

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

[CO/ 1]

BETWEEN:

ZURICH ASSURANCE LTD

Claimant

-and-

WINCHESTER CITY COUNCIL

1st Defendant

-and-

SOUTH DOWNS NATIONAL PARK AUTHORITY

2nd Defendant

GROUNDS OF CHALLENGE

Introduction

1. This is an application under Part 8 of the Civil Procedure Rules ("CPR"), pursuant to section 113 of the Planning and Compulsory Purchase Act 2004 ("PCPA") for an order that parts of the Winchester District Local Plan Part 1 – Joint Core Strategy ("JCS"), finally adopted by the resolution of Winchester City Council ("the Council"/"WCC") on 20 March 2013, be quashed and/or remitted for further examination.

2. The application is brought on three grounds:
 - (a) The Inspector made a methodological error in his assessment of the proposed housing requirement, by failing to have regard to the existing shortfall against the housing requirements in the South East Plan ("the Plan"). He therefore failed to assess the Plan correctly against the statutory requirements under s. 20(5) PCPA and without proper regard to the National Planning Policy Framework. The Council therefore erred in law by adopting the Plan, notwithstanding the Inspector's error;

 - (b) The Inspector erroneously concluded that the Council had complied with the duty to co-operate under section 33A PCPA. The Council therefore further

erred in law in adopting the plan, which had been approved on an unlawful basis;

(c) Both the Council and the Inspector erred in concluding that the Sustainability Appraisal ("SA") had complied with the requirements of the Strategic Environmental Assessment ("SEA") Directive and the domestic Environmental Assessment of Plans and Programmes Regulations 2004, and in approving and adopting the Plan without requiring further SA/SEA.

Identification of Parties

3. The Claimant, Zurich Assurance Ltd ("ZAL"), owns the freehold of the Sutton Scotney Estate, a large site located near Micheldever Station ("the Micheldever Station site"), at the northern edge of the Council's administrative area. The Claimant intends to secure housing development on all or part of this land.
4. The Claimant instructed its agents, Barton Willmore, to appear on a representative basis at the public examination of the JCS. Barton Willmore communicated the Claimant's core concerns about the JCS, especially the insufficient provision for future housing requirements in the region. If the JCS is not quashed or remitted then any application for planning permission at the Micheldever Station site would fail to be assessed against the adopted plan (under s.70(2) of the Town and Country Planning Act ("TCPA") 1990).
5. The First Defendant, Winchester City Council and Second Defendant, the South Downs National Park Authority ("the Park Authority"/"SDNPA") developed the JCS together. However the Council very much took the lead, and the SDNPA's resolution to adopt was expressly made "subject to the decision of Winchester City Council". These Grounds therefore concentrate on the Council's actions in preparing, submitting, and finally adopting the JCS.
6. No other Interested Parties have been identified at the present time, although the Secretary of State for Communities and Local Government ("the Secretary of State") has been served in accordance with CPR, Practice Direction 8A, paragraphs 22.4-22.5.

Background

7. The factual background to this challenge is complex, stretching back to the origins of the Plan in 2007/2008, and covering the housing and related infrastructure requirements of a number of neighbouring local planning authorities.

Winchester, South Hampshire and Central Hampshire

8. The Micheldever Station site has capacity for the construction of up to 12,000 new homes, with associated infrastructure, which would be built out in phases over a number of years. The site is close to the administrative boundaries of Test Valley Borough Council ("TVBC") and Basingstoke and Deane Borough Council ("BDBC"), and has good transport links. It therefore has the capability to make a major contribution to housing needs across the wider region.
9. The Council also adjoins a number of other local authorities, including East Hampshire District Council ("EHDC"), Fareham Borough Council ("FBC"), Havant Borough Council ("HBC") and Eastleigh Borough Council ("EBC"). Eleven authorities are combined within a sub-regional grouping known as Partnership for Urban South Hampshire ("PUSH"). The Council is also a member of the Central Hampshire Local Authority Working Party, comprising BDBC, TVBC and EHDC.
10. A number of these authorities are undergoing preparation of development plans at the present time, and this has revealed extensive housing shortages across the region. Those shortages have to be resolved through the plan-making process. It is therefore imperative that plan-making proceeds on a correct basis, with full regard to the relevant legislation and national planning policy.

Production of the JCS

11. The JCS has been in development since 2007. In early 2008, an Issues and Options Paper consultation was conducted. In May 2009, a Core Strategy Preferred Option was published. In 2011, the Council then re-titled the "Core Strategy", "Local Plan Part 1".

12. On 18 June 2012, the Draft JCS was submitted for independent examination to the Secretary of State, who then appointed Nigel Payne BSc (Hons), Dip TP, MRTPI, MCMI as an Inspector ("the Inspector").
13. On 12 September 2012, a Pre-Inquiry meeting was held.
14. On 30 October 2012, hearings commenced and continued until 9 November 2012. Barton Willimore provided extensive written submissions in advance, and were invited to attend sessions on 30 October and 31 October 2012 on "Strategy/Vision/Sustainability" and "Economy/Employment/Retail" and "Housing – General".
15. On 11 February 2013, the Inspector produced a report summarising his conclusions ("IR"), stating that the Plan would be sound, subject to proposed modifications.
16. On 13 March 2013, the Council's Strategic Head of Planning produced an extensive report recommending approval of the plan, with the aforesaid modifications.
17. On 19 March 2013, the SDNPA resolved to adopt the plan, subject to the decision of the Council.
18. On 20 March 2013, the Council finally resolved to adopt the Joint Core Strategy with the modifications recommended.

Legislative Framework

Planning and Compulsory Purchase Act 2004

The Joint Core Strategy

19. The Joint Core Strategy is a local development document and development plan document pursuant to s. 17(7) PCPA, and regulations 2 and 5(1), the Town and Country Planning (Local Planning) (England) Regulations 2012.

Challenges to Validity of Plans

20. Section 113 PCPA 2004 provides (so far as relevant, and with all emphasis added here and below):

113(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.

...

(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.

...

(9) The appropriate power is–

...

(c) Part 2 of this Act in the case of a development plan document or any revision of it;

...

