is irrational or can be impugned on public law grounds. That is the approach which the courts take to a challenge to an authority's decision on which options to treat as "reasonable alternatives" (see e.g. *Friends of the Earth* at [88(iv)] and there is no logical justification for taking any different approach to an issue about comparable treatment of such alternatives.

136. In *Heard* Ouseley J qualified the notion of comparable treatment in an important way. At [67] he stated:-

> "I accept that the plan-making process permits the broad options at stage one to be reduced or closed at the next stage, so that a preferred option or group of options emerges; there may then be a variety of narrower options about how they are progressed, and that that too may lead to a chosen course which may have itself further optional forms of implementation. It is not necessary to keep open all options for the same level of detailed examination at all stages. But if what I have adumbrated is the process adopted, an outline of the reasons for the selection of the options to be taken forward for assessment at each of those stages is required, even if that is left to the final SA, which for present purposes is the September 2009 SA."

137. In his summary of legal principles in *Friends of the Earth* Hickinbottom J made the same point at [88(vii)], but he also suggested that in some circumstances a plan-making authority might need to reassess alternatives which it had previously discarded:-

> "However, as a result of the consultation which forms part of that process, new information may be forthcoming that might transform an option that was previously judged as meeting the objectives into one that is judged not to do so, and vice versa. In respect of a complex plan, after SEA consultation, it is likely that the authority will need to reassess, not only whether the preferred option is still preferred as best meeting the objectives, but whether any options that were reasonable alternatives have ceased to be such and (more importantly in practice) whether any option previously regarded as not meeting the objectives might be regarded as doing so now. That may be especially important where the process is iterative, i.e. a process whereby options are reduced in number following repeated appraisals of increased rigour. As time passes, a review of the objectives might also be necessary, which also might result in a reassessment of the "reasonable alternatives". But, once an option is discarded as not being a reasonable alternative, the authority does not have to consider it further, unless there is a material change in circumstances such as those I have described."

It is necessary to emphasise, however, that such considerations are matters of judgment for the authority or their executive or delegatee (as appropriate).

138. Mr Katkowski QC placed some emphasis upon [88(v)] of *Friends of the Earth* which should be read together with [88(vi)]:-

> "(v) Article 5(1) refers to "reasonable alternatives *taking into account the objectives… of the plan or programme…* " (emphasis added). "Reasonableness" in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an "alternative" to the preferred plan, is not a "reasonable alternative". An option which will, or sensibly may, achieve the objectives is a "reasonable alternative". The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no "reasonable alternatives" to it.
>
> (vi) The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process."

139. So although Mr Katkowski QC is right to point out that at one stage HBC had certainly regarded FX3 as a "reasonable alternative", in the sense that it might sensibly achieve the authority's objectives, it does not follow that the authority remained obliged to carry on treating Flaxby in that way. Where an authority considers that only one proposal may go forward, it is entitled to assess how well each alternative performs against its objectives and to discard any that do not meet those objectives or perform sufficiently well. Even if circumstances subsequently change, the authority may judge that its earlier decision, and the reasons upon which it was based, make it unnecessary for a discarded option to be reassessed or to be included in any different SEA work.

**Ground 2 – failure to include an additional 630ha of land in the assessment of Flaxby as a broad location**

140. At the hearing Mr Katkowski QC confirmed that FPL is pursuing only one point under this ground, namely that HBC failed to compare the broad locations of Flaxby and Green Hammerton/Cattal on an equal basis because it did not include in the SA the additional 630 ha of land which had been identified by the consultees in response to SAA2 issued in July 2019. This area of land was not assessed in SAA2. The claimant submits that HBC should have issued an additional call for land which went beyond the exercise carried out between 14 and 22 March 2019 and then included in the SA the additional 630ha of land that would have been revealed.

*Discussion*

141. There is no merit in this complaint.

142. As far back as July 2017 HBC made it clear publicly that it had rejected site FX3 because its potential for growth was more restricted than in the case of GH11 and CA5, given its proximity to Knaresborough to the west and the A1(M) to the east (see also p.29 of the New Settlement Report). Thereafter, HBC adhered to that view. From November 2017 it was also known publicly that HBC was promoting a broad location for the new settlement within which the boundaries would be determined through a DPD. That location comprised CA4/CA5 and GH12 in addition to GH11. HBC's position was carried forward in the Publication Draft Local Plan (January 2018) and the Submission Draft Local Plan (August 2018), together with the accompanying SAs.

143. FPL was well aware of these matters. In March 2018 its consultants made representations to HBC complaining about a lack of comparison between the Council's preferred locations and other broad location, in particular Flaxby. They sought to argue that HBC had not given adequate reasons for preferring Green Hammerton or its "broad location" approach. But in my judgment the Council's reasons were clear enough. In reality, there was simply a clash of opinions.

144. Despite HBC having clearly stated its view that FX3 lacked potential for expansion, neither FPL nor any of the landowners sought to put forward the 630 ha in response to HBC's documents published in November 2017. That remained the case even when the draft Local Plan was submitted for examination in August 2018. The Court was told that this substantial area was only put forward for consideration in the consultation between 26 July and 20 September 2019. This was some 2 years after HBC had identified its reasons for rejecting Flaxby as the location for the new settlement. No explanation has been given for this delay, which is all the more surprising given the obvious importance of the local plan process being handled in an efficient and timely manner, not only for the local planning authority, but also for developers and all others interested in progressing that plan through to adoption.

145. Not surprisingly therefore, HBC pointed out that landowners had been able to bring forward land throughout the local plan process, so that it could not be said that any unfairness had occurred ([113] above). Officers had already given their views on the broad location at Flaxby identified by the Council. Essentially, this location was rejected for the same reasons as had been identified in 2017 (see [109]-[110] above). In October 2019 they went on to give their opinions on the additional 630 ha (see [114] above). They accepted that it might provide the opportunity to overcome *some* of the issues relating to place-making and expansion, but it did not provide a better locational advantage compared to Green Hammerton/Cattal as regards access to public transport. In addition, it was thought that the additional land might score red (according to the Council's "traffic light" system of assessment) as regards effects on ecological interests. They therefore concluded that a full and detailed assessment of the additional area of 630ha was not justified.

146. On 14 October 2019 the Inspector refused FPL's request to reopen the examination ([116] above). That was a procedural issue for his determination. His decision is hardly surprising given the late stage in the examination at which this substantial area of land was put forward and the lack of any justification from FPL, or any of the other

landowners involved, for the delay which had occurred. Certainly, none was put before the Court at the hearing.

147. The Inspector concluded that the additional work which had been undertaken on the SA to compare broad locations addressed any "perceived shortcomings" in the earlier SA (IR 197-199).

148. Having examined all the material before the court, I have reached the firm conclusion that neither the response of HBC nor that of the Inspector to the suggested addition of the 630 ha of land at Flaxby could be criticised as irrational (see *Khatun* and *Plan B Earth*) or in any way unlawful. I also note that the officers were acting well within the scope of their delegated authority (see [99] above). FPL's argument does not begin to get off the ground.

149. It also follows that FPL's complaint under ground 2 cannot lend any support to ground 1, in particular the failure of the full Council to consider SAA2 and consultation responses before adopting the Local Plan.

150. For all these reasons, ground 2 must be rejected.

**Ground 3 – insufficiency of information or enquiry about the viability and deliverability of Green Hammerton/Cattal**

151. Mr Katkowski QC referred to paragraph 173 of the NPPF (2012) which required development plans to be "deliverable" and careful attention given to viability and costs in plan-making so that development sites identified do not become subject to obligations and policy burdens which threaten the ability to develop them viably. But it should be noted that the focus of ground 3 is not on whether the requirements of the Local Plan were excessive so as to render any site non-viable. Rather the claimant, as the promoter of a rival scheme at Flaxby, was arguing before the Inspector that a new settlement at the Green Hammerton/Cattal location would not be commercially viable and therefore would not be deliverable.

152. As noted in [30] above, paragraph 182 of the NPPF (2012) stated that local plans should be "justified" on the basis of evidence which is "proportionate".

153. More detailed assistance was given in paragraph 004 of the National Planning Practice Guidance on "viability and plan-making"; in particular:-

> "Evidence should be proportionate to ensure plans are underpinned by a broad understanding of viability. Greater detail may be necessary in areas of known marginal viability or where the evidence suggests that viability might be an issue – for example in relation to policies for strategic sites which require high infrastructure investment."

154. The issue of whether viability should be addressed in terms of a "broad understanding" or in "greater detail" is a matter of judgment initially for the local planning authority. But the inspector conducting the examination of the draft plan may also address the adequacy of the information provided, in so far as he or she judges that to be necessary or appropriate to assess the soundness of the plan. But

judgments made by a local planning authority and the Inspector on, for example, the range of matters covered by a viability assessment, or the depth of the analysis, or whether further information should be sought, are not open to challenge in this Court unless shown to be irrational (see e.g. *Khatun* and [129] above). That is a difficult hurdle to surmount (see [126] above). Furthermore, viability appraisal is a technical matter for assessment by planning authorities and Inspectors, which attracts an enhanced margin of appreciation.

155. The Inspector reached his overall conclusions on viability in IR 188 and 190 (see [120]) above. He specifically addressed the deliverability of the new settlement in policy DM4 in IR 25 and 26 (see [119] above).

156. The focus of the challenge under ground 3 is on the Inspector's conclusions. Mr Katkowski QC submits that either:

i) It was perverse for the Inspector to reach his conclusions on viability on the basis of the material before the examination; or

ii) It was perverse for the Inspector not to call for the confidential information on viability which IP2 and IP3 had provided to HBC.

Acknowledging the high hurdle which must be overcome, Mr Katkowski QC did not put ground 3 in the forefront of the claimant's case.

157. In his witness statement Mr Morton referred to an expert viability appraisal submitted on behalf of FPL in March 2018 as part of its representations on the Publication Draft Local Plan. He said that this had suggested that infrastructure costs for GH11 would be £125m as compared with £46m for FX3 and that the outcome would be negative viability of £73m for the GH11 site and a positive viability of £33m for the FX3 site. He also refers to the rival interests and schemes of the main developers involved in promoting Green Hammerton/Cattal, IP2 and IP3, which, he says, called into question the deliverability of a new settlement at that location. The claimant submitted representations in the examination process in May and September 2019 which briefly stated that there had been a lack of comparative assessment of viability as between different locations. It was said that this work ought to have been included in the SA.

158. It is necessary to bear in mind that policy DM4 of the Local Plan only identified a *broad* location for a new settlement. The New Settlement DPD (which has subsequently been prepared and is the subject of consultation until 22 January 2021), will address matters such as the site boundary, the quantum and mix of uses, a concept plan, highway and access arrangements, public transport, and housing types and tenures including affordable housing. There is no legal challenge to that approach. Accordingly, any viability appraisal prior to the adoption of the Local Plan was bound to have been of a high-level, strategic nature, looking into the future over a long time span. The Local Plan does not expect all 3,000 of the dwellings at the new settlement to be provided during the plan period. It goes no further than to say "at least 1,000 dwellings" are expected to be provided by 2034/35 (paragraph 10.17). Each of the alternatives which have been considered would require very substantial investment in various kinds of infrastructure, the detail of which is still to be addressed. Accordingly, it is self-evident that any viability assessment for broad locations for a new settlement would be highly sensitive to *assumptions* about what infrastructure

would be required for each alternative, the future costs of such infrastructure and other development works, future land values and sale values, and finance costs. These assumptions are likely to fluctuate over time and be subject to substantial uncertainty, irrespective of the authorship of any assessment.

159. The New Settlement Background Paper (November 2017) summarised HBC's assessment of viability and deliverability (see e.g. paragraph 5.62 *et seq*). This was based upon material which each of the developers, including FPL, had submitted about their own schemes and HBC's Whole Plan Viability Study (2016) and Infrastructure Capacity Study. Paragraphs 5.106, 5.108 and 5.109 of the Background Paper confirmed that the developers of CA4/CA5 and FX3 had provided confidential viability assessments for their own sites and the developers of GH11/GH12 had provided a deliverability statement which included the costs of providing key infrastructure. On the basis of the viability assessment undertaken in the Infrastructure Capacity Study, paragraphs 7.3, 7.18 and 7.25 stated that CA4/CA5, FX3 and GH11 could all generate sufficient "headroom", or value, to meet critical infrastructure costs. HBC stated that because of the large infrastructure costs and the challenges faced, the viability for *each* site was in the "marginal" category, meaning that the residual land value exceeded "existing" or "alternative" use value, but *might* not generate any *further* uplift for the landowners involved. But the Council expected that to be the case for a project of this scale and type. It estimated that on a "net developable basis" residual values would be "well over £400,000/ha in all cases" (paragraph 5.66).

160. The Background Paper also summarised why HBC was satisfied that the promoters of CA4/CA5, GH11/GH12 and FX3 had sufficient control over land needed for the delivery of a new settlement.

161. In the examination of the draft plan, HBC relied upon the appraisal work which had been undertaken and said that it was satisfied that a viable scheme could be delivered at the policy DM4 location. The issue had been examined at the hearing session on "matter 12" and IP2 and IP3 had confirmed that viable schemes were deliverable there.

162. Mr Brown QC also referred to the "Whole Plan Viability Assessment" (September 2016) and the "Infrastructure Capacity Study". The information covered *inter alia* infrastructure costs and residual land values. The analysis showed the sensitivity of both Green Hammerton and Flaxby to assumptions about the scale of affordable housing and other developer contributions, such as the Community Infrastructure Levy, which may be required. The work carried out in 2016 was updated in May 2018. These documents recognised that the delivery of *any* large site would be challenging, not least because of the infrastructure and mitigation measures required. Having said that, significant land values would be generated.

163. Officers explained during the examination that the position on land ownership and availability within the Green Hammerton/Cattal broad location would not compromise the delivery of a new settlement there. Mr Procter and Mr McBurney reiterate points made at the examination that it is in the interests of both IP2 and IP3 to collaborate on the delivery of the new settlement in the DM4 location. Each has already invested many millions of pounds in the promotion of the new settlement,

initially on GH 11, but since late 2017 on the "broad location", in the firm belief that the project is viable and deliverable.

164. From this brief review of the material before the Inspector, I conclude that there was evidence which was legally sufficient to support his conclusions on viability and deliverability. It cannot be said that those conclusions were irrational, or that it was perverse for him not to call for more information, such as the confidential material submitted to HBC by developers. Bearing in mind that the Inspector's function was to examine the soundness of policy DM4 by considering whether it was justified by a proportionate evidence base, and not to resolve every contested issue raised by participants in the examination, it is plain that he considered the material before him to be adequate for that purpose.

165. For all these reasons ground 3 must be rejected.

**Ground 1 – failure by the Council to consider environmental assessment of alternative "broad locations"**

*A summary of the submissions*

166. Mr Katkowski QC submits that in order for SEA to be conducted lawfully, the plan-making authority must carry out an appraisal which compares its preferred policy proposal with reasonable alternatives in an equivalent manner. In the present case, FPL makes no legal complaint about the way in which alternative *sites* for a new settlement were compared up to and including the Additional Sites Plan and the New Settlement Report published in July 2017. The sites were compared on a like for like basis.

167. When in November 2017 HBC decided that the Local Plan should identify a "broad location" rather than a "site" for the new settlement, FPL complained that the Council had ceased to make a like for like comparison. Green Hammerton was assessed as a "broad location" comprising about 604ha, whereas Flaxby continued to be assessed as a "site" of 196ha, up to and including the submission of the Local Plan for examination. Mr Katkowski said that the inclusion of Flaxby in this exercise meant that it was judged by HBC to be capable of meeting the Council's objectives for a new settlement and that had not ceased to be the position when in 2017 Green Hammerton/Cattal was chosen as HBC's preferred option. Accordingly, it still remained a "reasonable alternative" for the purposes of the 2004 Regulations.

168. He then submitted that the Inspector had accepted that the sustainability appraisal for the new settlement policy should include a comparison between HBC's preferred option and alternatives, all as broad locations. Alternatively, he said, that exercise was carried out and consulted upon and it informed the Inspector's conclusion that the requirements of the 2004 Regulations had been satisfied, specifically in relation to the new settlement policy. SAA2 had become part of the environmental report for the purposes of Regulation 8(3). It was not therefore open to HBC to say now that this further work had been unnecessary in order to satisfy the 2004 Regulations.

169. Mr Katkowski QC submitted that there had been a failure to comply with regulation 8(3) because the full Council was required to take into account the further sustainability appraisal work, SAA2, together with the consultation responses and had

not done so. This obligation could not be discharged by officers acting under the delegated power granted on 14 November 2018 or by the Inspector's examination of the material and his conclusion that the requirements of the 2004 regulations had been satisfied. The judgment reached by the Inspector was not that of the full Council. The members were required to apply their own minds to the SEA material referred to in regulation 8(3).