(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. The JCS is a "relevant document" within the scope of s. 113.
22. The Claimant is clearly a "person aggrieved" by the JCS under s. 113(3).
23. This challenge has been brought within the statutory time limit under s. 113(4) and (11)(c) PCPA.
24. The grounds below fall within the scope of s. 113(3) and (6): the document has been adopted outside the appropriate powers, and procedural requirements have not been complied with, which have substantially prejudiced the interests of the Claimant.
25. It was established in *Blyth Valley Borough Council v Persimmon Homes (North East) Limited* [2008] EWCA Civ 861, [8] that s. 113(3)(a) brings into play the normal principles of administrative law.

Purpose of Independent Examination

26. The first half of section 20 PCPA provides (so far as relevant):

(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.

...

(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 ;and

(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

27. Section 20(5) therefore requires the Inspector to undertake a three-fold test, examining compliance with (a) planning policy and procedural requirements (sections 19 and 24(a)), (b) soundness (a term which is further defined in national policy); and (c) the duty to co-operate (which is again further defined in national policy).

(a) Planning Policy/Procedural Requirements

28. Section 19(2) PCPA provides (so far as relevant):

(2) In preparing a development plan document or any other local development document the local planning authority must have regard to—

(a) national policies and advice contained in guidance issued by the Secretary of State;

...

(5) 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.

29. Section 24(1) PCPA provides:

(1) The local development documents must be in general conformity with–

- (a) the regional strategy (if the area of the local planning authority is in a region other than London);

...

(b) Soundness

30. Paragraph 182 of the National Planning Policy Framework (to which regard must be had under s. 19(2)(a) above) provides the core national policy definition of “soundness”:

“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; and

- Consistent with national policy – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework.”

31. Aspects of those four requirements are further clarified throughout the rest of the NPPF, as set out in greater detail below.

(c) The Duty to Co-Operate

32. Section 33A was inserted into the PCPA by section 110 of the Localism Act 2011.

33. Section 33A PCPA provides (so far as relevant):

(1) Each person who is—

- (a) a local planning authority,
- (b) a county council in England that is not a local planning authority, or
- (c) a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c) or subsection (9) in maximising the effectiveness with which activities within subsection (3) are undertaken.

(2) In particular, the duty imposed on a person by subsection (1) requires the person—

- (a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken,

...

(3) The activities within this subsection are—

- (a) the preparation of development plan documents,
- (b) the preparation of other local development documents,

...

(d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c) that are, or could be, contemplated, and

- (e) activities that support activities within any of paragraphs (a) to (c),

so far as relating to a strategic matter.

(4) For the purposes of subsection (3), each of the following is a "strategic matter"—

(a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas,

...

(5) In subsection (4)—

...

"planning area" means—

(a) the area of—

(i) a district council (including a metropolitan district council),

...

(b) a National Park, ...

(6) The engagement required of a person by subsection (2)(a) includes, in particular—

(a) considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection (3), and

(b) if the person is a local planning authority, considering whether to agree under section 28 to prepare joint local development documents.

...

34. The requirements of the duty to co-operate are also further clarified by the NPPF, notably paragraphs 178-181 (cited further below).

Inspector's Duties

35. The latter half of section 20 PCPA provides:

(7) Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) considers that, in all the circumstances, it would be reasonable to conclude—

(i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and

(ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,

the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) is not required by subsection (7) to recommend that the document is adopted,

the person must recommend non-adoption of the document and give reasons for the recommendation.

(7B) Subsection (7C) applies where the person appointed to carry out the examination—

(a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

(a) satisfies the requirements mentioned in subsection (5)(a), and

(b) is sound.

(8) The local planning authority must publish the recommendations and the reasons.

36. The above provisions demonstrate the importance of the duty to co-operate under section 33A. Under s. 20(7A)(b), if the duty has not been complied with, then the Inspector must recommend non-adoption, hence the commonly-used formula within Inspectors' reports, "in recognition that there is no scope to remedy any failure in this regard".
37. It should be further noted that the Inspector's reasons must be adequate and intelligible, consistent with the test set out by Lord Brown in *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953, [36] (as applied in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin), [76]):

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Adoption

38. Finally, sections 23(2A) to (5) set out what a local planning authority is required to do following receipt of the Inspector's report:

(2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—

- (a) recommends non-adoption, and
- (b) under section 20(7C) recommends modifications ("the main modifications").

(3) The authority may adopt the document—

- (a) with the main modifications, or
- (b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.

(4) The authority must not adopt a development plan document unless they do so in accordance with subsection (2) or (3).

(5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority.

39. In short, the local planning authority must carefully examine the proposed modifications by the Inspector, before proceeding to adoption. Any error of law in the underlying Inspector's decision will vitiate the authority's resolution to adopt (*Blyth Valley v Persimmon* (supra)).

Ground 1: South East Plan Housing Requirement

Introduction

40. The Inspector made a methodological error in his assessment of the proposed housing requirement, by failing to have regard to the existing shortfall against the housing requirements in the South East Plan. He therefore failed to assess the Plan correctly against the statutory requirements under s. 20(5) PCPA and without proper regard to the National Planning Policy Framework ("NPPF"). The Council therefore erred in law by adopting the Plan, notwithstanding the Inspector's error.

Soundness

41. The fundamental starting point is that "soundness" is a statutory requirement, with its meaning clarified by the NPPF (to which regard must be had under ss. 20(5)(a) and 19(2)(a) PCPA).
42. There is no presumption as to soundness (*Blyth Valley BC v Persimmon Homes (North East) Ltd* [2009] JPL 335, per Keene LJ [40]). In examining the plan, an Inspector must give full effect to that statutory framework, approaching the test of soundness with a degree of methodological rigour, in accordance with the relevant policy. It is, of course, now firmly established following *Tesco v Dundee City Council* [2012] UKSC 13, that the correct interpretation of planning policy is a matter of law, for the court, not a mere matter of planning judgment.
43. In NPPF paragraph 182, each of the bullet points stresses that the Inspector must carefully scrutinise the evidence base underlying the plan: notably "Positively prepared – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements" and "Effective: the plan should be deliverable over its period". The fourth bullet: "Consistent with national policy" requires the Inspector to have regard to all the other policies in the Framework. In this context, the main policies would include:

(a) Paragraph 14:

14. At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.

For plan-making this means that:

- local planning 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:
 - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
 - specific policies in this Framework indicate development should be restricted.

(b) Paragraph 47:

47. To boost significantly the supply of housing, local planning authorities should:

- 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;
- identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under

delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;

- identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;
- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
- set out their own approach to housing density to reflect local circumstances.