170. FPL claimed that this was an important point because HBC's documents had said that the choice between the alternative sites was "finely balanced" (see e.g. paragraph 8.3 of the New Settlement Background Paper, November 2017). It was only proximity to existing rail stations and the greater potential for expansion which had led HBC to prefer the Green Hammerton site (GH 11). FPL contend that the decision to adopt a "broad location" approach in DM4 meant that it was necessary to revisit the "reasonable alternatives", including Flaxby, to re-assess (a) their potential for expansion, and (b) the scoring under the 16 sustainability objectives. The weight to be given to those factors was a matter of planning judgment, but it was ultimately for the members of the Council to decide how to weigh those aspects and the relative weight to give to proximity to existing rail stations. That would involve balancing a number of considerations and there was at least a real possibility that members, presented with the SAA2 exercise, might draw different conclusions to those reached by the officers (working with the Cabinet member) and the Inspector.

171. Mr Katkowski QC also submitted that the obligation on the members of the Council to consider a comparison of broad locations for a new settlement had applied not only when they decided to adopt the Local Plan, but also when they resolved that the draft plan should be submitted to the Secretary of State for examination. There is no evidence to show that that was done. He submitted that a Local Plan is supposed to contain the policies of the authority, that is its members rather than the officers. The requirement that only the members may take the decisions at these key stages of a plan carries with it an obligation that they consider the SEA work, which is to inform the preparation as well as the adoption of a plan. At the point of adoption, the members have only a binary choice, to adopt the plan with any main modifications, or to decide not to adopt the plan, in which case the whole plan falls away. The Council cannot make any fresh modifications at that point.

172. Mr Brown QC, supported by Mr Young QC and Mr Strachan QC for IP2 and IP3 respectively, pointed to the absence of any legal challenge to the SEA carried out up to and including July 2017. The decisions taken then were endorsed by the full Council. At that stage HBC had decided to discard FX3 as a reasonable alternative. It is permissible for a local planning authority to sieve sites or options at one stage in the process and thereafter not to carry out any further SEA work on sites which had been discarded. That is what happened in the present case. HBC's decision in November 2017 to base the settlement policy on a "broad location" did not oblige the Council to revisit sites which had been rejected, including FX3, or to include them in a comparison of broad locations. FX3 had been rejected for reasons which did not require Flaxby to be considered any further because of that particular change of approach.

173. In any event, at the Inspector's request, HBC did carry out a comparison of the broad locations. The outcome was only "finely balanced" in relation to general planning considerations, but not the two factors which HBC regarded as decisive.

174. Ultimately, the content or quality of the SEA is only criticised under grounds 2 and 3. Ground 1 raises a separate issue as to *who* was required to consider the environmental information (including the comparison of broad locations) in order to satisfy the 2004 Regulations. The delegation to officers dated 14 November 2018 is not challenged. That resolution allowed officers to agree main modifications to the draft plan as part of its examination by the Inspector, as well as to provide information requested by the Inspector. Mr Brown QC submitted that this delegation must have carried with it the carrying out of supplemental work on the SEA, consulting on that material and taking the product of that consultation into account. The delegation therefore allowed officers to deal with SAA2 and the consultation responses received, so as to satisfy the requirements of the 2004 Regulations. He submitted that this delegation was therefore a complete answer to ground 1. There was no legal requirement for the comparison of the Green Hammerton/Cattal broad location with other broad locations to have been considered by the full Council, whether in March 2020 at the adoption stage or, indeed, in August 2018 at the submission stage.

175. Mr Brown QC submitted that, in any event, on a proper reading of the 2004 Regulations, regulation 8(3) was not required to be satisfied at the adoption stage. That regulation should not be conflated with s.23(5) of PCPA 2004. It could be satisfied prior to adoption and therefore be addressed by officers acting under delegated powers. He sought to reinforce this submission by pointing out that once a draft Local Plan is submitted for examination, the outcome of the process is entirely dependent on the conclusions reached by the Inspector in his final report, including any main modifications to the plan which he or she decides should be made in order to render the plan sound and compliant with relevant legal requirements. These requirements include s.19(5) and the satisfaction of the 2004 Regulations. Accordingly, it was legally sufficient that by the time the Inspector's report and the plan came before the full Council, the Inspector had concluded that the requirements of the 2004 Regulations had been satisfied.

176. Mr Young QC and Mr Strachan QC also emphasised the procedural nature of the SEA Directive. The consideration of alternatives does not dictate any result but is to do with the obtaining of information to improve the quality of decision-making. That is part of the legal context for the interpretation of the delegation to officers and supports the submission that they were empowered to address the consultation responses on SAA2.

177. The parties' submissions give rise to the following main questions for the court to determine:-

    (i) Whether a comparison of broad locations was required by the 2004 Regulations;

    (ii) Who was required to comply with Regulation 8(3) and when;

    (iii) The legal consequences if HBC ought to have considered alternative broad locations before submitting the Local Plan for examination.

*Whether a comparison of broad locations was required by the 2004 Regulations*

178. In July 2017 HBC published the Additional Sites Plan and the New Settlement Report. In my judgment it is plain that at that stage the Council concluded that GH11 should be taken forward as the preferred location and that FX3 should cease to be considered. There were two key reasons for that decision (paragraph 7.4 of the Report).

179. First, the sites GH11 and CA5 were best placed to maximise the use of public transport because of direct access to two rail stations. By contrast there was no evidence that there would be a new rail station to serve FX3 during the plan period to 2035, if at all.

180. Second, GH11 and CA5 offered a greater opportunity for growth in the longer term beyond 2035, whereas FX3 was more restricted in this respect because of its proximity to the A1(M) to the east and Knaresborough to the west. The claimant does not suggest that HBC was not entitled to take into account this potential for further growth in the future, or that its conclusions on that subject at that stage were unlawful. This second reason reflected HBC's previously stated objectives for a new settlement, namely that it should "have the propensity to grow in the future" as well as "be designed to have its own identity and sense of place and create a new focus for growth" (see paragraph 7.2 of the Additional Sites Plan – July 2017). The officers' report in November 2017 makes it plain that these matters and the SA were considered by the full Council on this basis.

181. If in policy DM4 of the Submission Draft Local Plan HBC had continued to identify a *site* for the new settlement and had chosen GH11 as that site, it would not have been obliged to make any further comparison with FX3. It would unquestionably have been entitled to treat that site as discarded. FX3 ceased to be a "reasonable alternative" for the purposes of the 2004 Regulations.

182. But in the New Settlement Background Paper (November 2017) and the Publication Draft Local Plan (January 2018), HBC decided to promote a "broad location" for a new settlement at Green Hammerton/Cattal (sites GH11, GH12, CA4 and CA5), rather than the GH11 site. Paragraphs 8.3 and 8.4 of the Paper summarised why HBC had preferred the Green Hammerton option to any other. It is incontrovertible that the Council's thinking remained unchanged as to why FX3 (and other sites) had been discarded and Green Hammerton selected.

183. Paragraph 8.5 then explained why HBC had decided to identify a broad location rather than a site at Green Hammerton. In particular, this was to enable the Council to consider the optimum boundary of the new settlement, and to give an opportunity to address "the most appropriate spatial and place making approach" at the location which had been chosen *after having discarded other alternatives*. A decision on the exact boundary of the site would seek to exploit the existing railway line and optimise the delivery of the necessary improvements to the A59 in the longer term. HBC's thinking was influenced by the important consideration that "a new settlement represents an unprecedented scale of development in the district".

184. It is important to note that HBC's rationale for the "broad location" approach did not involve any departure from, or questioning of, or implications for what it regarded as the key reasons for having decided to prefer GH11 and discard FX3, namely direct access to rail stations and the potential for future growth. That second reason had

distinguished Green Hammerton and Flaxby at a strategic or high-level of analysis, noise from the A1(M) and proximity to Knaresborough. The selection of those factors as a critical step in the plan-making process, and the weight given to them, were entirely matters for the judgment of the authority or its executive (as appropriate) and are not open to challenge.

185. In *City and District of St Albans v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin) Mitting J accepted that SEA envisages a process of decision-making in which options can be progressively removed and clarified. They can be "considered and discarded so that they do not need thereafter to be revisited or re-appraised or taken into account again as alternatives to more detailed proposals within a selected option" ([14]).

186. It is apparent that HBC decided to promote a larger area of land as a broad location within which detailed site boundaries could be drawn, but not in order to promote a different type of settlement. The concept for this development, included the key residential and employment components, remained the same. The broader area was simply chosen so that through more detailed work in a DPD the characteristics of the new settlement already selected for Green Hammerton/Cattal could be optimised. But none of the rationale for adopting this "broad location" approach impinged upon the reasons why the Council had rejected FX3 as the location for a new settlement.

187. The full Council considered and approved this change of approach in 2017. There is nothing in the papers before the Court to suggest that the Council changed its view on these matters before they agreed to submit the Local Plan for examination.

188. During the examination the claimant repeated to the Inspector representations it had previously made to HBC as to why it considered a fresh comparison needed to be carried out between different broad locations. The SA accompanying the Submission Draft Local Plan assessed the proposed broad location in policy DM4 against HBC's sustainability objectives for the new settlement, but only addressed other locations as the *sites* already assessed. HBC responded that it had been decided not to take Flaxby forward as the preferred location for the new settlement on the basis of the like for like analysis carried out up until July 2017 "and not as a result of a comparison with the assessment of the broad location" (see [101] above). Although the submissions made for FPL made wide-ranging criticisms of HBC's response, there was no challenge to this summary of the documentation on how the decision to prefer GH11 had been taken.

189. The decision to discard other options, the reasons for that conclusion, and the decision that there was no need for the preferred broad location to be compared with other broad locations based on sites that had already been rejected, were all matters for evaluative assessment by HBC. It cannot be said that HBC failed to take into account FPL's objections about the way in which it handled this issue or that any of its judgments on these matters was irrational. I find it impossible to conclude that the approach taken by HBC up until the beginning of March 2019 was in any way unlawful.

190. But matters did not stop there. In his letter dated 11 March 2019 the Inspector said that he found the issue to be "finely balanced" and so it would be "sensible" for broad locations around each of the proposed potential sites to be assessed and compared.

Despite the issue which had arisen between FPL and HBC, the Inspector was not prepared to express a firm judgment about this matter either way. That reinforces the conclusion I have already reached that HBC's view on the matter could not be criticised as irrational. It lay within the range of different evaluative assessments which different decision-makers could lawfully make. It also follows that if the Inspector had gone further in his letter and ruled that HBC had to carry out the additional comparative assessment, I very much doubt whether that judgment could have been criticised as irrational. At the end of the day, this was a matter of judgment for the Inspector about how the 2004 Regulations should be *applied* in practice to the issues before him, and not about, for example, the objective *meaning* of those Regulations.

191. HBC responded by producing SAA2 which did assess and compare a number of broad locations with HBC's preferred option. Public consultation was undertaken on that work as part of the statutory examination process and the output of that consultation was taken into account by HBC's representatives in the examination and by the Inspector.

192. It is a general principle of public law that even where there is no legal requirement for consultation to be undertaken, nevertheless where a process of consultation is in fact embarked upon, it must be carried out properly, that is, in accordance with established legal principles (*R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at [108]). This means *inter alia* that "the product of consultation must be conscientiously taken into account when the ultimate decision is taken" *(ibid* approved by the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] 1 WLR 3947). This principle aligns with the requirement in Regulation 8(3) of the 2004 Regulations that opinions expressed in response to the environmental report must be taken into account before the adoption of the plan. The legal consequence is much the same as where an environmental impact assessment is produced by a developer voluntarily for a development falling within schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No.571). This engages the procedural requirements of the EIA regime (see regulation 5(1) and (2)).

193. I draw two conclusions from this analysis:-

(i) HBC cannot defeat ground 1 by arguing that a comparison of broad locations *never* fell within the scope of the SEA required by the 2004 Regulations. From the moment when SAA2 was published, that subject did fall within the 2004 Regulations, as well as falling within the scope of the examination of the draft Local Plan;

(ii) But prior to HBC deciding to produce SAA2, the Council was, as a matter of law, entitled to proceed on the basis that their environmental report need not make a comparative assessment of the DM4 location with broad locations for options which had previously been rejected as reasonable alternatives, including Flaxby.

*Who was required to comply with Regulation 8(3) and when?*

194. This case is concerned with the obligations of a local planning authority under the 2004 Regulations as they intersect with the statutory provisions leading to the adoption of the plan. But it is also necessary to have well in mind the legal framework which determines where responsibility lies as between the local authority and its executive under the 2000 Act and the 2000 Regulations. This has been summarised in [68] above.

195. Although s.17(3) of PCPA 2004 may give the impression that the local planning authority is entirely responsible for the policy content of a local plan, in the case of an authority with an executive that must give way to the constitutional arrangements put in place under the 2000 Act and the 2000 Regulations. The executive or cabinet is responsible for most of the local plan process from its inception. Even the function of deciding whether to modify or withdraw a plan in accordance with the recommendation of the examining Inspector is vested in the executive, before the plan can be considered by the authority for adoption (if that option remains open).

196. For the most part it is the executive, and not the full Council, which is in the "driving seat" during the local plan process and, to that extent, it is for the executive to decide whether to delegate particular responsibilities to a committee or to officers. Although it is for the full Council to decide whether to approve a draft plan for examination, once that step has been taken the executive is responsible for the authority's participation in the examination process through to the decision on whether to accept the Inspector's recommendations on, for example, adoption, or main modifications, or withdrawal of the plan. That responsibility includes the authority's initiation of and participation in the main modification procedure. These responsibilities also allow for delegation to officers under s.9E. Thus, the delegation authorised on 14 November 2018 lay well within the powers of HBC's Cabinet and HBC's officers were entitled to prepare an addendum to the environmental report (SAA2) and to undertake consultation on that document on behalf of HBC.

197. Regulation 5(1) requires "environmental assessment" to be carried out by the "responsible authority" which, for present purposes, refers to the authority by which or on whose behalf a plan is prepared (regulation 2(1)). The meaning of "responsible authority" is therefore consistent with the legal framework created by the 2000 Act for authorities with "executive arrangements".

198. The objective in Article 1 of the Directive, and hence the 2004 Regulations, is to promote the integration of environmental considerations into the preparation and adoption of plans. That indicates that the "environmental report(s)" and the product of consultation must be taken into account not only during the preparation of the plan but also in the decision whether it should be adopted. Plainly, that material must be taken into account by the person or body responsible at each relevant stage. Accordingly, both when a draft plan is submitted for examination and when it is finally adopted, it is the full Council which must take into account the "environmental assessment" as it then is. The functions of the full Council at these stages are non-delegable. At other stages the general position is that the environmental assessment is to be taken into account by the executive, or by any committee or officer to whom the executive's functions have lawfully been delegated.

199. I see no merit in HBC's submission that because regulation 8(3) indicates that the environmental assessment is to be taken into account *before* adoption, it does not have

to be considered by the full Council. The word "before" does not contain any suggestion that some body (or person) other than the entity responsible for taking the decision to adopt may discharge the requirements of regulation 8(3). Instead, that regulation is only laying down a straightforward requirement that a plan cannot be adopted unless the environmental assessment is taken into account in the decision to adopt, not afterwards. The objective of Article 1 of the Directive is clear, namely to integrate environmental considerations into the preparation and *adoption* of plans. Although the members of the full Council should be asked to consider the final SA, there is no requirement for them to consider all of the consultation responses to the SA one by one. There is often a good deal of overlap or repetition in such material and some of the points raised may not be significant. A proper summary and analysis of consultation responses and how they relate to the SA and the policies in the plan will normally suffice.

200. In any event, Mr Brown's submission does not assist the defendant on this part of ground 1. Adoption cannot be considered before the examination process is concluded by the Inspector sending his report to the authority. It is plainly essential for the environmental assessment to be considered alongside that report. It was the responsibility of HBC's Cabinet to take decisions on whether to accept recommendations in the report, other than the ultimate decision on whether the Local Plan should be adopted. Here it is accepted that the Cabinet did not consider the environmental assessment or any summary of it. Furthermore, the delegated power of officers conferred by the resolution of 14 November 2018, which would have included work on the iterations of the SA as a result of the Inspector's request on 11 March 2019, as well as consideration of the consultation responses, did not extend beyond the examination period.

201. The challenge relates solely to policy DM4 and related provisions dealing with the new settlement. HBC's failure at the adoption stage to comply with regulation 8(3) of the 2004 Regulations, in so far as the SEA was relevant to the new settlement policies, rendered unlawful the adoption in March 2020 of the Local Plan containing those policies. The SEA at that stage included SAA2 and the consultation responses to that document. This unlawfulness affected only the adoption stage of the Local Plan. The reasons I have given above are sufficient to determine ground 1.

*The legal consequences if HBC ought to have considered alternative broad locations before submitting the Local Plan for examination?*

202. But what if I had reached the conclusion, contrary to [193(ii)] above, that when HBC decided to identify a *broad location* rather than a *site* for the new settlement policy, it became obliged to make a fresh comparative assessment as between broad locations, including Flaxby? In the context of ground 1, it is said that when the full Council resolved to submit the draft Local Plan for examination they ought to have had regard at that stage to an SA which included that comparison, or at least a summary of that work. No such consideration took place.

203. It is a well-established principle that a defect in the SEA process at one stage may be cured by steps taken subsequently (see [36] above). Surprisingly, the claimant disputed that principle during the examination. However, rightly it did not persist in that argument in these proceedings.

204. Instead, Mr Katkowski QC submitted that a defect of this nature at the submission stage could not be cured by the full Council taking into account the comparative assessment of broad locations at the adoption stage. He said that this was because a local planning authority has only a limited choice at the adoption stage, either to adopt the plan with main modifications as recommended by the Inspector, or to withdraw or abandon the plan. As we have seen, the local planning authority cannot adopt the plan with any other modifications, unless they "do not materially affect the policies" in the plan (s.23(2) and (3)). Accordingly, if the members wished to substitute Flaxby for Green Hammerton/Cattal as the DM4 broad location, or to delete any reference in the plan to the location of the new settlement, they could not do so. They would only be able to give effect to that conclusion by deciding to abandon or withdraw the local plan and by restarting the process. Mr Katkowski QC submitted that these limitations on the authority's powers would inhibit proper consideration of that further comparative assessment by members of the full Council at the adoption stage, in contrast to the earlier stage when the Council approved the draft plan to be submitted for examination.

205. I do not accept this submission. It goes too far. It would mean that whenever the content of an SA suffers from a legal defect which is capable of affecting a policy or policies in a plan, and that defect is not corrected before the full Council considers the SA and approves the draft plan for submission for examination, it cannot be corrected thereafter. The curing of any such defect in the SA would always have to precede the submission of the plan for examination.

206. The claimant's submission is inconsistent with authority. For example, in *Cogent Land* the local planning authority published an addendum to its SA to address a legal defect in the environmental assessment accompanying the draft plan submitted for examination. They did so over one year after the submission of those documents to the Secretary of State. Singh J (as he then was) held that that step cured the failure to assess reasonable alternatives properly. His decision has been approved in *Spurrier* and *Plan B Earth* and more specifically in *No Adastral New Town Limited* at [53].

207. Those authorities reflect one of the objectives of the Directive, namely "to contribute to the integration of environmental considerations into the preparation and adoption of plans". The requirements of the Directive, which focus on consultation on the document or sequence of documents comprising the environmental report, are procedural in nature, not substantive. They are not intended to determine the outcome of the process.

208. I put to one side cases in which a substantial legal defect in the content of the environmental report is not addressed until after the examination process is concluded, where different considerations may or may not apply.

209. Here, "the broad locations" point was identified during the examination process, SAA2 was published and consulted upon and the consultation responses were taken into account by officers and by the Inspector. They had the responsibility for considering those matters during the examination stage. During that period, the environmental considerations arising from a comparison of broad locations were indeed integrated into the preparation of the plan during the process leading up to its adoption.

210. For present purposes, the examination process had essentially two possible alternative outcomes (ignoring in this case the possibility of a recommendation under s.20(7A)). First, an Inspector might have decided that the draft plan would be unsound unless DM4 was amended by a main modification substituting Flaxby for Green Hammerton/Cattal, or alternatively simply retaining the principle of a new settlement without identifying any location. No doubt FPL was aiming to achieve the former. HBC would then have been faced with the choice of deciding whether to adopt the plan subject to that and any other main modifications, or to withdraw the plan. Provided that the full Council took into account the final SA and the consultation responses, or at least a summary or analysis of that material, I do not see how, in the light of the authorities, it could be argued by any party that the earlier defect in the SEA would not have been cured by the publication of and proper consultation upon SAA2. So, if the Council had agreed with a recommendation by the Inspector to modify DM4 by identifying Flaxby as the broad location, I do not see how the promoters of the Green Hammerton/Cattal location, or an objector to Flaxby, could successfully have challenged the plan on the basis that the Council's failure to compare "broad locations" at the submission stage had not been cured because their consideration of the issues at the adoption stage was improperly inhibited by the binary nature of the decision which could then be taken.

211. The other possible outcome is that the Inspector would decide (as he did here) that policy DM4 should not be amended so as to delete the identification of Green Hammerton/Cattal as the broad location. Provided that the full Council had regard to the same SEA material, I do not see why a decision on their part to accept a recommendation by the Inspector that the plan be adopted without that modification would be any more open to legal challenge because the corrected SA had not been considered by the full Council at the submission stage and the legal nature of the adoption stage improperly inhibited a proper consideration of the issues. The legal analysis is no different according to who wins or loses the "merits" argument in the local plan process. Likewise, in either scenario the authority may decide not to accept the Inspector's recommendation on such an important topic with the consequence that the Plan has to be withdrawn.

212. On analysis, the only legal flaw in the procedure followed by HBC was that the full Council did not take into account the final SEA material and consultation responses, or a summary and analysis thereof, when they resolved to adopt the local plan. The claimant's focus on the binary or restricted nature of the decision on whether to accept the Inspector's recommendations on adoption or to withdraw the plan is irrelevant. The argument fails to take into account the local plan process as a whole.

*Conclusion on ground 1*

213. I uphold ground 1 of this challenge to the new settlement policies of the Local Plan, but only to a limited extent. The challenge relates solely to policy DM4 and related provisions dealing with the new settlement. HBC's failure at the adoption stage to comply with regulation 8(3) of the 2004 Regulations, in so far as the SEA was relevant to the new settlement policies, rendered unlawful the adoption in March 2020 of the Local Plan containing those policies. The SEA at that stage included SAA2 and the consultation responses to that document. I reiterate that this unlawfulness affected only the adoption stage of the Local Plan.

## Conclusions

214. Grounds 2 and 3 of the challenge have been rejected. Ground 1 has been accepted but only to the limited extent identified in [213] above. Neither HBC nor IP2 or IP3 submitted that in the event of any ground succeeding, wholly or in part, relief should be refused by the court in the exercise of its discretion. They were right not to do so. On the material before the Court I could not have been satisfied that, if the full Council had taken into account the SEA material to which I have referred, it is *inevitable* that they would still have resolved to adopt the local plan with policy DM4 (and related policies) as it stands *(Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041*).* It is not for the Court to stray into the forbidden territory of evaluating for itself the substantive merits of the issues. These are matters for the Council to determine *(R (Smith) v North East Derbyshire Primary Care Trust* [2006] 1 WLR 3315*).*

215. The Court has a discretion as to what remedy should be granted under s.113(7) to (7C). Mr Katkowski QC accepted, rightly in my judgment, that it would not be appropriate for the Court to quash the Local Plan, not even if the Court had accepted FPL's three grounds of challenge in their entirety. A quashing order, even in relation to part of the Plan, would result in HBC having to repeat the whole of the local plan process in relation to any part of the Plan which is quashed. That would be wholly unjustifiable.

216. Instead, it is appropriate for the Court to exercise its statutory power to remit the Local Plan with directions as to the action to be taken by HBC in relation to the document. In principle the directions should be limited to rectifying the legal error I have accepted (see *Woodfield v. JJ Gallagher Limited* [2016] 1 WLR 5126). In my judgment there was no error in the local plan process up to and including the conclusion of the examination process.

217. I invite the parties to agree directions for dealing with the flaw I have identified in the decision to adopt the Local Plan (and, as appropriate, the decision by the Cabinet on 3 March 2020) and in default of agreement to exchange and file brief written submissions.

## Addendum – Issues relating to the Court's order

218. There are three main issues arising from the parties' submissions on the terms of the Court's order.

*The scope of the order to remit*

219. In [216] I referred to the power to remit the Local Plan in s.113(7)(b) of PCPA 2004, without indicating at that stage the extent of any remitter.

220. Both limbs (a) and (b) of s.113(7) refer to "the relevant document", but s. 113(7C) provides that the powers to quash or remit are exercisable in relation to the whole or any part of the document. So, for example, in *Woodfield* [2016] 1 WLR 5126 Patterson J remitted only one policy in a local plan ([5]).

221. FPL submits that I should remit the whole of the Local Plan. I agree, but not for the reasons they give.

222. It is necessary to pay careful attention to two different but connected issues. The first issue is what steps need to be taken by HBC in order to remedy the error of law identified by the Court? The second is what needs to be remitted to HBC so that the authority has the necessary power to deal with those steps properly and in accordance with the law?

223. Unless and until the Court makes an order under s. 113 quashing or remitting the local plan, the plan-making authority is *functus officio* in relation to the plan-making process. It is the court's order which revives the authority's powers, but the extent of those powers will depend upon the order made.

224. Here FPL's challenge only related to the new settlement policies in the Local Plan and FPL's ground 1 was only concerned with the failure of HBC to consider SAA2 and the consultation responses thereto. It has never been suggested that this failure is linked to any other part of the Local Plan or that any other part of the plan ought to be reconsidered by HBC.

225. The Local Plan has not been challenged by any other party, whether in relation to the new settlement policies or any other part of the plan. For example, no one has suggested that the whole plan should be quashed or remitted because of the failure of the full Council to consider the SA at the adoption stage. The Local Plan is now immune from any such challenge by virtue of the ouster permissions in s.113(2) and (3) of PCPA 2004.

226. Accordingly, the purpose and wording of the Court's order should be tailored to fit with that analysis and the reasoning in this judgment. The essential requirement is that the Cabinet and the full Council should consider whether or not to accept the Inspector's recommendations with regard to the new settlement policies in the Local Plan and whether or not they wish the plan to be adopted containing those policies. That requires them to consider the SEA material (including consultation responses) in so far as it is relevant to that specific task. I note that no party has suggested that the SA needs to be further updated at this stage, but, in any event, that would be a matter for HBC.

227. It should be recalled that one potential option which the Court must leave open to HBC is the rejection of the Inspector's recommendation in favour of adopting the Local Plan with the new settlement policies. But in the event of the authority deciding that those policies should not be included in the Plan, or should be amended in some material way not addressed by the Inspector's main modifications, it could only give effect to that decision by not adopting (or withdrawing) the Plan (see above [33] to [34] and [204] et seq). Accordingly, I cannot accept the submission by HBC, IP2 and IP3 that the Court should only remit the new settlement policies. Unless the whole of the Local Plan is remitted, HBC's consideration of the relevant questions relating to the new settlement policies would be unlawfully constrained.

228. FPL also submits that a reasonable opportunity should be given to it and "anyone else" to submit written representations to the Cabinet and the full Council before they take their decisions in response to the Court's order, given the time that has elapsed

since the decisions taken on the 3 and 4 March 2020 and the possibility that circumstances may have changed materially since then. However, FPL has not identified any material change of circumstance of which it is aware. HBC, IP2 and IP3 oppose this suggestion on the basis that, applying *Woodfield*, relief should be limited to matters necessary to address the error at the adoption stage identified in the judgment; that is as far back as the matter should be remitted or "rewound".

229. It is not suggested by the FPL that this additional round of consultation stage forms part of the statutory scheme. There is no such requirement, for example, if a local planning authority were to take a year or so to decide on their response to an Inspector's report. HBC points out that the meeting of the full Council will be the subject of a published agenda and report by officers which will be made available to the public in the normal way. It will be open to FPL and any other interested party to send representations to HBC before the meeting, and even before that stage is reached. I do not think it would be appropriate for the Court to impose a consultation requirement in the circumstances of this case. That is a matter which should be left to HBC to consider.

230. FPL has also sought a direction from the Court that consultation on the New Settlement DPD should be paused until the outcome of the decisions by the Cabinet and the full Council on the Local Plan, so that those decisions are not "prejudged". FPL has not explained how s. 113 confers jurisdiction on the Court in a challenge against one plan to make an order directing the procedure to be followed for a different plan which is not (and could not be) the subject of that challenge. Section 113 does not authorise the authorise the making of such an order in order to remedy a legal flaw in the "relevant document" which is before the Court, or in the process which has led up to its adoption. The ouster provisions in s.113(2) and (3) should also be borne in mind as they apply to the DPD.

231. In any event, even if I have the power to make the direction sought, I decline to exercise it. I agree with HBC, IP2 and IP3 that it is necessary for the order to address the legal flaw in the local plan process identified in this judgment. It has not been suggested, let alone demonstrated, that the *legality* of the process *currently* being followed for the DPD is dependent upon the outcome of this challenge or the steps now required to be taken by HBC by the order the court will now make. If HBC were to decide against adoption of the Local Plan, that might have implications for the DPD, but that would be a matter for HBC to address. I do not see why allowing the consultation process to continue until the closing date for the receipt of representations would involve the Cabinet or the full Council prejudging its decisions on the local plan in response to this judgment. Finally, it would be confusing to the public for the consultation on the DPD now to be halted.

*Costs of the claim*

232. As between FPL and HBC the former submits that it should be paid all its costs by the latter. HBC submits that there should be no order as to costs or that FPL should only recover 10-20% of its costs. HBC submit that additionally two items of FPL's costs should be disallowed in any event.

233. The relevant principles relied upon by the parties are contained in CPR 44. Both sides place emphasis upon the extent to which they have been successful. HBC also raises issues as to the way in which the litigation has been conducted.

234. HBC has been successful in resisting grounds 2 and 3. They were weak grounds. They received no encouragement at all in the order of Sir Wyn Williams dated 12 August 2020 granting permission to apply for statutory review. Had they been successful,l the scope of the relief to which the FDL would have been entitled would have been wider, requiring the local plan process to be "rewound" to an earlier stage. So, it was important for HBC to succeed on those grounds and it had to incur costs in order to do so.

235. FPL has been successful in relation to ground 1, but as is apparent from the judgment, only in relation to a relatively small part of the argument. FPL mounted a much more ambitious, time-consuming and costly attack on the local plan process, which would have required SAA2 to have been produced and considered by the full Council prior to the submission of the Local Plan. They also argued that alleged defect could not be cured by steps taken subsequently. In effect FPL was seeing to have the plan "rewound" at least as far back as the submission stage, so that the examination of the new settlement policies would have to be repeated. They have failed in achieving what was plainly the main object or thrust of the challenge.

236. On the other hand, I do not accept HBC's submissions that there should be no order as to costs. During the process FPL did seek to have matters considered by members of the Council rather than simply by officers, specifically in relation to the "broad location" issue. HBC resisted that suggestion. It was necessary for FPL to bring proceedings, but they ought to have been on a much more limited scale. Taking into account also the unnecessary expenditure to which HBC has been put in order to resist the substantial parts of the claim where FPL was unsuccessful, FPL should be awarded only 15% of its costs, subject to what I say below.

237. Not surprisingly, there has been no real attempt by FPL to defend the size of the original claim bundle of around 11,000 pages. The helpful core bundles agreed between all the parties for the hearing, covering all three grounds and including material from opposing parties, ran to only 663 pages. During the hearing it was only necessary for relatively small additions to be made to those bundles. Plainly, HBC would have incurred costs unnecessarily through having to deal with the superfluity of material contained in the claim bundle.

238. The Court has repeatedly said that it will consider disallowing the costs of bundles and documents filed which are excessive, whether originating from a claimant or another party, in the exercise of its discretion, and also as a necessary sanction, having regard to the obligations of each party under CPR 1.3. Taking into account the costs which HBC would have been forced to incur unnecessarily, I conclude that the whole of the costs of the original claim bundle must be disallowed.

239. I have already explained why it was inappropriate for FPL to rely upon Mr Morton's witness statement, apart from one small section ([12] above). I commend the good judgment of HBC in deciding not to file a witness statement in reply to material of that kind. But they nevertheless incurred costs in having to consider this largely

inadmissible material. It is therefore appropriate for the Court to disallow the costs of Mr Morton's witness statement in its entirety.

240. In reaching these conclusions on costs, I have not double-counted any of the arguments advanced by HBC or their effect on the costs recoverable by FPL.

*Costs relating to the joinder of IP2 and IP3*

241. IP2 and IP3 applied to be joined as interested parties. That was resisted by FPL. The interested parties ask for an order that FPL pays their costs of making the application for joinder and of resisting that application on the grounds that FPL was unsuccessful and acted unreasonably. FPL resist the applications.

242. FPL rightly points out that under paragraph 4.1 of CPR PD 8C they were not required to serve the claim on the interested parties when it was first filed. The rule recognises that although a challenge to a local plan may affect the interests of many individuals, businesses and organisations, it is not practicable or necessary for everyone concerned about that challenge to be served or joined (see e.g. *IM Properties Development Limited v Lichfield District Council* [2015] EWHC 1982 (Admin) at [61] to [(63]). However, the Court has inherent jurisdiction to join an additional party so as to avoid injustice, albeit that that discretion is likely to be exercised rarely (see e.g. *George Wimpey UK Limited v Tewkesbury Borough Council* [2008] 1 WLR 1649 at [11] to [12], *R (Capel Parish Council) v Surrey County Council* [2008] EWHC 2364 (Admin) at [11]).

243. It follows that it was necessary for IP2 and IP3 to make an application to justify to the Court why exceptionally an order should be made joining them as interested parties. IP2 and IP3 were successful in their application and FPL was unsuccessful in its resistance. Mr Neil Cameron QC, sitting as a Deputy High Court Judge, made an order for joinder on 2 July 2020. In effect, FPL's arguments have sought to revisit the merits of that order, which was not appealed. This was inappropriate.