(c) Paragraph 156:

156. Local planning authorities should set out the strategic priorities for the area in the Local Plan. This should include strategic policies to deliver:

- the homes and jobs needed in the area;

...

(d) Paragraph 158:

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.

44. In summary, in examining a plan for "soundness" the above policy requirements have to be read in a combined fashion. Taken together, the clear requirement is that the evidence base must be accurate, "objectively assessed", and the Inspector must apply a careful, thorough approach to all the available data in reaching his conclusions.

The South East Plan

45. The South East Plan ("SEP") (also known as the "Regional Strategy for the South East") covered the Council's administrative/planning area. At the time of the report and the Council's adoption, conformity was required under s. 24(1) PCPA, however all parties were aware of its imminent revocation under the "Regional Strategy for the South East (Partial Revocation) Order 2013" (which came into force from 25 March 2013).
46. SEP Policies SH5 ("South Hampshire") and AOSR2 ("Rest of Hampshire") provided:

POLICY SH5: SCALE AND LOCATION OF HOUSING DEVELOPMENT 2006-2026

Local planning authorities will allocate sufficient land and facilitate the delivery of 80,000 net additional dwellings in South Hampshire between 2006 and 2026.

In managing the supply of land for housing and in determining planning applications, local planning authorities should work collaboratively to facilitate the delivery of the following level of net additional dwellings in the sub-region:

...

Winchester (part)

Annual Average: 337

Total: 6,740

...

The delivery of new housing will be monitored and managed separately within the south west and south east sub-areas of the sub-region. If that monitoring identifies a potential shortfall in the capacity of previously developed land to achieve the required provision of dwellings, the respective sub-area will bring forward measures to secure the delivery of housing within the plan period....

POLICY AOSR2: SCALE AND LOCATION OF HOUSING DEVELOPMENT 2006-2026

Provision will be made for 18,900 net additional dwellings between 2006 and 2026 distributed as follows:

...

Winchester (part)

Annual Average: 275

Total: 5,500

...

Council's Approach Pre-Submission

47. The Council acknowledged in the Housing Technical Paper (June 2011), that existing completion rates were not meeting the requirements of the South East Plan, creating a shortfall. However, in their preparation of the JCS, the Council sought to undo the requirements of the South East Plan, setting an artificially low housing requirement figure.
48. The Council's position on conformity with the South East Plan was set out in Background Paper 1, Housing Provision, Distribution and Delivery (June 2012) which recorded that following receipt of advice from the government's Chief Planner (letter dated 6 July 2010), the Council decided to review their South East Plan housing target (Cabinet Report 2040(LDF)).
49. The Council's subsequent review of its housing requirements resulted in a Local Plan housing target for Winchester of 11,000 net new dwellings over the period 2011 to 2031. This was a locally derived target that deliberately disregarded the South East Plan.
50. Notwithstanding the above, following representations on the Pre-Submission Local Plan that questioned its legal compliance, the Council concluded that the Plan was in general conformity with the South East Plan in all respects, including the housing requirement it imposed. In this regard, paragraph 4.11 of Housing Background Paper (BP1) (June 2012) states that:

"Nevertheless, the Council is satisfied that the Plan meets the 'legal compliance' test of conformity with the SE Plan. The precise degree of conformity which may be needed should also have regard to the fact that the SE plan is now out of date and not locally-derived, unlike the Local Plan's housing requirements, and is also on the brink of abolition, at which point its provisions will cease to have any effect."

51. The Council therefore based their decision as to conformity on the basis that the South East Plan covered the period 2006 to 2026 with its requirement of 12,240 dwellings. By adding past completions for the period 2006-2011 to the Council's Local Plan Trajectory for 2011 to 2026, this equated to an expected supply of 12,175 dwellings over the period 2006 to 2026. It should also be noted that under Winchester's alternative Strong Economy Trajectory, expected supply was identified to reach 13,997 by 2026.
52. In the same document, the Council also addressed projecting forward the South East Plan annual housing requirement from 2026 to 2031. The Council rejected this approach and concluded that rolling forward the annual requirement would simply extend an out of date projection and not provide an up to date and objectively assessed estimate of housing need.
53. In a further document, Supplement A - Housing Delivery Record 2001 to 2011 (August 2012) the Council again addressed shortfall against the South East Plan housing requirement. The Council acknowledged that a shortfall existed but argued that it should be disregarded, due to timing of the SE Plan adoption, the recession and delays in bringing forward the Local Plan. Paragraph 1.13 of that document stated:

"However, as the South East Plan came into effect it brought about a substantial increase in the housing requirement, from an annual average of 486 dwellings in the HCSPR to 612 dwellings in the SE Plan (an increase of over 30%). This resulted in a substantial increase in the 5-year requirement from adoption of the SE Plan in 2009. In fact an immediate 'backlog' was created as the SE Plan's base-date was 2006, so its requirements were in effect 'backdated'. This coincided with a fall in housing completions and supply due to the recession, and delays in bringing forward the Local Plan/Core Strategy, which was (and still is) the planned means of increasing supply. The 2006 Local Plan allocated a series of 'Local Reserve Sites' to be released if needed to maintain land supply. These have all now been released (totalling about

400 dwellings) but this has not been adequate on its own to resolve the shortfalls against the SEP requirements."

54. On the Council's proposals there would be no conformity with the South East Plan. Instead, by the end of March 2011, shortfall against the South East Plan stood at -854 dwellings.

The Inspector's Decision

55. The Inspector considered the question of housing requirements in his report from [IR47] onwards:

47. The extant SE Plan (POL1) (2009) has a requirement of 12,240 new dwellings for the district from 2006 to 2026 to meet housing needs. Notwithstanding the impending revocation, this plan has to remain in general conformity with that expectation, as well as addressing the objectively assessed local need for new housing in accord with the NPPF (para 17). In particular, the Council's most up to date figures relating to affordable housing (EB124) (2012) indicate a requirement of around 370 units per year in the district.

48. Albeit somewhat dated, the extensive technical evidence underlying the SE Plan requirements remains relevant and reinforces the conclusion that residential development pressures are only likely to increase in adjoining areas if Winchester district does not fully address its own needs. Providing suitable and available capacity can be identified, without compromising other important objectives of the NPPF, such as the protection of the SDNP, there is no justification for any under-provision of new housing over the plan period.