244. FPL's challenge sought to quash policies in the local plan for a new settlement on land in which IP2 and IP3 had substantial interests and for which they had invested large sums of money and effort over many years in order to promote a new settlement. The purpose of FPL's challenge was to advance their own rival site in substitution for that identified in the Local Plan. FPL did not seek any interim relief of the kind discussed in *IM*, but nevertheless, powerful reasons have been set out for the joinder of IP2 and IP3, which do not require to be recited here. It is not difficult to imagine what FPL's reaction would have been if the if "the boot had been on the other foot" and there had been opposition to their wish to participate in a claim challenging the identification by the local plan of Flaxby as the location for the new settlement.

245. Although an application for joinder was necessary, it ought to have been the subject of a straightforward consent order and a relatively inexpensive procedure. It was unreasonable for FPL to resist the application and in so doing it caused IP2 and IP3 to incur costs unnecessarily.

Appendix 6

Neutral Citation Number: [2014] EWHC 406 (Admin)

Case No: CO/3796/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2014

**Before** :

**THE HONOURABLE MR JUSTICE SALES**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Ashdown Forest Economic Development Llp** | **Claimant** |
| **- and -** | |
| **(1) Secretary of State for Communities and Local Government**<br>**(2) Wealden District Council**<br>**(3) South Downs National Park Authority** | **Defendants** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**David Elvin QC & Charles Banner** (instructed by **King Wood Mallesons LLP**) for the **Claimant**
**Richard Kimblin** (instructed by **the Treasury Solicitor**) for the **First Defendant**
**James Pereira & David Graham** (instructed by **Wealden District Council** ) for the **Second and Third Defendants**

Hearing dates: 4/2/14-5/2/14

- - - - - - - - - - - - - - - - - - - - -

# Judgment

## Mr Justice Sales :

*Introduction*

1. This is a claim under section 113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to quash, in whole or in part, the Wealden District Core Strategy Local Plan ("the Core Strategy"). The Core Strategy forms part of the statutory development plan for the administrative areas of both the Second Defendant, Wealden District Council ("WDC"), and the Third Defendant, South Downs National Park Authority ("SDNPA"). WDC had the main role in preparing the Core Strategy for adoption. It was adopted by WDC and SDNPA jointly on 19 February 2013.

2. The Claimant is an umbrella organisation representing the interests of a number of major landowners in the area covered by the Core Strategy, whose property interests are affected by the Core Strategy. In particular, the Core Strategy places limits on building development in the general area covered by it and also specific restrictions in relation to building development in an area within 7 km of the boundary of Ashdown Forest, which is a protected site within the area covered by the Core Strategy. The landowners would like greater opportunities to develop their land by building on it than the Core Strategy allows for.

3. Ashdown Forest is designated as a Special Area of Conservation under the Habitats Directive (Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) and the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"). It is also designated as a Special Protection Area under the Birds Directive (Directive 2009/147/EC on the conservation of wild birds) and the Habitats Regulations.

4. The Core Strategy was adopted by WDC and SDNPA after an extensive iterative process of consultation and refinement, including an examination in public before an Inspector (Mr Moore, appointed by the Secretary of State, the First Defendant), at hearings in January and February 2012 and on 6 September 2012. The Inspector's Report on the Core Strategy pursuant to section 20 of the 2004 Act was issued on 30 October 2012. It made certain recommendations, subject to compliance with which the Inspector found the Core Strategy to be "sound" and cleared it for adoption by WDC and SDNPA.

5. In order to protect Ashdown Forest to the level required by the Habitats Directive, the Birds Directive and the Habitats Regulations, the draft Core Strategy submitted for examination by the Inspector WDC included an overall housing requirement for the area covered by the Core Strategy of 9,600 in the period to 2030 and proposed measures of particular control in relation to new development close to the Forest in the form of a prohibition on new development within 400m of the edge of the Forest (to limit predation by domestic cats and so forth) and a requirement that for new development within 7 km of the Forest suitable alternative natural green space ("SANG") should be provided. The purpose of the proposed SANG requirement was to limit housing development in proximity to the Forest, with a view to limiting

recreational visits to the Forest to a level which would not place excessive strain on the bird wildlife in the Forest.

6. The overall housing requirement figure of 9,600 in the draft Core Strategy was a considerable reduction below the then current figure of 11,000 contained in another planning document, the South East Plan. The South East Plan was the regional spatial strategy for the South East which had been promulgated under the 2004 Act prior to the removal of the layer of regional strategy planning by amendment of that Act by the Coalition Government. The Government announced in July 2010 that regional strategy plans were to be revoked. However, the South East Plan was only formally revoked with effect from March 2013, after adoption of the Core Strategy in issue in these proceedings.

7. Although the Inspector found that the figure of 11,000 for the overall new housing requirement in the South East Plan remained the appropriate figure for new housing needs in the area, he considered that the lower figure proposed by WDC for inclusion in the Core Strategy was justified by reason of environmental constraints in relation to the need to protect Ashdown Forest from the detrimental effects of traffic pollution associated with increased density of population in the area. For separate reasons which are not the subject of challenge he reduced WDC's proposed figure of 9,600 to 9,440. The Inspector also considered that the 7 km SANG zone and 400m development exclusion zone were appropriate, and required that they be promoted from discussion in explanatory text in the draft Core Strategy to be incorporated into a formal policy statement in the approved version of the Strategy, in policy WCS12 (Biodiversity).

8. The Claimant challenges the lawfulness of the adoption of the Core Strategy on four grounds:

   i) Ground One: In relation to the statement of overall housing requirement in the Core Strategy as adopted, the Inspector reached an irrational and illogical conclusion, contrary to the approach he should have adopted in compliance with national policy guidance as to his role in examining a development plan, that the lower figure of 9,440 was justified. He erred in accepting WDC's contention that a risk of environmental damage to Ashdown Forest arising from the impact of nitrogen and nitrogen oxide pollution from traffic ("nitrogen deposition") associated with housing development at a higher figure meant that the objectively assessed need for 11,000 new homes in the relevant period could not be met. He should have found that WDC had not carried out sufficient investigations to determine whether in fact the higher, objectively assessed housing requirement figure could have been accommodated without undue risk of environmental damage to the Forest. He should have required WDC to undertake further work to see whether an overall new housing requirement of up to 11,000 could be accommodated and included in the Core Strategy, and until that work was done should have treated the draft Core Strategy as unsound and not properly capable of adoption. The unlawfulness in the approach and conclusion of the Inspector

prevented the adoption of the Core Strategy by WDC and SDNPA from being lawful. Mr Kimblin appeared for the Secretary of State to defend the Inspector against this allegation of unlawfulness in his approach and Mr Pereira, for WDC and SDNPA, adopted his submissions in relation to this Ground;

ii) Ground Two: Again in relation to the statement of overall housing requirement in the Core Strategy, the steps taken by WDC to investigate whether the figure of 9,440 was justified were inadequate to comply with its obligations under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") and the domestic regulations which implement that Directive, the Environmental Assessment of Plans and Programmes Regulations 2004 ("the Environmental Assessment Regulations"), which required it to examine reasonable alternatives to the plan which it chose to adopt and to explain its choice;

iii) Ground Three: Again in relation to the statement of overall housing requirement in the Core Strategy, WDC failed to carry out an appropriate assessment as required by regulation 61(1)(a) of the Habitats Regulations and the Habitats Directive regarding the impact on Ashdown Forest of nitrogen deposition; and

iv) Ground Four: In relation to the 7 km SANG zone, the adoption of Policy WCS12 was contrary to the SEA Directive and the Environmental Assessment Regulations, in that there was no assessment of the relative environmental impacts of a different radius or of alternative means of mitigating the additional recreational pressure on Ashdown Forest arising from new development.

9. Mr Pereira presented the submissions for WDC and SDNPA in relation to Grounds Two, Three and Four. The Secretary of State made no submissions in relation to those Grounds, since they were not directed against the Inspector (even though, presumably, in theory they might have been, as further grounds on which it might have been said that the Inspector ought to have found that the Core Strategy had not been lawfully prepared and was unsound).

*Legal Framework*

*(i) The 2004 Act*

10. The Core Strategy qualifies as a "development plan document" for the purposes of the 2004 Act. Once such a core strategy is adopted by a local planning authority, it becomes part of the statutory development plan of that authority. This has the result that planning applications must be determined in accordance with the core strategy, as in relation to other parts of the statutory development plan, unless material considerations indicate otherwise: section 38(6) of the 2004 Act.

11. A core strategy also sets the framework for drawing up other, lower level and more detailed parts of the statutory development plan of a local planning authority. Here, the relevant local planning authority is WDC.

12. The Secretary of State has given policy guidance in relation to this process in the National Planning Policy Framework issued in March 2012 ("the NPPF"), which replaced a range of previous policy guidance documents. The NPPF includes a presumption in favour of sustainable development. Paragraph 47 of the NPPF requires local planning authorities (amongst other things) to identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements, with a view to boosting significantly the supply of housing. The extent of identification of deliverable sites required by this paragraph depends on the size of the housing requirement identified in a local planning authority's core strategy. One effect of the incorporation of the lower housing requirement figure in the Core Strategy, therefore, is that WDC will work to identify a lower level of specific deliverable sites in its other plan documents, which has a negative effect on the ability of local landowners to obtain planning permission for new developments on their land.

13. The NPPF includes the following guidance at paragraphs 158-159:

> "*Using a proportionate evidence base*
>
> 158. Each local planning authority should ensure that the Local Plan is based on adequate, up-to-date and relevant evidence about the economic, social and environmental characteristics and prospects of the area. Local planning authorities should ensure that their assessment of and strategies for housing, employment and other uses are integrated, and that they take full account of relevant market and economic signals
>
> *Housing*
>
> 159. Local planning authorities should have a clear understanding of housing needs in their area. …"

14. At the time when the Core Strategy was drawn up, subjected to examination in public and adopted, the 2004 Act required a local planning authority to have regard to the regional strategy for its area in drawing up its own development plan documents: section 19(2)(b). Section 24(1)(a) provided that such local development documents "must be in general conformity with" the regional strategy. Hence WDC was required to have regard to the South East Plan when drawing up the Core Strategy and the Core Strategy was required to be "in general conformity" with the South East Plan. The South East Plan identified the housing requirement for WDC's area for the period to 2030 as 11,000 homes.

15. The notion of "general conformity" of local development plans with a regional strategy imports a limited degree of latitude for local plans to depart from what is set

out in a regional strategy: see *Persimmon Homes (Thames Valley) Ltd v Stevenage B.C.* [2005] EWCA Civ 1365; [2006] 1 WLR 334.

16. Section 20 of the 2004 Act provides for independent examination of development plan documents. A local planning authority must submit every development plan document, when it believes it is ready, to the Secretary of State for independent examination. The examination is carried out by an inspector appointed by the Secretary of State. Section 20(5) provides in relevant part as follows:

> "(5) The purpose of an independent examination is to determine in respect of the development plan document–
>
> (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b) whether it is sound …"

17. The inspector may make recommendations for modifications to a development plan document to make it sound.

18. Paragraph 182 of the NPPF provides as follows:

> "*Examining Local Plans*
>
> 182. The Local Plan will be examined by an independent inspector whose role is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and whether it is sound. A local planning authority should submit a plan for examination which it considers is "sound" – namely that it is:
>
> - *Positively prepared* – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;
>
> - *Justified* – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;
>
> - *Effective* – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities;

> - *Consistent with national policy* – the plan should enable the delivery of sustainable development in accordance with the policies in the [NPPF]. …"

19. Under Ground One, the Claimant submits that the Inspector failed properly to follow the guidance in the NPPF in arriving at his conclusion that the Core Strategy as ultimately adopted was sound, and that his conclusion was illogical and irrational.

20. Section 113 of the 2004 Act provides in relevant part as follows:

> **"113 Validity of strategies, plans and documents**
>
> (1) This section applies to–
>
> …
>
> (c) a development plan document; …
>
> (2) A relevant document must not be questioned in any legal proceedings except in so far as is provided by the following provisions of this section.
>
> (3) A person aggrieved by a relevant document may make an application to the High Court on the ground that–
>
> (a) the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with.
>
> (4) But the application must be made not later than the end of the period of six weeks starting with the relevant date.
>
> (5) The High Court may make an interim order suspending the operation of the relevant document–
>
> (a) wholly or in part;
>
> (b) generally or as it affects the property of the applicant.
>
> (6) Subsection (7) applies if the High Court is satisfied–
>
> (a) that a relevant document is to any extent outside the appropriate power;
>
> (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.
>
> (7) The High Court may—

(a) quash the relevant document;

(b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.

(7A) If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.

(7B) Directions under subsection (7A) may in particular—

(a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;

(b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;

(c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);

(d) require action to be taken by one person or body to depend on what action has been taken by another person or body.

(7C) The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

…

(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document.

(11) References to the relevant date must be construed as follows–

…

> (c) for the purposes of a development plan document (or a revision of it), the date when it is adopted by the local planning authority or approved by the Secretary of State (as the case may be); …"

21. In *Blyth Valley BC v Persimmon Homes (North East) Ltd* [2008] EWCA Civ 861; [2009] JPL 335 the Court of Appeal held that the ground of challenge in section 113(3)(a) "in effect amounts to an assertion that the adoption of the document in question was ultra vires, and it brings into play the normal principles of administrative law" (per Keene LJ at [8]).

22. It is common ground that the Claimant has proper standing to bring this challenge and that the challenge is brought within time.

*(ii) The Habitats Directive, the Birds Directive and the Habitats Regulations*

23. The Habitats Directive and the Birds Directive have been implemented in domestic law by the Habitats Regulations. The Directives and the Regulations provide for development plans and projects to be screened before adoption to determine whether they might pose a risk of harm to protected sites, and if it is determined that they may create a risk of harm an "appropriate assessment" of the extent of the harm and whether it is acceptable or can be mitigated is required before the plan or project is adopted.

24. The relevant provision in the Habitats Regulations is regulation 61, which provides in relevant part as follows:

> "**61. Assessment of implications for European sites and European offshore marine sites**
>
> (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of

> the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.
>
> (4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given. …"

25. Regulation 61 applies in relation to the adoption of the Core Strategy. As described in greater detail below, WDC carried out a screening exercise in relation to the relevant policies proposed for the Core Strategy and determined that at a stipulated housing requirement figure of 9,600 the increase in traffic from development in its area would not pose a significant risk of harm to the Ashdown Forest protected site. WDC also assessed that with the protective measures including the 7 km SANG zone, additional impact from recreational visitors to the Forest from new development in its area would be kept within reasonable bounds and would not create significant additional risk to the protected site. As a result of the screening exercise, therefore, WDC determined that it was not necessary to carry out an "appropriate assessment" under regulation 61 in relation to its proposals for the Core Strategy.

26. On the other hand, if a higher housing requirement figure were included in the Core Strategy, there would have been a risk of harm arising from nitrogen deposition associated with increased levels of traffic in relation to development in the area and it would have been necessary to proceed to carry out an "appropriate assessment" before a policy with such higher level of housing requirement was included in the Plan.

27. Regulation 61 is directly relevant to Ground Three. The Claimant maintains that WDC acted in breach of that regulation and the Habitats Directive in the way in which it carried out the screening exercise, in that it failed to have regard to the

cumulative effect of the Core Strategy in combination with other plans, which the Claimant says would have shown a decline in nitrogen deposition rates which would have permitted accommodation of a higher housing requirement figure in the Core Strategy.

*(iii) The SEA Directive and the Environmental Assessment Regulations*

28. The SEA Directive was promulgated to supplement and extend effective protection of the environment beyond that achieved by the Environmental Impact Assessment ("EIA") Directive (Directive 85/337/EEC). The SEA Directive, requiring environmental assessment of strategic development plans, is designed to ensure that there is an environmental assessment in relation to adoption of such plans, that is to say, at a planning stage before site specific applications are made and decided in the context of constraints which may be imposed as a result of such strategic plans. As the European Commission has pointed out, the EIA Directive and the SEA Directive "are to a large extent complementary: the SEA is 'up-stream' and identifies the best options at an early planning stage, and the EIA is 'down-stream' and refers to the projects that are coming through at a later stage" (*Report on the Effectiveness of the Directive on Strategic Environmental* Assessment, 2009, section 4.1).

29. The recitals in the SEA Directive include the following:

> "Whereas:
>
> (1) Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development. …
>
> (4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.
>
> (5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in

which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

(6) The different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment. …

(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, Member States should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes.