49. The SE Plan figure is equivalent to 612 new houses per year. Albeit rolled forward 5 years from 2026 to 2031, a district total of 11,000, as submitted, would deliver an average of only 550 annually; effectively a reduction of about 10%. Although 550 a year would be materially greater than the recent average from 2001 to 2011, of about 486, based on the Council's affordable housing requirement figures (EB124) (2012) a total of 11,000 new homes would not provide appropriately for objectively assessed local needs.

...

53. A total of 12,500 and an average rate of new housing delivery of 625 over the plan period would represent the positive approach to sustainable development required by the NPPF as it would reflect objectively assessed local needs for affordable housing. Moreover, the additional 2% or so would allow for a limited buffer of new housing land supply, as recommended in the NPPF (para 47). It would also help to take into account the likely upward movement of household growth in the medium to longer term if the economy improves from its present low base. A revised total of 6,000 new units in the two main site allocations outside Winchester (not 5,500) would also be closer to the Implied housing target for the PUSH growth area of the district in the most recent South Hampshire Strategy document (OD28) (October 2012).

...

56. Therefore, a total new dwelling target of 12,500 across the district from 2011 to 2031, with a delivery rate of 625 per year on average, is considered to be realistic, as well as positive in terms of the economic growth of the district. This is so not only in relation to past delivery rates locally, albeit a material "step change" upwards, but also the reasonably assessed capacities of the main three strategic sites allocated in the plan and their realistic implementation prospects, including in respect of economic viability. Moreover, it would be generally consistent with the Council's "stronger housing market" scenario considered in Appendix D of the Housing Background Paper (BP1) (June 2012).

...

58. All of the above should be sufficient to meet local affordable housing needs within the first 10 years or so of the full plan period, given the scale of existing and projected demand as well as the current backlog (BP2) (June 2012). The latter is of a magnitude that renders it incapable of realistic resolution within 5 years, taking into account an assessment of the likely resources to be available, the capacity of the local house building industry and the ability to sell the associated market housing in the current economic conditions."

Adoption

56. The Council therefore adopted the Inspector's proposed housing requirement of 12,500 and an average rate of new housing of 625 per year over the plan period. Policy CP1 of the JCS provides: "Provision will be made within the District for ... about 12,500 dwellings (net) in the period April 2011 to March 2031..." Performance against the South East Plan of this modification would present a shortfall in 2026 of -659. The Inspector had used the South East Plan annual requirement of 612, rolled forward from 2026 to 2031, to benchmark the Council's submitted 11,000 dwellings requirement and found that it would only deliver 550 annually, a reduction of about 10%.
57. The Inspector's proposed housing requirement of 12,500 would therefore be -594 dwellings short of the rolled forward South East Plan target by 2031, compared with Council's 11,000 target which is -2,094 short by 2031.
58. In summary, the housing requirement recommended by the Inspector (and subsequently adopted by the Council) clearly would not conform to the South East Plan because it was -659 dwellings short of the South East Plan housing requirement as at March 2026, and -594 dwellings short of the rolled forward South East Plan housing requirement as at March 2031, calculated on the basis that it would be legitimate to roll forward the South East Plan housing requirement and that shortfall against the South East Plan housing target as at March 31 2011 should be met in full.
59. The table below illustrates the above figures:

Table 1, Cumulative Deficit against South East Plan, 2006 to 2031

5 year period ending 31 st March	2011	2016	2021	2026	2031
South East Plan Requirement	3,060	6,120	9,180	12,240	
South East Plan Rolled Forward					15,300
Winchester Net Completions	2,206				
Winchester JCS Requirement		3,125	6,250	9,375	12,500
Deficit	-854	-789	-724	-659	-594

Submissions

60. The Council provided the Inspector with a housing requirement in the Draft JCS that did not take into account the significant backlog against the South East Plan targets in previous years. In examining the Plan, the Inspector did not adequately investigate the issue of shortfall, and thereby failed to take it into account. He therefore failed, in all the circumstances, to adequately assess whether the Plan met "objectively assessed requirements"/"needs", as required by paragraphs 182 and 14 of the NPPF. He further failed to assess whether the evidence submitted by the Local Planning Authority was "adequate, up-to-date and relevant" in line with paragraph 158. In so doing, the Inspector failed to discharge his obligation to assess "soundness", whether under section 20(5)(b) PCPA or in terms of compliance with national policy under sections 20(5)(a) and 19(2)(a) PCPA, or in terms of "general conformity" with the regional strategy under s. 24(1) PCPA.
61. It is further submitted that the Inspector failed to give adequate or intelligible reasons for his decision on this "principal important controversial issue".
62. The question of housing numbers is not abstract. A failure to provide adequate housing within the Council's administrative area would have substantial knock-on effects on economic and social conditions across the area, and, as the Inspector acknowledged at [IR48], the wider region.
63. The housing requirement was of fundamental importance to the JCS and the policies based upon it should therefore be quashed and/or remitted.

Ground 2: Duty to Co-Operate

Introduction

64. It is submitted that the Inspector failed to have proper regard to the Council's failure to comply with the duty to co-operate under section 33A PCPA particularly in relation to the Central Hampshire authorities: Test Valley Borough Council ("TVBC"), Basingstoke and Deane Borough Council ("BDBC") and East Hampshire District Council ("EHDC"); but also in relation to the South Hampshire authorities. The Council therefore again erred in law in adopting the Plan, which had been approved on an unlawful basis.

Legislative and Policy Framework

65. The duty to co-operate is a statutory obligation, with its meaning further clarified within national planning policy. Section 33A(2)(a) requires that local authorities "engage constructively, actively and on an ongoing basis" in the plan-making process. The nature of that duty is clarified by 33A(6)(a), "considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the preparation of development plan documents".
66. The NPPF contains a number of references to the duty to co-operate:

- (a) Paragraph 157 provides:

157. Crucially, Local Plans should:

- be based on co-operation with neighbouring authorities, ...

- (b) Paragraph 159 further states:

159. Local planning authorities should have a clear understanding of housing needs in their area. They should:

- prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries.

67. The fullest policy description of the duty is set out in paragraphs 178 to 181:

178. Public bodies have a duty to cooperate on planning issues that cross administrative boundaries, particularly those which relate to the strategic priorities set out in paragraph 156. The Government expects joint working on areas of common interest to be diligently undertaken for the mutual benefit of neighbouring authorities.