(10) All plans and programmes which are prepared for a number of sectors and which set a framework for future development consent of projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, and all plans and programmes which have been determined to require assessment pursuant to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, are likely to have significant effects on the environment, and should as a rule be made subject to systematic environmental assessment. When they determine the use of small areas at local level or are minor modifications to the above plans or programmes, they should be assessed only where Member States determine that they are likely to have significant effects on the environment. …

(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme. Member States should communicate to the Commission any measures they take concerning the quality of environmental reports

> (15) In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion. …
>
> (17) The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.
>
> (18) Member States should ensure that, when a plan or programme is adopted, the relevant authorities and the public are informed and relevant information is made available to them. …"

30. The operative part of the SEA Directive includes the following provisions:

> "*Article 1*
>
> **Objectives**
>
> The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain and programmes which are likely to have significant effects on the environment.
>
> *Article 2*
>
> **Definitions**
>
> For the purposes of this Directive:
>
> (a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government and

- which are required by legislative, regulatory or administrative provisions;

(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

(c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;

(d) 'The public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

*Article 3*

**Scope**

…

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC. …

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set

out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive. …

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public. …

*Article 4*

**General obligations**

1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure. …

*Article 5*

**Environmental report**

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

*Article 6*

**Consultations**

1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. …

*Article 9*

**Information on the decision**

1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:

(a) the plan or programme as adopted;

(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and

(c) the measures decided concerning monitoring in accordance with Article 10.

2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States. …"

31. Annex I to the SEA Directive, which sets out the information to be included in the environmental report, provides as follows:

"The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

(a) an outline of the content, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental

> importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;
>
> (e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
>
> (f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;
>
> (g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;
>
> (h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
>
> (i) a description of the measures envisaged concerning monitoring in accordance with Article 10;
>
> (j) a non-technical summary of the information provided under the above headings."

32. As usual with EU legislation, a purposive approach is to be taken to the interpretation of the SEA Directive: *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 at [20]-[21] per Lord Reed JSC. The Directive is implemented in domestic law by the Environmental Assessment Regulations. The Regulations closely follow the drafting of the SEA Directive and are to be interpreted in conformity with it, in accordance with usual *Marleasing* principles (Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1992] 1 CMLR 305).

33. Guidance in relation to the precautionary principle, in light of which the SEA Directive is to be interpreted, is provided in a number of judgments: see e.g. Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee* [2005] 2 CMLR 31, para. 44.

34. Regulation 12 corresponds to Article 5 of the Directive. It provides in relevant part as follows:

> "**12.— Preparation of environmental report**
>
> (1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and
>
> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
>
> …
>
> (5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies. …"

35. Schedule 2 to the Environmental Assessment Regulations is in material respects in the same terms as Annex I to the Directive.

36. Regulation 13(1) corresponds to Article 6 of the Directive. It provides that every relevant draft plan prepared pursuant to regulation 12 "and its accompanying environmental report" shall be made available for the purposes of consultation.

37. Regulation 16 makes provision in relation to the procedures to be followed after a plan has been adopted. It corresponds to Article 9 of the Directive. It requires publication of the plan as adopted, its accompanying environmental report and various information.

*Factual Background*

38. In May 2009, the South East Plan was promulgated as the relevant regional strategy for the South East. It included statements of housing requirements for the South East for the period to 2030. The housing requirement for the area of WDC was set at 11,000 homes. The South East Plan included the following policy NRM5, "Conservation and Improvement of Biodiversity":

> "Local planning authorities and other bodies shall avoid a net loss of biodiversity, and actively pursue opportunities to achieve a net gain across the region.
>
> i. They must give the highest level of protection to sites of international nature conservation importance (European sites). Plans or projects implementing policies in this RSS are subject to the Habitats Directive. Where a likely significant effect of a plan or project on European sites cannot be excluded, an appropriate assessment in line with the Habitats Directive and associated regulations will be required.
>
> ii. If after completing an appropriate assessment of a plan or project local planning authorities and other bodies are unable to conclude that there will be no adverse effect on the integrity of any European sites, the plan or project will not be approved, irrespective of conformity with other policies in the RSS, unless otherwise in compliance with 6(4) of the Habitats Directive.
>
> iii. For example when deciding on the distribution of housing allocations, local planning authorities should consider a range of alternative distributions within their area and should distribute an allocation in such a way that it avoids adversely affecting the integrity of European sites. In the event that a local planning authority concludes that it cannot distribute an allocation accordingly, or otherwise avoid or adequately mitigate any adverse effect, it should make provision up to the level closest to its original allocation for which it can be concluded that it can be distributed without adversely affecting the integrity of any European sites.
>
> iv. They shall avoid damage to nationally important sites of special scientific interest and seek to ensure that damage to county wildlife sites and locally important wildlife and geological sites is avoided, including additional areas outside the boundaries…"

39. In July 2009 WDC issued a consultation document on spatial development options for the Core Strategy. It was premised on a housing requirement of 11,000 homes, as stated in the South East Plan. Various options for the distribution of this requirement in WDC's area were canvassed.

40. Alongside this, WDC issued a Sustainability Appraisal drawn up by its environmental consultants in relation to the spatial development options for the Core Strategy. A Sustainability Appraisal is a form of assessment required in the plan development process which also qualifies as the environmental report required by the SEA Directive and Regulations. Chapter 6 reviewed the likely predicted impacts of the housing distribution options under review.

41. At about the same time, WDC conducted some preliminary screening work for the purposes of the Habitats Directive and Regulations and noted that it appeared that an "appropriate assessment" would be required in relation to the impact of the Core Strategy on Ashdown Forest. The possible impacts were noted to be increased recreational pressure on the site from new housing development in the north of WDC's area, where the Forest is located, and nitrogen deposition associated with increased traffic movements close to the Forest arising from such development.

42. In early 2010, WDC's environmental consultants did some preliminary work on an appropriate assessment report under the Habitats Directive and Regulations. On 8 June 2010 there was a meeting between WDC and its consultants and representatives of Natural England, one of the statutory consultee bodies in relation to the development of the Core Strategy. Natural England said that it considered that new development in WDC's area up to 7 km from Ashdown Forest, in combination with new housing development elsewhere, had the potential to affect adversely the integrity of the protected site through disturbance of the bird species there, so that the precautionary principle required the implementation of mitigation measures comprising a development exclusion zone within 400m of the boundary of the Forest and a requirement that any net increase in dwelling numbers within 7 km of the Forest would require the provision of SANGs (it was noted that it might be acceptable to have one or two large SANGs to cover a number of developments, rather than requiring a separate SANG for each development in that area). Natural England also noted the issue of nitrogen deposition associated with a housing requirement of 11,000 dwellings, and said that mitigation measures would be required in relation to that as well.

43. In mid-2010, the Government announced that it intended to revoke the layer of regional strategy plans in the planning system, which would entail revocation of the South East Plan. However, the formal legal revocation of the South East Plan did not occur until March 2013, shortly after adoption of the Core Strategy. WDC therefore remained obliged to ensure that its Core Strategy, as adopted, was in general conformity with the South East Plan. The announcement of the revocation of the South East Plan served as a spur to WDC to do further work to update the evidence base in relation to the requirement for new homes in its area.

44. On 21 September 2010, Natural England published a report it had commissioned on data analysis of a visitor survey at Ashdown Forest. The analysis modelled visitor levels set against the distribution of the protected birds present on the site. The report did not seek to explore breeding success. It noted, "Additional development surrounding the site is likely to result in increases in visitor rates to the site", and gave predictions of the number of additional visits arising from development in different locations around the site. The report stated, "It is not possible to determine whether or not an increase in visitor rates may result in impacts on the [protected] bird species for which the site is designated." The analysis compared Ashdown Forest with studies of disturbance at other protected sites, in particular the Thames Basin Heaths and the Dorset Heaths. In relation to those sites, a 5 km protective zone had been operated. The analysis indicated that Ashdown Forest had lower densities of protected species (nightjar, woodlark and Dartford Warbler) than the Thames Basin Heaths and (save in relation to woodlarks) Dorset Heaths, while it had much lower densities of visitors than the Thames Basin Heaths but slightly higher on average than the Dorset Heaths. The report reviewed studies which showed links between human disturbance and negative effects on all three species.

45. Chapter 8 of the report discussed the implications of the evidence for site management, spatial planning and mitigation. The report stated that "whilst birds [in Ashdown Forest] are not being displaced from breeding habitat as a result of recreation, it cannot be conclusively determined that current levels of recreational pressure are not affecting the breeding success of birds exposed to recreational pressure" (para. 8.8) and "The level at which recreational pressure will be such that birds will begin to be displaced is not known. Given the evidence from other sites, there is the potential that, were access levels to increase, there may be avoidance of otherwise suitable habitat and there may be impacts on breeding success" (para. 8.9). It was noted that mitigation strategies, along with long term monitoring, were in place in relation to the Thames Basin and Dorset Heaths to counteract the effects of increasing levels of housing in their vicinity (also para. 8.9). The report referred to the principle of taking a precautionary approach (para. 8.12) and advised that a similar approach to protection of other heathland sites should be taken, but with adjustment for the specific features of Ashdown Forest (paras. 8.13-8.15).

46. The report recommended adoption of a 400m exclusion zone in which residential development is avoided, on the basis that at such short distances it is difficult to provide alternative sites for use and residents would be likely to use the Forest for their local recreational needs, such as the daily dog walk, and so as to minimise other urban effects, such as cat predation (paras. 8.16-8.17). It also analysed the extent of a "Wider Zone of Influence", by assessing "how far people travel to visit Ashdown and where new housing will result in a definite increase in visitor pressure to the [protected site] and where these visits are of a type that will have an impact on the site" (distinguishing, for example, daily recreational visits to walk the dog from visits once or twice a year to see the view) (para. 8.18). The report noted that 5 km zones had been established around the protected sites at the Thames Basin and Dorset Heaths in which it was recognised that new development had the potential to result in increased use of the heaths so that mitigation measures needed to be established (para.

8.19). The report then reviewed data from visitor surveys in relation to Ashdown Forest and the Thames Basin and Dorset Heaths; noted that visitors to the Forest appeared to travel further than in relation to the other sites; and modelled the visitor rates to be expected at the Forest from development of specific numbers of houses at specific locations, highlighting how the effect of additional housing near it would lead to a much higher increase in visitors than an equivalent sized development much further from it, thereby putting increased pressure on the protected species at the Forest.

47. The effect of the analysis in the report was to identify that people were willing to travel greater distances by car to get to Ashdown Forest than in relation to the Thames Basin and Dorset Heaths, with the result that one should expect to establish a wider protective zone in relation to the Forest in which mitigation measures would be required (the measure considered appropriate was use of SANGs) than in relation to the other sites reviewed, in order to offset its greater attractive force and the likely additional visitor numbers which would be generated by residential development in its vicinity. In due course, a 7 km zone was chosen to reflect these points. In my view, this zone was appropriately based on the available evidence and the advice of Natural England, the expert statutory consultees on environmental issues.

48. On 16 September 2010 WDC officers met with representatives of Natural England to discuss the issue of nitrogen deposition in relation to Ashdown Forest. Natural England explained its view that if the estimated annual average daily traffic ("AADT") flows would be increased by 1,000 cars or more on any road in or adjacent to the Forest, that would represent a material increased risk to the environmental integrity of the protected site and would trigger the need for a detailed "appropriate assessment" to be carried out pursuant to the Habitats Directive, Birds Directive and the Habitats Regulations. Conversely, if the estimated AADT flows for cars were less than 1,000, there would be no material increase in risk and a detailed appropriate assessment would not be required.

49. There is no challenge to the use of the 1,000 AADT flow figure as the relevant threshold to trigger the need for a detailed appropriate assessment of the impact of increased nitrogen deposition on Ashdown Forest. Mr Elvin QC, for the Claimant, however, emphasises that if the 1,000 AADT flow increase threshold were exceeded because of the extent of housing development in the vicinity of the Forest, it would not necessarily follow that such development could not be permitted because of the operation of the Habitats Directive, Birds Directive and the Habitats Regulations. If a detailed appropriate assessment were carried out, as required by that legislation, it might reveal that the possible environmental harm posed by more extensive development was in fact within acceptable limits and that such development could safely proceed.

50. In February 2011, WDC issued a Proposed Submission Core Strategy. This was a draft of the Core Strategy document which it would in due course have to submit to the Secretary of State for the purposes of independent examination, issued for the purposes of consultation before the final submission version of the Core Strategy was

drawn up. In the Proposed Submission Core Strategy, in accordance with advice which had by this stage been received from Natural England, WDC included a proposal for a 400m development exclusion zone around Ashdown Forest together with a 7 km zone within which any development would have to be accompanied by mitigation measures in the form of provision of SANGs (see, in particular, para. 3.32). Proposed policy WCS12 (Biodiversity) stated, among other things, that WDC would prevent a net loss of biodiversity, ensure a comprehensive network of habitats and work with partners to maximise opportunities to ensure that habitats etc. are maintained, restored and enhanced (but it did not include specific text relating to the 400m exclusion zone and 7 km protective zone around the Forest). WDC also included a proposed policy WCS1 (Provision of Homes and Jobs 2006-2030) which used the figure of 9,600 additional dwellings to be provided in the period, rather than the 11,000 figure included in the South East Plan.

51. In conjunction with the Proposed Submission Core Strategy, WDC also issued a Sustainability Appraisal of it, again for the purposes of consultation before final submission to the Secretary of State. This Sustainability Appraisal was proposed as the document which would cover the matters required to be examined in an environmental report for the purposes of the SEA Directive and the Environmental Assessment Regulations. It included a discussion of six strategic spatial housing options which had been reviewed at the outset of WDC's consideration of the Core Strategy and explained in chapters 1 and 6 the reasons why three of them had not been taken forward for more detailed consideration, while the other three (identified as Scenarios A, B and C) had been. Chapter 8 set out the sustainability appraisal of the selected three plan alternatives.

52. Scenario A reflected the overall number (11,000) and distribution (7,000 in the south of WDC's area and 4,000 in the north) of additional dwellings as allocated to WDC in the South East Plan. Scenario B also reflected the overall 11,000 figure in the South East Plan, but provided for 6,000 to be allocated to the south of WDC's area and 5,000 to the north (where Ashdown Forest is located), to accommodate infrastructure constraints in the south. It was noted that in terms of environmental impact on Ashdown Forest, Scenario A would be better than Scenario B, because it involved less new development close to the Forest.

53. Scenario C involved a departure from the overall 11,000 figure for new dwellings in the South East Plan in favour of a figure of 9,600. It was described as having emerged as a result of the sustainability appraisal of Scenarios A and B, which ran into infrastructure capacity constraints (both Scenario A and Scenario B, but in particular in relation to Scenario A) and environmental constraints (both Scenario A and Scenario B, but in particular Scenario B in relation to Ashdown Forest, by reason of its higher distribution of new homes in the north of WDC's area). WDC stated: "Scenario C seeks to maximise housing delivery within acknowledged capacity constraints …" (para. 8.13).

54. At para. 8.40 and in Table 8.8 WDC explained its reasons for not proceeding with Scenario A and Scenario B, and for selecting Scenario C for detailed sustainability

review, in order to comply with Article 5(1) of and paragraph (h) of Annex I to the SEA Directive. The main reasons given for rejecting Scenarios A and B related to infrastructure constraints which had nothing to do with the need to protect Ashdown Forest, but an additional reason given for rejecting Scenario B was that the distribution of new development under it did not reflect environmental constraints including in relation to the protected site at Ashdown Forest. In relation to Scenario C, WDC stated:

> "Scenario C distributes growth in line with acknowledged infrastructure capacity and is realistic in terms of the likelihood of the provision of new infrastructure to support growth. This distribution places less pressure on resources both environmental and social and enables a more realistic balance of housing growth with employment provision. Broadly in line with Parish responses to requirements for new growth [part of the further work done after the announcement that the South East Plan was to be revoked] it should meet the needs of local communities. The predicted environmental effects for this Scenario are less adverse than for Scenario A or B and the selection of this option is therefore more likely to achieve the vision for Wealden of protecting the essential rural character and high quality environment."

55. Alongside this Sustainability Appraisal, WDC issued a report by itself and East Sussex County Council (the relevant highways authority) for the purposes of the Habitats Regulations, which assessed, among other things, the impact on the increase in traffic resulting from WDC's Proposed Submission Core Strategy on the Ashdown Forest protected site. This report explained the methodology behind choosing an increase of 1,000 AADT flows on any road in or within 200m of the Forest as the relevant threshold for assessing whether a detailed appropriate assessment under the Habitats Regulations would be required or not, and contained an assessment of the traffic impacts flowing from WDC's proposed Core Strategy (Scenario C). The additional AADT flows on all relevant roads were assessed to be below the 1,000 level (albeit, in the case of one road, at a figure of 950, which did not leave much headroom). This meant that a detailed appropriate assessment was not required under the Habitats Regulations in relation to Scenario C.

56. After further consultation on these documents, in August 2011 WDC drew up and submitted to the Secretary of State for independent examination final submission versions of the draft Core Strategy, the related Sustainability Appraisal and the related assessment under the Habitats Regulations. This latter document was entitled simply, "Assessment of the Core Strategy under the Habitats Regulations" ("the Habitats Regulations Assessment"), and was in relevant parts in the form of a screening assessment to explain why no detailed "appropriate assessment" was required in relation to Ashdown Forest under the Habitats Regulations; but in some places in the submission version of the Core Strategy and the Sustainability Appraisal it was referred to as the "Appropriate Assessment". The Sustainability Appraisal

constituted the "environmental report" required by the SEA Directive and the Environmental Assessment Regulations.

57. The submission Core Strategy and Sustainability Appraisal were in relevant respects closely similar to the draft versions of February 2011, with the Sustainability Appraisal amplifying the reasoning set out in the draft version. It was again explained why Scenario C had been chosen as the Core Strategy. Policy WCS12 was included in the same terms, together with para. 3.32 in relation to the 400m exclusion zone and 7 km protective zone around Ashdown Forest. Policy WCS1, with a requirement for 9,600 additional dwellings, was repeated.

58. Chapter 8 of the Sustainability Appraisal again identified infrastructure constraints in relation to Scenario A (para. 8.6). In addition, it noted that Scenario A performed poorly in relation to general environmental objectives (not restricted to the issue of protection of Ashdown Forest), and although it was noted that it would have benefits in terms of impact on Ashdown Forest as compared with Scenario B, it was stated that the distribution figures for new homes in relation to both these scenarios "would result in mitigation requirements for impacts on the Ashdown Forest [protected site], as highlighted by the Habitat Regulations Assessment" (para. 8.7).

59. Infrastructure objections to Scenario B were identified (para. 8.9). In addition, it was noted that it performed poorly in relation to general environmental objectives, and these were assessed to be worse than for Scenario A since more development would be directed in proximity to Ashdown Forest and it would, "on a precautionary basis, require mitigation to prevent additional nitrogen deposition and prevent an adverse effect on the integrity of [the protected site]", which would require measures to restrict additional traffic journeys across the local strategic road network, which would have inherent difficulties in terms of implementation and reliability (para. 8.11).

60. Paragraph 8.13 of the Sustainability Appraisal again explained that Scenario C emerged from work which revealed infrastructure capacity and environmental constraints in relation to Scenarios A and B, and stated that Scenario C would be more beneficial overall in sustainability terms, "as it places less pressure on environmental resources, on infrastructure and on communities and is evidence-based at a local level using the most up to date evidence [sc. on housing requirements]".

61. Table 8.2 set out a comparison of Scenarios A, B and C against the Sustainability Appraisal framework. Against the objective of ensuring "that everyone has the opportunity to live in a good quality, sustainably constructed and affordable home", the greater new housing numbers in Scenarios A and B (11,000), as against only 9,600 in Scenario C, were noted. But for Scenario A it was noted that constraints under the Habitats Regulations would prevent delivery in the south of WDC's area, for Scenario B it was noted that constraints under the Habitats Regulations would prevent delivery in the north of the area (by reference to the Habitats Regulations Assessment for Ashdown Forest) and also to a lesser extent in the south of the area (by reference to the Habitats Regulations Assessment for the Pevensey Levels), while

for Scenario C it was noted that "This scenario allows delivery of the maximum amount of housing the District can accommodate focusing on the areas where affordable housing is needed the most."

62. Mr Elvin criticised this statement in relation to Scenario C as a false explanation, because WDC had not carried out a detailed appropriate assessment under the Habitats Regulations in relation to Ashdown Forest to examine whether the higher housing figures and distributions under Scenarios A or B might in fact be accommodated. If WDC had done that work - although clearly this was a matter of speculation - it might have been discovered that the development in Scenario A or Scenario B could have been accommodated without breach of the obligations under the Habitats Directive, Birds Directive and Habitats Regulations to protect Ashdown Forest.

63. I do not consider that this criticism is fair. Unlike for Scenario C, the need for an "appropriate assessment" of the environmental impact on Ashdown Forest under those Directives and Regulations had not been screened out in relation to Scenarios A and B by the assessment work in relation to nitrogen deposition. It is common ground, therefore, that WDC could not lawfully have adopted either Scenario A or Scenario B on the evidence then available. As discussed below, there were good reasons why WDC had not carried out a detailed "appropriate assessment" in relation to those scenarios. Thus, in the circumstances which applied in August 2011, WDC was entitled to state as its assessment that Scenario C allowed delivery of the maximum amount of housing the district could accommodate.

64. Again in stated compliance with Article 5(1) of and paragraph (h) of Annex I to the SEA Directive, para. 8.40 and Table 8.9 (renumbered from Table 8.8 in the draft submission version) of the Sustainability Appraisal explained the reasons for selecting or rejecting alternatives, why Scenario C had been selected for full sustainability appraisal and why Scenarios A and B had not been so selected in terms which were essentially the same as those in the draft submission version (see paras. [53] and [54] above).

65. At para. 9.15 of the Sustainability Appraisal, in relation to the topic of conservation and enhancement of the biodiversity in WDC's area, WDC noted:

> "The broad locations for development have been chosen with biodiversity implications in mind and on a strategic level 'least worst options' in terms of impact on biodiversity were progressed. There is still uncertainty over the specific impacts on biodiversity from the spatial policies and strategies and these will be explored and understood further at the Site Allocations Stage. The Core Strategy has two policies that will have significant beneficial effects for biodiversity, WCS12 and WCS13 aim to put biodiversity central to considerations when planning and designing development areas and this should help

> to mitigate overall impacts on biodiversity on a district wide level."

66. Para. 9.34 of the Sustainability Appraisal noted that the Habitats Regulations Assessment had identified the need for mitigation and avoidance measures in relation to impacts from air quality and recreational pressure, and referred to the 400m development exclusion zone and 7 km protective zone around Ashdown Forest, which it said was outlined in the Core Strategy "and will be developed in subsequent [development plan documents]".

67. The Habitats Regulations Assessment was by expert consultants, UE Associates Ltd, appointed by WDC. The Assessment reviewed a number of protected sites in WDC's area, including Ashdown Forest. It explained the issue of nitrogen deposition in relation to the Forest and again set out the methodology and screening assessment based on the additional 1,000 AADT flow figure, essentially repeating the previous information (see para. [55] above). It noted analysis which had been carried out which showed that "the nitrogen deposition load [at the centre of the Forest] is significantly exceeded beyond the ability of habitats to withstand deleterious effects, even without implementation of the Core Strategy" and that the "situation is likely to be more severe in closer proximity to busy road corridors" (p. 18 and Table 5.1).

68. The Habitats Regulations Assessment also reviewed the visitor analysis in relation to the Forest (para. [46] above), referred to the advice from Natural England on 19 February 2010 and 8 June 2010 (para. [42] above) and in light of this material and in accordance with the precautionary principle stated that avoidance and mitigation measures were required, including the 400m exclusion zone and 7 km protective zone within which SANGs would be required to balance any development. Adoption of these measures would mean that effects connected with increased recreational pressure on the Forest from new development could be "satisfactorily avoided and reduced." No further detailed "appropriate assessment" would be required under the Habitats Regulations.

69. The Inspector held examination in public hearings between 17 January and 2 February 2012 and on 6 September 2012 and issued his Report on 30 October 2012.

70. The Inspector concluded that, with certain limited modifications, the Core Strategy was "sound" (in compliance with section 20(5) of the 2004 Act) and was in general conformity with the South East Plan (in compliance with sections 24(1) and 20(5) of the 2004 Act).

71. The Inspector was not persuaded by WDC's case that new work on the level of housing requirement in its area meant that the assessment in the South East Plan of a requirement of 11,000 new homes could be treated as superseded. Therefore, justification for the lower figure of 9,600 in the Core Strategy had to rely on other factors in the South East Plan and the NPPF (para. 15 of the Inspector's Report). He found that although the difference between the 9,600 and the 11,000 figures was significant and would, if taken alone, have meant that the Core Strategy was not in

general conformity with the South East Plan (para. 16), nonetheless the Core Strategy could be found to be in general conformity with the South East Plan and to comply with the NPPF by reason of the infrastructure and environmental constraints highlighted by WDC, read against Policy NRM5 in the South East Plan, as follows:

> "17. SEP [South East Plan] Policy NRM5 indicates that when deciding on the distribution of housing allocations local planning authorities should consider a range of alternative distributions within their area and should distribute an allocation in such a way that it avoids adversely affecting the integrity of European sites. In the event that the planning authority concludes that it cannot distribute an allocation accordingly, or otherwise avoid or adequately mitigate any adverse effect, it should make provision up to the level closest to its original allocation for which it can be concluded that it can be distributed without adversely affecting the integrity of any European site. The supporting text states that where provision is less than in the RS [regional strategy] the Council will need to demonstrate at independent examination that this is the only means of avoiding or mitigating any adverse impacts on European sites. This will involve clearly showing that they have attempted to avoid adverse effects through testing different distribution options and that the mitigation of impacts would be similarly ineffective.
>
> 18. Policy NRM5 therefore places the onus on the local planning authority to show that there are circumstances that mean that the RS provision cannot be met. As such, if the Council can demonstrate that the approach in the policy has been achieved, the CS [Core Strategy] would be in general conformity with the SEP in this respect. In this context, the Council has sought to justify the lower level of provision principally on the basis that in its view:
>
> - In south Wealden there is an infrastructure constraint relating to the capacity of the Hailsham North and Hailsham South waste water treatment works (WWTWs) which discharge into the Pevensey Levels – a Ramsar Site and candidate Special Area of Conservation (cSAC). These currently operate to the highest environmental standards and cannot be improved. Accordingly development above this existing limited headroom for these works cannot be accommodated until a new solution has been devised. While there are various options, the work to explore these has only just commenced. Such an approach is supported by other SEP policies, such as CC7 which indicates that the scale and pace of development will depend on

> sufficient capacity being available in existing infrastructure to meet the needs of new development.
>
> - In north Wealden levels of development beyond those proposed would have a significant effect on the Ashdown Forest SAC in terms of nitrogen deposition.
>
> 19. The presumption in favour of sustainable development in the Framework [the NPPF] does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined. The Framework cross refers to the guidance on the statutory obligations for biodiversity set out in Circular 06/2005 with the greatest protection being given to designations of international importance. In that context, the factors relevant to SEP Policy NRM5 are also those that in terms of the Framework may lead to housing provision being restricted against the assessed needs. …"

72. At paras. 20-25 of his Report, the Inspector reviewed the infrastructure constraints in relation to waste water treatment in the south of WDC's area before turning to the issue of nitrogen deposition in relation to Ashdown Forest, as follows:

> "*Nitrogen deposition*
>
> 26. Nitrogen emissions from traffic can increase acid deposition and eutrophication, potentially to the detriment of the Ashdown Forest and Lewes Downs SACs. The Design Manual for Roads and Bridges (DMRB) provides a methodology for a scoping assessment for air quality. This initially requires the identification of roads which are likely to be affected by development proposals. There are several criteria that are used to identify an affected road but the key one here is whether traffic flows will change by 1,000 AADT (annual average daily traffic flow) or more. As applied by the Council in its Habitats Regulations Assessment (HRA) the DMRB shows no roads in the Ashdown Forest SAC (or Lewes Downs SAC) that would be affected by the development proposed in the CS. This conclusion is supported by Natural England (NE).
>
> 27. I am satisfied that the DMRB methodology is the correct approach to a scoping assessment of air quality and that, as concluded in the HRA, the scale and distribution of development proposed in the CS is acceptable in this regard.

28. Based on the DMRB results, one section of the A26 would have an additional AADT of 950, indicating very little headroom for development beyond that proposed without further assessment to determine whether there would be a likely significant effect on the Ashdown Forest SAC. This work has not been done. However, the best available evidence on the existing nitrogen deposition load toward the centre of the SAC is that it significantly exceeds the ability of habitats to withstand deleterious effects. Deposition is likely to be more severe close to road corridors. Furthermore, I am mindful that the traffic modelling does not take account of possible traffic impacts of growth in neighbouring authorities. Although heathland management may have some part to play in mitigating the effects of nitrogen deposition, in the context of these other factors there is sufficient evidence at this point on a precautionary basis to restrict further development in north Wealden beyond that in the CS. On this basis there is not the scope to transfer SEP housing provision from the Sussex Coast Sub Region in the context of SEP Policy SCT5.

29. It has been concluded that in relation to the [waste water treatment] issue an early review of the plan is required. Air pollution relating to Ashdown Forest SAC could in the future restrict further planned development which might otherwise be acceptable. To ensure that the housing and other needs of the area are being addressed in the context of the Framework, for the review it would be important to establish more accurately the current extent and impact of nitrogen deposition at Ashdown Forest, the potential effects of additional development on the SAC and the possibility of mitigation if required, working collaboratively with other affected authorities. I therefore include an appropriate modification to this effect (MM63).

30. While the strategic development proposed in the CS would be achievable, concern has been expressed during the examination that windfall developments which might otherwise be acceptable in planning terms are being refused on the basis of the nitrogen deposition concern. The Framework requires that local planning authorities should look for solutions rather than problems and work proactively to secure developments that improve the economic, social and environmental conditions of the area. It supports economic growth in rural areas. In this context, the Council should not await commencement of the formal review before beginning the more detailed investigation of this matter. …"

73. In the context of the present case, paras. 28 and 29 of the Report deserve emphasis. The Inspector there explained why he accepted WDC's contention that there were important environmental constraints arising by reference to the Ashdown Forest protected site which, in conjunction with other constraints, meant that development at the level of 11,000 new homes in WDC's area would not be viable. The Core Strategy had been screened to show that there was not a need to carry out a detailed "appropriate assessment" under the Habitats Regulations in relation to its new homes figure and proposed distribution, but in light of the precautionary principle and the low headroom for screening clearance of the Core Strategy it could not be said that a higher housing figure (such as was included in Scenarios A and B) – and the likely increased traffic pressure on the road network in the vicinity of the Forest that would result - would not have significant detrimental effects on the Forest. Indeed, there was already evidence of deleterious effects on the Forest from nitrogen deposition, so that there was a real prospect that increased nitrogen deposition load from significantly increased traffic flows associated with new housing development at the higher figure would indeed be found to have a material detrimental effect if further and more detailed investigations of the issue were undertaken. Moreover, full examination of the issue would need to take account of possible traffic impacts of growth in neighbouring authorities and would require collaborative work with those other authorities – whereas the background to the examination of WDC's Core Strategy, as Mr David Phillips for WDC explained to the Inspector on 19 January 2012 at the session of the examination in public dealing with environmental issues, was that other neighbouring authorities were some way behind WDC in working up their relevant development plans so this sort of full examination of the issue would not be possible for some time. At the same session, Natural England stated that it agreed with WDC's approach, which struck an appropriate balance between pragmatism and the precautionary approach. In those circumstances, WDC had made out a sufficient case on the currently available evidence to warrant restricting the new homes number in its area to 9,600, and was not found to have failed to make out its case by reason of the absence of further and more detailed work. The appropriate course, in the circumstances, was to approve the Core Strategy (with all the co-ordination advantages and benefits for coherent planning which would be associated with having a Core Strategy plan in place) while at the same time requiring WDC to undertake further review work in the future to supplement the existing evidence base.

74. The Inspector then went on at paras. 31-33 of his Report to deal with issues relating to phasing and the supply of housing land and previously developed land, before continuing to set out his conclusions on Issue 1 (whether the Core Strategy is in general conformity with the South East Plan, and whether the scale and distribution of housing provision has been justified and is consistent with the NPPF) and Issue 2 (whether the Core Strategy is sound), as follows:

> "*Conclusions on the amount and distribution of housing development*
>
> 34. The CS has not established the full, objectively assessed housing needs of the District but it has demonstrated on the

currently available evidence that there are at present restrictions on the overall scale of housing development that can be accommodated. However, the CS should be positively prepared and every effort made to meet the housing needs of an area. The Framework aims to boost significantly the supply of housing. It is therefore important to ensure that new homes are brought forward as quickly as possible.

35. The CS should make provision up to the level closest to its original SEP allocation for which it can be concluded that it can be distributed without adversely affecting the integrity of any European site. The proposed phasing modifications and the level of housing need mean that development could come forward more quickly than anticipated in the CS, providing greater flexibility in the land supply. The Framework indicates that local plans should be drawn up over an appropriate timescale, preferably a 15-year time horizon, taking account of longer term requirements. In this case, having regard to the significant infrastructure and environmental uncertainties beyond the scale of growth proposed by the Council, I consider that the plan period should be limited to 15 years, bringing the end date forward from 2030 to 2027 and the rate of new housing development closer to that in the SEP. There is insufficient evidence on the rate at which the SDAs could be delivered to justify bringing the end date even further forward.

36. If the CS provision of 9,600 dwellings related to the period 2006 to 2027 this would amount to an annual average of about 460 – some 17% short of the RS requirement. The deletion of the SDA at Heathfield (see below) would reduce this provision by 160 to 9,440 or an annual average of about 450 new homes between 2006 and 2027. Based on the distribution provided by the Council at paragraph 12, the SEP housing provision for the 'Rest of Wealden' would be achieved but that for the 'Sussex Coast Sub Region' would still be some 29% short, giving an overall District shortfall of over 18% compared with the RS. A series of modifications are necessary to achieve these changes to the time period and amount of new housing (MM1, MM3, MM7 to MM13, MM15, MM16, MM18, MM19, MM22 to 24, MM27, MM54). Taken with the earlier modifications on phasing they would enable provision to the level closest to the SEP requirement having particular regard to the waste water infrastructure issues in the south of the District.