179. Local planning authorities should work collaboratively with other bodies to ensure that strategic priorities across local boundaries are properly coordinated and clearly reflected in individual Local Plans. Joint working should enable local planning authorities to work together to meet development requirements which cannot wholly be met within their own areas – for instance, because of a lack of physical capacity or because to do so would cause significant harm to the principles and policies of this Framework. As part of this process, they should consider producing joint planning policies on strategic matters and informal strategies such as joint infrastructure and investment plans.

180. Local planning authorities should take account of different geographic areas, including travel-to-work areas. In two tier areas, county and district authorities should cooperate with each other on relevant issues. Local planning authorities should work collaboratively on strategic planning priorities to enable delivery of sustainable development in consultation with Local Enterprise Partnerships and Local Nature Partnerships. Local planning authorities should also work collaboratively with private sector bodies, utility and infrastructure providers.

181. Local planning authorities will be expected to demonstrate evidence of having effectively cooperated to plan for issues with cross-boundary impacts when their Local Plans are submitted for examination. This could be by way

of plans or policies prepared as part of a joint committee, a memorandum of understanding or a jointly prepared strategy which is presented as evidence of an agreed position. Cooperation should be a continuous process of engagement from initial thinking through to implementation, resulting in a final position where plans are in place to provide the land and infrastructure necessary to support current and projected future levels of development.

68. Finally, NPPF paragraph 182 provides that an Inspector should assess whether a Plan has been prepared in accordance with the duty to co-operate, such that compliance with the duty must also be reflected in the assessment of soundness:

- 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;

...

- Effective – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities;

...

69. As observed above, following *Tesco v Dundee*, the correct interpretation of the above planning policy provisions is a matter of law, for the court.

70. Section 33A has only been the subject of one judgment to date, in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin), [62]-[69]. The decision is of limited assistance in the instant case, given that the key question there was whether the duty applied to a plan which had completed its preparation before the provisions had come into force, and the judge declined to give further guidance (at [71]).

71. Nevertheless, there is an Inspector's decision which provides valuable insight into how the duty to co-operate should be interpreted and approached at the examination stage. On 14 March 2013, Inspector Alan Mead BSc (Hons) MRTPI MIQ issued a report refusing to approve the North London Waste Plan, annexing his conclusions from 31

August 2012. The Inspector provides an exemplary, thorough exploration of the meaning of the statutory duty and related planning policy, which is worth citing in full:

"23. I agree that the 2004 Act gives no definition of what constitutes "engagement". However, a starting point in assessing what is involved in the duty to co-operate is the Concise Oxford Dictionary definition of co-operate "... work together...; concur in producing an effect...". Moreover, the NPPF includes phrases such as "...joint working on areas of common interest..." (para 178); "...work collaboratively with other bodies..." (para 179). Finally, NPPF para 181 states that "Co-operation should be a continuous process of engagement from initial thinking through to implementation, resulting in a final position where plans are in place to provide the land and infrastructure necessary to support current and future levels of development."

24. There is also a consideration of what might be perceived as falling short of co-operation. The Act and the NPPF use the term "co-operation" and not "consultation". If the duty had been merely to consult, the Act and subsequent advice would have said so. It is a familiar term in planning practice. Consultation has been defined by the Court of Appeal in the following terms:

"Whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken." [R v North and East Devon Health Authority Ex p. Coughlan [2001] QB 213]

25. It is reasonable to conclude that engagement as part of co-operation is more than the process of consultation outlined above and, as described in the Act, co-operation should be constructive and have active engagement which is ongoing. The Councils submit that advice in the NPPF about what constitutes "engagement" should

not be given any weight. However, the Introduction to the NPPF states that it must be taken into account in the preparation of local plans (para 2).

26. The duty to co-operate as provided for in Section 110 of the Localism Act came into effect on 15 November 2011 and there was no formal duty to co-operate before that date. Nevertheless, the date triggered the legal requirement and all DPDs submitted after that date must comply. I realise that co-operation with some S33A bodies may well have continued as illustrated by some of the minor modifications to the Plan. Furthermore, I have no reason to doubt that other modifications might have been submitted during the Examination as a result of further engagement, whether they had been agreed with S33A bodies or not. However, the key issue is whether or not there has been active and ongoing engagement with all the relevant planning authorities.

27. I note that reports were submitted to the London Regional Technical Advisory Board (RTAB) about the progress of regional plans and strategies and that representatives of the South East of England RTAB (now SEWPAG) and the East of England RTAB (now East of England WTAB) were invited to the London RTAB meetings. I have no doubt that inter-regional movements of waste were a constant topic for discussion at those meetings and that the progress of the NLWP was reported.

28. The Councils have also listed some of the representations made in response to the consultation at the Issues and Options stage of the preparation of the Plan in October 2009, which include 9 separate comments from the East of England Regional Assembly (as it then was), all of which have been the subject of responses by the Councils. The consultation on the draft Plan in May 2011 resulted in further representations from Essex County Council, Hertfordshire County Council and East of England Regional Assembly to which responses were again made by the (North London) Councils.

29. Nevertheless, the evidence is that no representative of any London borough or the GLA has attended either the South East or the East of England Regional meetings on waste during the last 8 years. The Councils note that there was no concern expressed about the NLWP from Buckinghamshire County Council, Northamptonshire

County Council, Bedfordshire County Council or its replacements Central Bedfordshire Council and Bedford Borough Council, Thurrock Council and Milton Keynes Council, all of whom, it is claimed, receive significant imports of waste from North London. However, this only serves to illustrate the lack of dialogue. There was a single meeting each with representatives of Essex County Council and Hertfordshire County Council in order to exchange information.

30. The various tasks to undertake in order to co-operate and to demonstrate co-operation are being developed in more detail since the coming into effect of S110 of the Localism Act, especially in guidance issued by the Planning Advisory Service (PAS) and the Planning Officers' Society (POS). The PAS is part of the Local Government Association and is funded by DCLG. Whereas the guidance is non statutory and so carries less weight than the NPPF, it shows how to meet the duty to co-operate. Similarly, the POS has published an Advice Note on Transition to the Localism Act and the National Planning Policy Framework in which further guidance is given.

31. Whatever constitutes best practice will evolve with the experience of successive DPD Examinations. Therefore, it would be unreasonable to expect a plan which underwent practically all its preparation prior to the commencement of "the duty" to display best practice in co-operating with other appropriate planning authorities. However, as a basic minimum, engagement has to be "constructive, active and ongoing" (S33A(2)(a)) and, as stated in the Framework, "... a continuous process of engagement from initial thinking through to implementation, ..." (para 181). This has not occurred between the Councils and Hertfordshire County Council and Essex County Councils. Nor have I any evidence that co-operation has occurred between Northamptonshire County Council, Buckinghamshire County Council or the Bedfordshire Councils where a significant amount of waste from North London is also transported for management or disposal.