*Overall conclusion*

37. In the light of the above considerations and modifications I conclude that the CS is in general conformity with the SEP and that the scale and distribution of housing provision has been justified and is consistent with the Framework. The CS is therefore both sound and legally compliant in this regard.

**Issue 2 – Whether the overall special strategy is soundly based, presenting a clear spatial vision for the District in accordance with national and regional policies.**

38. The CS contains a vision for the District and a series of spatial planning objectives. The spatial strategy derives from and broadly reflects the vision and objectives. In turn, subject to specific concerns and main modifications identified and discussed elsewhere in this report, the CS policies also broadly reflect the vision and objectives.

39. The methodology and process by which the CS has been produced is recorded in Background Paper 1: Development of the Core Strategy (BP1) and the consultation process in the Council's Regulation 30(1)(d) Statement – BP8. Initial consultation took place on issues and options in 2007 which embraced consideration of alternative locations for development. In 2009 there was further consultation on the vision and the strategic spatial housing and employment options. The Strategic Housing Land Availability Assessment (SHLAA) was used to identify potential housing sites which were assessed in accordance with sustainability objectives.

40. BP10: Sustainability Appraisal of the Core Strategy (SA) includes consideration of both the strategic options and the alternative broad locations for growth at the main settlements. In the light of the High Court judgement on *Save Historic Newmarket Ltd and Others v Forest Heath District Council and Others* (2011) [[2011] JPL 1233] the Council has indicated that it is satisfied that the sustainability appraisal undertaken adequately assesses alternatives and sets out the reasons why they were rejected. The alternative growth locations are considered in more detail below. However, overall, reasonable alternatives to the spatial strategy have been considered and the audit trail by which it has been arrived at, as set out in the evidence base, is sufficiently clear.

41. Having regard to my conclusions on the scale of development in the first main issue and the main modifications

> recommended elsewhere in this report, I conclude that the overall spatial strategy is soundly based, presenting a clear spatial vision for the District in accordance with national and regional policies."

75. In the event, for further reasons which are not called in question in these proceedings, the Inspector reduced the new homes figure of 9,600 to 9,440 and modified the relevant period in relation to this from 2006-2030 to 2006-2027. He required Policy WCS1 in the Core Strategy to be modified accordingly.

76. The Inspector also required modification of Policy WCS12 in the Core Strategy, to promote the explanatory text in para. 3.32 regarding the need for a 400m development exclusion zone and a further 7 km protective zone around Ashdown Forest into the body of the Policy itself. This reflected an amendment to the Core Strategy proposed by WDC. The Inspector considered the justification for these measures at paras. 53 to 55 of his report, as follows:

> "**Issue 5 – Whether the Core Strategy makes appropriate provision for the protection of the natural environment and other environmental assets and for sustainable construction.**
>
> *Ashdown Forest Special Protection Area*
>
> 53. The HRA has addressed the impacts of possible additional disturbance and urbanising effects from residential development on the Ashdown Forest Special Protection Area (SPA) where there are breeding populations of Dartford warbler and nightjar. It indicates that it cannot be concluded that the CS would not lead to adverse effects on the ecological integrity of the SPA. Avoidance and mitigation measures are required including a 400m zone around the SPA where residential development will not be permitted, a 7km zone where new residential development will be required to contribute to Suitable Alternative Natural Greenspaces (SANGs), an access strategy for the Forest and a programme of monitoring and research. The measures are regarded as critical infrastructure in the Infrastructure Delivery Plan (IDP). This approach is supported by Natural England (NE). I am satisfied that it is justified by the evidence base, including the 7km zone which is broader than those used elsewhere but supported by local factors, including the distance visitors to the Forest are willing to travel.
>
> 54. The main impact of these measures would be on the towns of Crowborough and Uckfield and villages and rural areas within the buffer zones. I have seen evidence that there is a

> reasonable expectation that suitable SANGs could be provided relating to the SDAs at the towns. There is a large supply of open spaces within the District, many under the ownership or management of town or parish councils. NE is confident that SANGs can be delivered. However, for windfall planning applications and smaller sites where SANGs cannot be provided on site there is the possibility that otherwise acceptable development might be delayed while suitable SANGs are identified and brought forward.
>
> 55. The CS does not refer to these measures in a policy but includes text suggested in the HRA in supporting justification. The Council has proposed a modification (MM62) to the plan that would include a policy reference to them being taken forward in subsequent DPDs. The Strategic Sites DPD is not expected to be adopted until Summer 2014 and the Delivery and Site Allocations DPD in Autumn 2015. To avoid otherwise acceptable development being delayed it is important that, with appropriate partners, the Council proactively identifies suitable SANGs and develops an on-site management strategy for the Forest as soon as possible in accordance with the conclusions of the HRA. While accepting the general thrust of the Council's approach, for the CS to be effective I am including a further modification to the policy to reflect this (MM63)."

77. The addition which the Inspector required to be made to WCS12 was as follows:

> "In order to avoid the adverse effect on the integrity of the Ashdown Forest Special Protection Area and Special Area of Conservation it is the Council's intention to reduce the recreational impact of visitors resulting from new housing development within 7 kilometres of Ashdown Forest by creating an exclusion zone of 400 metres for net increases in dwellings in the Delivery and Site Allocations Development Plan Document and requiring provision of Suitable Alternative Natural Green Space and contributions to on-site visitor management measures as part of policies required as a result of development at SD1, SD8, SD9 and SD10 in the Strategic Sites Development Plan Document. Mitigation measures within 7 kilometres of Ashdown Forest for windfall development, including provision of Suitable Alternative Natural Green Space and on-site visitor management measures will be contained within the Delivery and Site Allocations Development Plan Document and will be associated with the implementation of the integrated green network strategy. In the meantime the Council will work with appropriate partners to identify Suitable Alternative Natural Green Space and on-site

> management measures at Ashdown Forest so that otherwise acceptable development is not prevented from coming forward by the absence of acceptable mitigation.
>
> The Council will also undertake further investigation of the impacts of nitrogen deposition on the Ashdown Forest Special Area of Conservation so that its effects on development can be more fully understood and mitigated if appropriate."

78. WDC and SDNPA accepted these and other modifications set out by the Inspector in his Report and adopted the Core Strategy, as so modified, on 19 February 2013.

*Legal Analysis*

*Ground One: the Inspector reached an irrational conclusion that the Core Strategy could be approved as sound and capable of adoption based on the housing requirement figure of 9,440*

79. The assessment by the Inspector in relation to soundness of the Core Strategy (section 20(5)(b) read with the guidance in the NPPF) and its general conformity with the South East Plan (section 24(1) of the 2004 Act) is one involving evaluative judgments in relation to the planning merits and other matters which are primarily for the Inspector. The test on judicial review in relation to this Ground is a *Wednesbury* rationality test (see generally *Persimmon Homes (Thames Valley) Ltd v Stevenage BC* [2005] EWCA Civ 1365; [2006] 1 WLR 334).

80. In my view, the Inspector's reasoning on this part of the case is rational and compelling. He was entitled to conclude that WDC had produced sufficient evidence in relation to the risk of environmental harm to Ashdown Forest to justify the use of the smaller 9,600 housing figure in the Core Strategy, that the possibility that further work on the issue of nitrogen deposition would show that a higher housing figure could be accommodated was so speculative and likely to be so delayed as not to warrant holding up the approval of the Core Strategy, and that this possibility would be more appropriately accommodated by requiring further investigatory work to be carried out after the adoption of the Core Strategy and when other neighbouring authorities were more advanced in producing their own development plans.

81. Similarly, I consider that WDC acted in a rational and lawful way in making the examination of the nitrogen deposition issue which it did and in not seeking to undertake any further or more detailed investigation before deciding to submit and then to adopt the Core Strategy. WDC had taken reasonable steps to inform itself about relevant matters in respect of that issue and it was not irrational for it to choose not to pursue further investigations before proceeding to decide that it was appropriate to select Scenario C for assessment under the SEA Directive and to adopt a Core Strategy based on a figure for new homes derived from Scenario C: cf *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065B; *Cotswold DC v Secretary of State for Communities and Local Government*

[2013] EWHC 3719 (Admin), [57]-[61]; and *R (Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] QB 37, [34]-[35]. WDC's assessment was that any housing development above that in the Core Strategy would exceed the 1,000 AADT flows threshold and require a detailed "appropriate assessment" (which, given the low headroom below that figure even for the number of new homes in the Core Strategy, was plainly a rational view); and it was informed by environmental consultants and Natural England that a full detailed "appropriate assessment" of the impact of proposals for development above the 1,000 AADT flows threshold would require traffic modelling on a co-ordinated approach between planning authorities (see, in particular, paragraphs 32, 92 and 124 of Marina Brigginshaw's first witness statement for WDC). The Inspector did not err in concluding that WDC had properly made out its case for deciding to proceed with Scenario C without further examination at the plan making stage of the nitrogen deposition issue.

82. There is nothing in the guidance in the NPPF which indicates that the Inspector proceeded in an illogical or irrational way, or in a way which conflicted with that guidance. In particular, he was entitled to conclude, in conformity with paragraph 158 of the NPPF, that WDC had produced sufficient objective evidence to justify its adoption of the figure of 9,600 (later reduced to 9,440), rather than 11,000, for new homes.

83. I therefore dismiss the challenge under Ground One.

*Ground Two: The investigatory steps taken by WDC in relation to deciding to adopt the figure of 9,440 for new homes in the Core Strategy were inadequate and in breach of WDC's obligations under the SEA Directive and the Environmental Assessment Regulations*

84. The Inspector found that reasonable alternatives to the spatial strategy in the Core Strategy (i.e. Scenario C) had been considered and that the audit trail by which it had been arrived at, as set out in the evidence base, was sufficiently clear: para. 40 of the Inspector's Report, set out above. I agree with him.

85. As I understood Mr Elvin's submissions, he criticised WDC under this Ground on two fronts. First, he contended that WDC had not done sufficient work as required under the SEA Directive and the Environmental Assessment Regulations to identify reasonable alternatives for consideration, because of WDC's omission to investigate in greater detail - including by commissioning what would have been the necessary "appropriate assessment" under the Habitats Directive and the Habitats Regulations - whether 11,000 new homes might in fact be accommodated in WDC's area without causing environmental harm to the Ashdown Forest protected site. Secondly, he criticised the adequacy of the reasons given in the Sustainability Appraisal (the environmental report for the purposes of the SEA Directive) for choosing Scenario C and maintained that they were insufficient to meet WDC's obligations under Article 5 of the Directive (regulation 12 of the Environmental Assessment Regulations). In addition, at paragraph 22 of his written submissions in reply, sent after the end of the oral hearing, Mr Elvin submitted for the first time that since the environmental report published under Article 5 must be subjected to consultation under Article 6, it is the

February 2011 environmental report (i.e. Sustainability Appraisal) which had to include the contents required by Article 5; the August 2011 documents were not relevant because they were published after the consultation had concluded.

86. I do not accept either of the criticisms of WDC advanced by Mr Elvin. Nor do I accept his new submission in reply. I deal with this latter point first.

87. The thrust of Mr Elvin's argument in opening was that the court should apply the legal analysis set out by Collins J in *Save Historic Newmarket Ltd v Forest Heath District Council* [2011] EWHC 606 (Admin); [2011] JPL 1233, in which at [40] Collins J accepted the submission by counsel for the claimant (Mr Elvin again) "that the final report [i.e. the sustainability appraisal] accompanying the proposed Core Strategy to be put to the inspector was flawed", in that it failed to comply with the council's obligations under the SEA Directive and the Environmental Assessment Regulations. Thus the analysis drawn from *Save Historic Newmarket Case Ltd* involved a focus on the August 2011 documents – the draft Core Strategy submitted for independent examination, the final version of the Sustainability Appraisal and the Habitats Regulations Assessment. The Claimant's pleaded case (see paragraph 41 of the Particulars of Claim) relied upon this analysis based on *Save Historic Newmarket Ltd* and focused on "the environmental report accompanying the final draft of the plan [i.e. the August 2011 Sustainability Appraisal accompanying the submission draft of the Core Strategy]", as did Mr Elvin's skeleton argument (paragraph 40). There was no reference to an alternative argument such as he sought to introduce in his written submissions in reply. Mr Pereira (as was clear from his written and oral submissions) and I understood that the Claimant's case, as presented by Mr Elvin, was focused on the compliance of the August 2011 documents with the SEA Directive and the Environmental Assessment Regulations. Mr Elvin did not seek to correct Mr Pereira on that score while Mr Pereira was presenting his submissions.

88. In my judgment, the Claimant required permission to introduce this new argument in reply, to the effect that the August 2011 documents are irrelevant to the analysis in relation to the SEA Directive. Mr Elvin did not seek permission from the court to introduce it and, had he done so, I would have refused it, since it would have required the case to be re-argued. It would have required far greater elaboration by Mr Elvin than a single short paragraph in his reply submissions to develop and make good the point, and then full submissions from Mr Pereira.

89. I would add that I am far from being persuaded that there is anything in this new argument in any event. Collins J in *Save Historic Newmarket Ltd* and Ouseley J in *Heard v Broadland BC* [2012] EWHC 344 (Admin); [2012] Env. LR 23 at [13] (where he set out para. [40] of Collins J's judgment as providing a useful summary of the law) both had no difficulty in accepting that the focus for analysis under the SEA Directive is properly upon the final form documents submitted to the Secretary of State for independent examination. The Inspector in the present case investigated the same documents for compliance with the SEA Directive, specifically by reference to *Save Historic Newmarket Ltd*. I was not shown any document or evidence to suggest that the Claimant or anyone else in the course of the examination in public suggested

that this focus on the August 2011 documents was wrong as a matter of law. The SEA Directive does not itself make provision for an independent examination in public by an Inspector. That is a procedure adopted in the United Kingdom as part of its planning regime into which the requirements of the SEA Directive have been introduced and with which they have been aligned. As Ouseley J explains in *Heard v Broadland DC* at [11], the SEA Directive permits a national authority to integrate compliance with the Directive into national procedures. The procedures involved in independent examination of a plan by an inspector, including by examination in public, appear to me to be a consultation process which is capable of fulfilling the consultation requirement under Article 6 of the Directive. If that is so, then Mr Elvin's new submission in reply falls away. I emphasise again, however, that I have not heard argument on this issue so this view must be regarded as provisional.

90. I turn, then, to Mr Elvin's two criticisms of what was done by WDC. As to the substance of the work to be done by a local planning authority under Article 5 in identifying reasonable alternatives for environmental assessment, the necessary choices to be made are deeply enmeshed with issues of planning judgment, use of limited resources and the maintenance of a balance between the objective of putting a plan in place with reasonable speed (particularly a plan such as the Core Strategy, which has an important function to fulfil in helping to ensure that planning to meet social needs is balanced in a coherent strategic way against competing environmental interests) and the objective of gathering relevant evidence and giving careful and informed consideration to the issues to be determined. The effect of this is that the planning authority has a substantial area of discretion as to the extent of the inquiries which need to be carried out to identify the reasonable alternatives which should then be examined in greater detail.

91. These points are similarly relevant to interpretation of the SEA Directive and the standard of investigation it imposes as under ordinary domestic administrative law: see, e.g., the review of the authorities by Beatson J (as he then was) in *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), [71]-[78]. The Directive is of a procedural nature (recital (9)) and the procedures which it requires involve consultation with authorities with relevant environmental responsibilities and the public, with a view to them being able to contribute to the assessment of alternatives (recitals (15) and (17); Articles 5 and 6). The relevant aspect of the obligation in Article 5 is to identify and then evaluate "reasonable alternatives" to the plan in question. Under the scheme of the Directive and Environmental Assessment Regulations it is the plan-making authority which is the primary decision-maker in relation to identifying what is to be regarded as a reasonable alternative (and see *Heard v Broadland BC* at [71] per Ouseley J: part of the purpose of the process under the Directive is to test whether a preferred option should end up as preferred "after a fair and public analysis of what the authority regards as reasonable alternatives"). In respect of that decision, the authority has a wide power of evaluative assessment, with the court exercising a limited review function.

92. This interpretation is reinforced by the scope for involvement of the public and the environmental authorities in commenting on the proposed plan and to make counter-

proposals to inform the final decision by the plan-making authority. The Directive contemplates that the plan-making authority's choices may be open to debate in the course of public consultation and capable of improvement or modification in the light of information and representations presented during that consultation, and accordingly recognises that the choices made by the plan-making authority in choosing a plan and in selecting alternatives for evaluation at the Article 5 stage involve evaluative and discretionary judgments by that authority which may be further informed by public debate at a later stage.

93. The interpretation is also supported by the limited nature of the information which the plan making authority is obliged to provide to explain the selection of the "reasonable alternatives" which are selected for examination. It is only "an outline of the reasons" for selecting those alternatives which has to be provided (paragraph (h) of Annex I; language which is similar to that used in paragraph (a), "an outline of the contents, main objectives of the plan or programme [etc]"), directed to equipping the public to participate in debate about the plan proposed, not a fully reasoned decision of a kind which might be appropriate for a more intrusive review approach or exercise of an appellate function on the part of the court.

94. As Mr Pereira submitted, paragraph (h) of Annex I (replicated in Schedule 2 to the Environmental Assessment Regulations) is to be contrasted with the language in the text of the equivalent paragraph of the draft of the SEA Directive which was originally proposed for adoption. The corresponding paragraph in the draft Directive (paragraph (f)) referred to "any alternative ways of achieving the objectives of the plan or programme which have been considered during its preparation (such as alternative types of development or alternative locations for development) and the reasons for not adopting these alternatives". This was a more demanding standard in relation to the level of reasons which would be required to be given at the Article 5 stage which the legislator chose to reject in favour of an obligation to provide only "an outline of the reasons" for selecting the alternatives to be subjected to full comparative appraisal.

95. The European Commission has issued guidance in relation to the SEA Directive: *Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*. Paragraph 5.6 emphasises the importance of review of alternatives under Article 5: "The studying of alternatives is an important element of the assessment and the Directive calls for a more comprehensive review of them than does the EIA Directive." Paragraphs 5.11 to 5.14 and 5.28 deal with the assessment of alternatives, as follows:

> "**Alternatives**
>
> 5.11 The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

5.12 In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the draft plan or programme and for the alternatives [footnote: Compare Article 5(3) and Annex IV of the EIA Directive which require the developer to provide an outline of the main alternatives studied and an indication of the main reasons for his choice taking into account the environmental effects]. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen. This includes for example the information for Annex I (b) on the likely evolution of the current state of the environment without the implementation of the alternative. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects.

5.13 The text of the Directive does not say what is meant by a reasonable alternative to a plan or programme. The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (e.g. different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes covering long time frames, especially those covering the very distant future, alternative scenario development is a way of exploring alternatives and their effects. As an example, the Regional Development Plans for the county of Stockholm have for a long time been elaborated on such a scenario model.

> 5.14 The alternatives chosen should be realistic. Part of the reason for studying alternatives is to find ways of reducing or avoiding the significant adverse environmental effects of the proposed plan or programme. Ideally, though the Directive does not require that, the final draft plan or programme would be the one which best contributes to the objectives set out in Article 1. A deliberate selection of alternatives for assessment, which had much more adverse effects, in order to promote the draft plan or programme would not be appropriate for the fulfilment of the purpose of this paragraph. To be genuine, alternatives must also fall within the legal and geographical competence of the authority concerned. An outline of the reasons for selecting the alternatives dealt with is required by Annex I (h). …"
>
> "*(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.*
>
> 5.28 Information on the selection of alternatives is essential to understand why certain alternatives were assessed and their relation to the draft plan or programme. A description of the methods used in the assessment is helpful when judging the quality of information, the findings and the degree to which they can be relied upon. An account of the difficulties met will also clarify this aspect. When appropriate, it would be helpful to include how those difficulties were overcome."

96. It is open to the plan-making authority, in the course of an iterative process of examination of possible alternatives, "to reject alternatives at an early stage of the process and, provided there is no change of circumstances, to decide that it is unnecessary to revisit them"; "But this is subject to the important proviso that reasons have been given for the rejection of the alternatives, that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary, by repeating them, to know from the assessment accompanying the draft plan what those reasons are": *Save Historic Newmarket Ltd v Forest Heath District Council*, [16]-[17]. It may be that a series of stages of examination leads to a preferred option for which alone a full strategic assessment is done, and in that case outline reasons for the selection of the alternatives dealt with at the various stages and for not pursuing particular alternatives to the preferred option are required to be given: *Heard v Broadland DC*, [66]-[71]. As Ouseley J put it in *Heard*, in this sort of case "The failure to give reasons for the selection of the preferred option is in reality a

failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage" ([70]).

97. A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: see *Heard v Broadland DC* at [71]). The court will be alert to scrutinise its choices regarding reasonable alternatives to ensure that it is not seeking to avoid that obligation by saying that there are no reasonable alternatives or by improperly limiting the range of such alternatives which is identified. However, the Directive does not require the authority to embark on an artificial exercise of selecting as putative "reasonable alternatives," for full strategic assessment alongside its preferred option, alternatives which can clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan and for good planning reasons, as not in reality being viable candidates for adoption.

98. In my judgment, that is the position in the present case, by contrast with the position in *Heard v Broadland DC*. In *Heard*, the plan-making authority failed to explain in outline its reasons for the selection of the alternatives dealt with at the various stages, and failed to explain why ultimately only the preferred option was chosen to go forward for full assessment (see [66] and [70]-[71]). In this case, however, WDC has made rational and lawful choices in narrowing down a field of six options, initially to three (Scenarios A, B and C), and then in choosing only to take Scenario C forward for full detailed strategic assessment. It has explained its reasons for doing so at each stage in some detail in, respectively, chapter 6 and chapter 8 of the Sustainability Appraisal.

99. I have already explained above that WDC made a rational and lawful choice in deciding that a detailed "appropriate assessment" should not be carried out under the Habitats Regulations in relation to Scenarios A and B. It was speculative whether an "appropriate assessment" would ever really show that more extensive housing development could actually take place in the vicinity of Ashdown Forest without nitrogen deposition effects from increased traffic flows having a detrimental effect on the Forest, which was already significantly affected by such deposition, as the Habitats Regulations Assessment made clear. As explained in the Sustainability Appraisal (paras. [58]-[61] above), there were other and more prominent reasons why WDC had decided that it would not be appropriate to take Scenarios A and B forward for more detailed examination, none of which were subject to challenge. Accordingly, it was unlikely that a detailed "appropriate assessment" would make a significant difference to the selection of the reasonable alternatives required by Article 5 - in this regard, it should be noted that the Inspector's discussion at paragraphs 28 and 29 of his Report was directed to the question whether the Core Strategy was in general conformity with the South East Plan, not to the question whether selection of Scenario C but not Scenarios A and B for detailed examination had been reasonable for the purposes of the SEA Directive. Moreover, a full examination of the environmental effects from new residential development beyond that in Scenario C would require information about the development plans proposed by neighbouring

authorities who were well behind WDC in getting to a position where they could make a useful contribution to such an examination. In these circumstances a decision to proceed to examine Scenario C and not to do further work in relation to Scenarios A and B was well within the discretionary area of judgment allowed to WDC under the SEA Directive and the Environmental Assessment Regulations.

100. As to the Claimant's challenge to the adequacy of the reasons given by WDC in the Sustainability Appraisal for selecting Scenario C, but not Scenarios A or B, for full strategic assessment, I consider that it fails. WDC was only obliged to give an "outline of the reasons for selecting the alternatives dealt with", which in my view it undoubtedly did in chapters 6 and 8 of the Sustainability Assessment. In giving "outline reasons" it was entitled to focus, as it did, on the main reasons why particular alternatives (in particular, Scenarios A and B) were not considered to be viable or attractive having regard to the full planning context– and hence were not "reasonable alternatives" - without descending into great detail to set out each and every aspect of the case or of impediments to adoption of such alternatives.

101. Mr Pereira submitted that since paragraph (h) requires only an outline of the reasons for selecting the alternatives dealt with, it was open to WDC to amplify the reasons set out in the Sustainability Appraisal for selecting the alternatives dealt with, if it was necessary to do so to meet a rationality or other challenge directed against the merits of the choices it had made. I agree with this. It is implicit in the idea of a statement of "outline reasons" that fuller reasons may underlie the outline reasons which are set out, and where necessary to do so to meet a challenge to the merits of the decisions it has made it is open to a plan-making authority to amplify the outline reasons it has given, provided that it does not seek to rely ex post facto on entirely different or wholly new reasons for the choices made: compare *R (Wall) v Brighton and Hove City Council* [2004] EWHC 2582 (Admin); [2005] 1 P & CR 33, [59] per Sullivan J (as he then was).

102. In my view, the outline reasons given by WDC in the Sustainability Appraisal for selection of Scenario C and rejection of Scenarios A and B without further full assessment either under the Habitats Directive and Regulations or under the SEA Directive and the Environmental Assessment Regulations are compatible with and cover the detailed reasons explained by the Inspector and by WDC in these proceedings why those further assessments of Scenarios A and B were not taken forward. The objectives of the SEA Directive to contribute to more transparent decision-making and to allow contributions to the development of a strategic plan by the public have been fulfilled in the circumstances of this case. The Sustainability Appraisal and the accompanying Habitats Regulations Assessment were made available to the public, from which they could see why a detailed "appropriate assessment" under the Habitats Regulations was not thought to be necessary in relation to Scenario C and could see that no detailed "appropriate assessment" had been thought to be required in relation to Scenarios A and B. Members of the public were in a position to challenge each of those assessments during the examination of the proposed Core Strategy, should they wish to do so.

103. In fact, it does not appear that any significant criticism or sustained argument was directed to those matters in the course of the procedures leading up to adoption of the Core Strategy. That in turn reinforces my view that WDC could not be criticised for irrationality in choosing not to pursue a detailed "appropriate assessment" in relation to Scenarios A or B.

104. For the reasons given above, I dismiss the challenge under Ground Two.

*Ground Three: Failure to carry out a detailed "appropriate assessment" in respect of the Core Strategy in relation to nitrogen deposition, in breach of regulation 61(1)(a) of the Habitats Regulations*

105. In my judgment, this Ground of challenge must be dismissed as misconceived. I accept the primary submission made by Mr Pereira, namely that WDC had carried out an appropriate screening assessment in relation to the Core Strategy (which adopted Scenario C), as set out in the Habitats Regulations Assessment, and had determined in that screening assessment that adoption of the Core Strategy was not likely to have a significant effect on the Ashdown Forest protected site. Therefore, by this work, WDC had properly established that there was no obligation on it under regulation 61(1)(a) of the Habitats Regulations to proceed to make a detailed "appropriate assessment" of the implications of adoption of the Core Strategy for Ashdown Forest.

*Ground Four: Breach of the SEA Directive and the Environmental Assessment Regulations by failing to consider alternatives to the protective 7 km SANG zone*

106. I also dismiss this Ground of challenge. As the Commission guidance at para. 4.7 and the court in *Save Historic Newmarket Ltd* at [15] and in *Heard v Broadland DC* at [12] explain is permissible, the Habitats Regulations Assessment was issued with and incorporated by reference into the Sustainability Appraisal and hence into the environmental report required under the SEA Directive and the Environmental Assessment Regulations; and in the Sustainability Appraisal itself, WDC made clear that it adopted the protection recommendations set out in the Habitats Regulations Assessment. Chapter 6 of the Habitats Regulations Assessment contained a detailed discussion of the issue of disturbance of wildlife at Ashdown Forest through increased recreational pressure associated with new residential development in its vicinity. The protective 7 km SANG zone was stated by WDC's expert environmental consultants to be required to avoid harm to the Ashdown Forest protected site from increased residential development, and this was also the advice of Natural England.

107. The basis for this requirement was set out in the Habitats Regulations Assessment. It noted that increased recreational visitors associated with new housing in the vicinity of the Forest might have a negative effect on protected bird species, and that the closer a residential development to the Forest the more likely its inhabitants are to visit on a regular basis. It specifically referred to the protective 5 km SANG zone around the Thames Basin Heaths protected site as a relevant precedent, based on an identified study, which "sought to draw a reasonably precautionary conclusion from the variety of potential methods proposed for determining SANG provision" and

explained that "The 5km threshold aims to 'capture' around three quarters of all visitors to the heaths, including 70% of drivers and all pedestrians" (section 6.4, p. 31). The Assessment referred to the comparative visitor survey and analysis which had been conducted in relation to Ashdown Forest and concluded that the protective SANG zone around the Forest should be set at 7 km, since "This is considered to be sufficient to capture a similar proportion of visitors to Ashdown Forest, as compared to the avoidance measures adopted in relation to the Thames Basis Heaths SPA" (section 6.4, p. 32). The Assessment included a map showing what a 7 km protective zone would look like, and which main centres of population would be within it, and what a 15 km protective zone would look like, and an analysis of what additional visits might be associated with new development in that wider zone (section 6.4 and table 6.1, pp. 31-33).

108. Accordingly, in my view, the principled reasoning and evidence base which justified the selection of a protective zone set at 7 km were clearly set out in the relevant environmental report. Indeed, on a fair reading of the Habitats Regulations Assessment/environmental report I think one could say that three alternatives had been canvassed (a 5 km zone in accordance with the precedent at the Thames Basin Heaths; a 15 km zone; and a 7 km zone), and that clear reasons had been given for selecting the 7 km solution chosen to be included in the Core Strategy, namely that the Thames Basin Heaths protective zone was considered to provide a good model for controlling increased visitor numbers to the precautionary level considered appropriate by experts and that an extension of the protective zone around Ashdown Forest to 7 km was assessed to be necessary to provide the same level of protection. Read in this way, I think that the Habitats Regulations Assessment did in fact include a comparative assessment to the same level of detail of the preferred option (a 7 km zone) and two reasonable alternatives, a 5 km zone and a 15 km zone.

109. But even if one does not read the Habitats Regulations Assessment in that way, but rather just as a principled set of reasons for choosing a 7 km protective zone, in line with Mr Pereira's submissions, the reasons given explain clearly why that solution was chosen and, by clear implication, why other solutions were not chosen. Adjusting para. [70] of Ouseley J's judgment in *Heard v Broadland DC* for the circumstances of this case, the reasons given for selecting the 7 km protective zone as the relevant mitigation measure were in substance the reasons why no other alternatives were selected for assessment or comparable assessment. No other alternative would achieve the objectives which the 7 km zone would achieve. Again, the objectives of the SEA Directive to contribute to more transparent decision-making and to allow contributions to the development of a strategic plan by the public have been fulfilled in the circumstances of this case. WDC had explained the reasons for choosing a 7 km zone and members of the public were in a position to challenge those reasons and WDC's assessment during the examination of the proposed Core Strategy, should they wish to do so.

110. Mr Elvin sought to suggest that WDC should have commissioned further work to assess other possible options which might have resulted in equivalent visitor densities in relation to bird population density as between Ashdown Forest and the Thames

Basin or Dorset Heaths. I do not accept this suggestion. As the Habitats Regulations Assessment made clear, it was largely unknown exactly how and to what extend increased recreational visits might affect the protected bird populations, and any attempt to marry up visitor densities and bird densities in such a precise way would have been a spurious and potentially misleading exercise, which would not have met the points made by WDC's expert environmental advisers and Natural England. Neither of them suggested that there was any alternative which might be suitable and which should be examined further. A decision-maker is entitled, indeed obliged, to give the views of statutory consultees such as Natural England great weight: see *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), at [72]. No-one else raised any sustained or developed argument in the course of the iterative process of development of the Core Strategy in favour of a different solution. WDC was entitled to proceed to adopt the solution proposed by both Natural England and its own expert advisers without seeking to cast around for other potential alternatives to examine. To have done so would have been a completely artificial exercise in the circumstances.

111. In examining the Claimant's complaint under this Ground, it is also telling, I think, to compare the position in relation to the 400m development exclusion zone, which was part of the package of measures recommended by UE Associates Ltd and Natural England adopted by WDC in the Core Strategy. The Claimant makes no challenge to the lawfulness of adoption of this zone. Yet the position in relation to consideration and adoption of this part of the Core Strategy is closely similar to that in relation to the protective 7 km SANG zone. A reasoned explanation for choosing the 400m development exclusion zone was set out, and there was no distinct examination of alternatives (say, a 300m zone or a 500m zone). In my view the Claimant was right not to challenge the lawfulness of the selection of this zone. The reasons why it was chosen were fully explained and open to comment or criticism by the public, and in view of the reasons given in relation to it, it would have been completely artificial to have conducted separate assessments of notional different sized exclusion zones.

112. In these proceedings, the Claimant has adduced evidence from Karen Colebourn, an ecological consultant, giving her opinion about possible mitigation measures "which may be suitable at Ashdown Forest", including decreasing car park capacity or increasing the cost of parking, creation of special dog exercise areas, provision of information and education for dog owners and improvement of strategic walking routes. This is opinion evidence put forward not in the context of the iterative process resulting in adoption of the Core Strategy, but well after the event. No concrete, worked through proposals are set out and there is no evidence to suggest that such measures would actually work by themselves. I accept Mr Pereira's submission that it cannot sensibly be contended on the basis of Ms Colebourn's evidence that no reasonable planning authority would have failed to identify these as "reasonable alternatives" so as to be obliged to assess such ideas or their efficacy in the Sustainability Appraisal. I am fortified in this view by the fact that the Inspector did not consider that further assessment work was required in relation to this part of the Core Strategy.

*Conclusion*

113. For the reasons given above, this challenge is dismissed on all Grounds. It follows that it is not necessary or appropriate to consider issues regarding the exercise of the court's discretion in relation to remedy, which would only have arisen if any of the Grounds of challenge had been made out.