32. I do not doubt that consultation during the various stages of the preparation of the Plan reached most, if not all, of the planning authorities which comprise the planning areas with whom I consider there is a duty to co-operate. However, I do not accept that the level of engagement with them has approached what is

envisaged by the duty to co-operate as described in the Act and the further guidance in the Framework. It has been consultation rather than co-operation.

33. I appreciate that various technical papers have been produced on the inter-regional flows of waste which, although important, are merely gathering evidence on which to base any future decisions. A waste session was held when the Replacement London Plan (2011) was examined in 2010 with attendees including bodies representing the East of England and the South East Regions, Essex County Council and Hertfordshire County Councils. I note the submissions by the (North London) Councils and the Regions about paras 5.82 and 5.83 of the Panel Report and also the Councils' view that the London Plan Examinations were the primary level for matters such as the amount of waste to be exported from London to be discussed and agreed. However, this view ignores the subsequent introduction of the duty to co-operate as now described in S33A of the 1994 Act. The Replacement London Plan was prepared and submitted before the commencement of the duty to co-operate on 15 November 2011. The NLWP was submitted after that date and so must comply with the relevant legal requirement. Moreover, discussion at inter-regional forums is not a substitute for a dialogue between planning authorities."

72. The following principles emerge from the above decision:

(a) Full weight must be accorded to the terms "engagement" and "co-operation" [22];

(b) "Co-operation" requires more than "consultation" [23];

(c) The NPPF, read as a whole, emphasises that engagement as part of co-operation requires "joint working" or "collaboration" [22]-[23];

(d) There must be "a continuous process of engagement from initial thinking through to implementation", as described in s.33A(6): "agreements on joint approaches" [23]-[25], [41];

(e) An Inspector must therefore scrutinise the level of engagement and agreement between local authorities [28]-[29];

(f) Government guidance as to best practice, in addition to the NPPF, e.g. from the Planning Advisory Service, may be a relevant consideration [30];

(g) Occasional or nominal communication is wholly insufficient [29]-[32]; and

(h) All neighbouring authorities should be involved, it is not sufficient to focus on a limited few [31].

Duty to Co-Operate Statement

73. The Council published a Duty to Co-Operate Statement in June 2012 ("the Statement").
74. An introductory map within the Statement identifies all neighbouring planning authorities. However the document is organised by way of general forms of co-operation, as opposed to a fuller survey of the level of agreement reached with identified neighbouring authorities.
75. The section on Central Hampshire is extremely limited, failing even to name the neighbouring authorities:

Central Hampshire Local Authority partnership working

3.11 The local authorities in rural central Hampshire have met on a regular basis to consider spatial planning matters. This 'Central Hampshire and New Forest Leaders Meeting' evolved to help develop the 'Rest of Hampshire' (outside PUSH) input to the South East Plan and met regularly over the period from mid-2005 to mid-2007. There are fewer cross-boundary issues in this rural part of Hampshire than in PUSH and no need was identified for the grouping to develop into a formal Joint Committee in the way that PUSH had. Most cross boundary issues were dealt with by means of joint working on evidence commissioning and policy development.

3.12 For example, the following components of the City Council's evidence base were developed or commissioned jointly with one or more of the other Central Hampshire authorities:

- Hampshire Gypsy and Traveller Accommodation Assessment 2006
- Strategic Housing Market Assessment 2007 and updates
- Strategic Flood Risk Assessment 2007
- Affordable Housing Viability Studies 2008
- Open Space, Sports and Recreation Study 2008
- Local Connections Housing Study 2010
- Hampshire Gypsy & Traveller Needs Assessment 2012

3.13 There have also been regular meetings and sharing of policy experience and drafting on key issues, particularly affordable housing.

76. At paragraph 4.4, the Statement observes:

4.4 The non-PUSH part of the District is a predominantly rural area, and there are no cross boundary issues relating to major housing development, nor any need to develop a sub-regional growth strategy. The main towns in the area are generally smaller and much more widely dispersed than in the PUSH area. Therefore, cross boundary issues are concerned more with wider policy issues, such as the need to encourage rural affordable housing. No need has ever been identified to establish a formal joint committee or other formal arrangements, given the modest cross-boundary issues experienced. Nevertheless, most authorities in this area formed an informal Central Hampshire and New Forest group to monitor and influence the content of the SE Plan. This involved regular meetings of leading Members and officers of the authorities during the period from 2005 – 2007.

Other Local Authorities

77. Several neighbouring authorities made submissions to the examination indicating that they did not consider that the duty to co-operate had been met, and that they had major concerns about soundness. The absence of agreement on such matters spoke for itself.

78. For example, Fareham Borough Council ("FBC") observed in their submission (dated 9 March 2012):

"Winchester City Council has not had due regard to the Duty to Co-operate with the Borough Council in the planning of the North Whiteley expansion in particular with regard to the timing and location of both education provision (primary and secondary schools) and transport provision (road access)."

79. Eastleigh Borough Council also submitted representations (dated 13 February 2012) challenging the soundness of the plan, notably in relation to the traffic/transport impacts of developments within the plan area.

80. Although Basingstoke and Deane Borough Council did not criticise the Council's approach to the duty to co-operate, the same could not be said for the Council's own submissions to the Basingstoke and Deane Borough Council plan (issued on 23 March 2012), which crucially accepted that housing was a cross-boundary issue:

"Whilst Winchester City Council acknowledges and welcomes the work that has been carried out to produce a locally-derived housing target for the Borough, it is concerned that the implications of failing to provide for in-migration have not been properly assessed and could lead to failure to provide for local housing needs and increase pressure on neighbouring districts"

Winchester City Council considers that policy SS1 is not to be legally compliant as the Council has not taken due regard of the effect of the policy on neighbouring districts when preparing the policy. The policy therefore has not taken full account of the duty to co-operate."

Inspector's Decision

81. The Inspector's principal observations are contained at paragraphs IR5 and 6:

"5. Section s20(5)(c) of the 2004 Act requires that I consider whether the Council complied with any duty imposed on them by section 33A of the 2004 Act in relation to the Plan's preparation. It is a requirement that the Council engages constructively,

actively and on an ongoing basis with the County Council, neighbouring local authorities and a range of other organisations, including the Highways Agency, the Environment Agency and Natural England. In particular, the South Downs National Park Authority has been fully involved throughout and accordingly the document has been submitted jointly. It will therefore also represent their strategic planning policy until a new Local Plan for the Park is adopted in 2014; the work on which has started.

6. In the Duty to Co-operate Statement (SD9) and elsewhere the Council has satisfactorily documented where and when co-operation has taken place, with whom and on what basis, as well as confirming that such positive engagement will continue. This includes with all the authorities in the Partnership for Urban South Hampshire (PUSH) area and particularly with Fareham BC and Havant BC in relation to the strategic land allocations at North of Whiteley and West of Waterlooville, as well as North of Fareham, the importance of which cannot be overstated in terms of new housing delivery. In the absence of any indication to the contrary, I am satisfied that the duty to co-operate has been met."

82. The Inspector further noted at [IR59]:

"It is relevant to note that no neighbouring Councils have raised concerns over the proposed level of new housing under the duty to co-operate, or in other respects, other than in relation to some matters of implementation. The plan, as modified, would not give rise to implications for others to accommodate development that is not being provided for in Winchester. This is borne out by reference to the extensive consultations at earlier plan stages, including in respect of realistic alternative options having been considered."

Submissions

83. The Inspector erred in concluding that the Council had complied with the duty to co-operate. Paragraph [IR6] indicates that the Inspector approached the duty to co-operate in the manner of a presumption, using the formulation "in the absence of any indication to the contrary". As with "soundness", explored in *Blyth Valley v Persimmon*, [40], the Inspector's role is inquisitorial. There is no presumption. The Inspector is

required to rigorously assess whether the Council's own actions had complied with the duty, it was not sufficient to rely on the alleged absence of complaint from neighbouring authorities. In any event, his conclusion that there was "no indication to the contrary" was simply wrong.

84. The Inspector erred in relying upon the descriptions within the Duty to Co-Operate Statement. The Statement indicates that no serious attempt had been made to engage with the Central Hampshire authorities on the strategic question of housing, and certainly no effort to reach any form of agreement. It was entirely inappropriate for the Council to rely, as they sought to at paragraph 3.11, on the premise that there were "fewer cross-boundary issues" (undefined) and at 4.4 "there are no cross boundary issues relating to major housing development, nor any need to develop a sub-regional growth strategy." Further, there was no demonstration that work was ongoing. Instead significant reliance had been placed on activity undertaken in 2005-2007, and a varied collection of documents since then. But the generalised reference to joint working on evidence commissioning and policy development did not provide any adequate explanation of the progress made towards agreements on housing provision.
85. It is further submitted that if the Inspector did have regard to this matter, he failed to give adequate or intelligible reasons for his decision on what was clearly a "principal important controversial issue".
86. The importance of the statutory duty must be interpreted in the light of the broader legislative history. The duty was introduced under the Localism Act 2011 to address the impact of the loss of the "top-down" effect from Regional Strategy, by the introduction of a "bottom-up" or inter-authority, collaborative duty. The mechanism was intended to be effective, to achieve adequate housing provision across a wider region. It was therefore incumbent on the Council to demonstrate clear, substantial progress towards "agreements on joint approaches" and for the Inspector to recognise that that had not been demonstrated in this case. He did not do that, and accordingly, erred in law.
87. There is no scope for error in relation to the duty to co-operate, under s. 20(5) and s. 20(7A)(b) PCPA. The Defendant has therefore acted outside the powers under Part 2 PCPA in adopting the JCS, and the relevant policies within the JCS should therefore be quashed and/or remitted.

Ground 3: Sustainability Appraisal

88. The Council and Inspector erred in relation to the Sustainability Appraisal, failing to recognise that it was seriously flawed, in breach of section 19(5) PCPA, and in breach of the requirements of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") and the implementing domestic legislation, the Environmental Assessment of Plans and Programmes Regulations 2004.

The SEA Directive

89. The SEA Directive's Preamble paragraph(4) provides that:

"Environmental assessment is an important tool for integrating environmental considerations into the 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.

90. Paragraphs (14) & (15) of the Preamble provide:

"(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.”

91. Article 1 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.”

92. Article 2(1) requires environmental assessment to be carried out for specific types of plans. The JCS is a qualifying document, as set out in the Sustainability Appraisal (paragraph 1.1, page viii).

93. Article 5 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 I.

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.

...

~~94. Annex I provides that the information to be provided under Article 5(1) must include:~~

...

(f) the likely significant effects (1) 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;

...

Environmental Assessment of Plans and Programmes Regulations 2004

95. Regulation 8 requires a local planning authority to undertake environmental assessment of plans and renders adoption of plans in the absence of such assessment unlawful:

(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) if it is a plan or programme co-financed by the European Community, the environmental assessment has been carried out as mentioned in regulation 7;

(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).

96. Regulation 12 dictates the requirements of the 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."

97. Schedule 2 of the Regulations includes the requirements under Annex I of the Directive.

Authorities

98. In *Save Historic Newmarket Ltd v Forest Heath DC* [2011] EWHC 606 (Admin), the High Court quashed parts of the Forest Heath Core Strategy, where there had been inadequate coverage and assessment of reasonable alternatives and increases to housing provision:

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.

99. The above passage was considered "a useful summary of the test" in *Heard v Broadland DC* [2012] EWHC 344 (Admin), at [13]. In *Heard*, Ouseley J further held at [71]:

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 alongside 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.

100. Both *Save Historic Newmarket* and *Heard* were applied in *Cogent Land LLP v Rochford DC* [2013] EWHC 2542 (Admin), albeit no breach was found on the specific facts in that case. The test in *Heard* has most recently been considered (by Ouseley J) in

R(Buckinghamshire CC) v Secretary of State for Transport [2013] EWHC 481 (Admin), [119].

The Sustainability Appraisal

101. At paragraph 8.51, the main SA document (June 2012) considers, in very brief terms, the overall target of 11,000 dwellings, acknowledged to be reduced from 12,740:

Active Communities

CP1 Housing Provision

8.51 The policy has been updated since 2009 to reflect consultation and the generation of locally derived housing targets with a reduction in overall housing number from at least 12740 (2006-2026) to about 11000 dwellings (2011-2031). The policy sets out the housing figures and refers to the spatial strategy for each of the three spatial areas WT, SH and MTRA to provide clarity on housing numbers for the plan period.

8.52 Sustainability Appraisal of the apportionment and expected level of development has been covered earlier in this document when considering the strategic and rural allocations. This level of housing development is likely to have some cumulative effects on environmental factors – the significance and nature is uncertain and it is the detail of other policies, location and detail of strategic allocations, that will mitigate against the potential adverse effects on water, landscape and biodiversity.

8.53 Overall, this policy strongly supports SA objectives for communities and housing; the significance of potential cumulative adverse effects on water, landscape and biodiversity are uncertain and will be mitigated by other specific topic policies.

The Housing Technical Paper Sustainability Appraisal

102. SA was conducted for the Housing Technical Paper (June 2011) in a document dated May 2012 ("HTPSA"). Paragraphs 2.2-2.4 stated:

2.2 A high level and strategic approach to the SA is appropriate to the nature and detail of the Housing Technical Paper that considers a number of potential scenarios to develop a new housing target for housing provision in the Winchester District. The Housing Technical Paper is not site-specific so it is not possible to undertake an SA of the potential site impacts of the various scenarios. The SA can only generalise about the effects of overall housing numbers on the District as a whole. Potential site impacts will depend upon the scale, nature and location of housing developments and the effectiveness of mitigation for negative effects is dependent upon other policies.

2.3 The assessment was made against the baseline information and review of plans/programmes compiled for the SA, the evidence base compiled for plan-making, and comparisons of previous housing predictions with actual delivery. Where possible, the likely significance and nature of potential effects from each of the scenarios for housing were identified, and uncertainties were noted.

2.4 The four alternative approaches to housing provision considered in the Technical Paper are as follows:

Scenario 1: Government Projections using the ONS 2008-based population projections to determine population change for the Winchester District to 2031. The total population increase projected from 2011-2031 is 16,550 and the total dwelling increase needed to accommodate this 11,000; the increase in economically active population is 6,550.

Scenario 2: Zero Net Migration (Natural Change). The model imposes a constraint on migration to produce a scenario where in and out migration is in balance. The population would fall from 2011 to 2031 by about 850, although an increase in dwellings of over 3,500 would still be needed because household size continues to fall.

Scenario 3: Economic-Based Projections. This scenario was developed by consultants as an attempt to model an economically-led scenario. If the annual rates calculated by NLP were applied over a 20 year period they would equate to an increase of 10,760 additional jobs, a further 7,420 economically

active population, a total population increase of 28,834 and a requirement for 15,640 dwellings.

Scenario 4: Affordable Housing-led Projections. Based on the NLP studies, the housing requirement needed to generate 375 affordable dwellings per annum would be in the range 18,760-25,000 dwellings (depending upon a proportion of 30% or 40% for affordable housing) for the 20 years over the period 2011-2031.

103. Of those Options, Scenario 1 matched the Council's target, whilst Scenario 3 was closest to the Claimant's figures. The HTPSA findings were set out at section 3. Paragraph 3.2 set out the reasons for selecting Scenario 1, identifying the primary negative effect as "The overall effect is likely to reduce the ability or propensity of people to create separate households".

104. At paragraph 4.1 the HTPSA concluded, with respect to Scenario 3:

"Whilst Scenario 3 indicates positive effects on the economy, the effects of such high numbers of population predicted may be negative with uncertain effects on the environment, and the capacity of infrastructure and supporting community facilities.

Environmental Impacts/Mitigation

105. The SA and the HTPSA did not consider what the impact would be of mitigating for a larger demand for housing in the Council's administrative area, or assess whether Scenario 1 would be considerably more expensive to mitigate due to the requirement to 'import' workers into the District due to the resultant housing shortage of this scenario with less development contribution funding to help deliver the infrastructure. There is no evidence that quantifies what the impact on infrastructure would be in the case of Scenario 1 or Scenario 3. Indeed there is there no evidence that quantifies what the commuting and infrastructure costs would be for any of the scenarios considered by the Council.

Examination of Alternatives

106. The HTPSA stated that regarding Scenario 3 "further studies reduced employment (and population) figures down to similar number of dwellings as to the preferred Scenario 1" (paragraph 4.3). This appears to be a reference to the 'Review of Employment Prospects, Employment Land & Demographic Projections Study'. The main SA document provided further explanation by stating that:

"The need for some further work on updating economic needs, which might result in some changes to the housing requirement proposed, was identified. This was undertaken for the Council and published in August 2011. The employment and population figures for Scenario 3 were revised to take into account the effects of the economic recession. This resulted in a reduction in overall economic growth for the District and housing numbers were reduced correspondingly to a level that was similar to those numbers predicted for Scenario 1." (paragraph 11.8)

107. The result of the Council viewing Scenario 1 and Scenario 3 as the same in the SA and HTPSA is that both scenarios are assessed as having the same effect and the Council have therefore not properly considered Scenario 3 as an alternative.
108. Further, the Council never considered the South East Plan's housing provision to be a 'reasonable alternative' to their preferred housing 'scenario' and it was never therefore identified as a scenario for testing nor was it subject to an SA – apart from the historic SA of the South East Plan as a whole.

PUSH South Hampshire Strategy

109. Given that the PUSH South Hampshire Strategy (2012) (SHS) was adopted prior to the Examination's public hearings, it is not clear how the development apportioned to Winchester District through the South Hampshire Strategy was assessed through the SA or where these development numbers were accounted for in the 'scenarios' that were tested by the Council. As the PUSH South Hampshire Strategy did not undergo a formal SA process itself (only SA 'lite') the additional development apportioned to Winchester District was not subject to any formal SA. Whilst at the JCS Examination public hearings it was informally agreed by the Council and participants that little weight should be

given to the SHS. However the weight to be given to the SHS has never been formally clarified.

The Inspector's Report

110. The Inspector observed at [IR4]:

"...based on the absence of effect on the overall aims, objectives and main elements of the plan as most concern clarity and effectiveness, I am satisfied that a further Sustainability Appraisal (SA) is not necessary in this instance."

111. The Inspector remarked at [IR15]:

"This conclusion is reinforced by the outcome of the ongoing SA/SEA process that has been properly carried out at each stage of the plan's progress to submission, including the realistic consideration of reasonable alternatives."

112. The Inspector wrongly assumed that Scenario 3 had been properly appraised at [IR17]:

"The SA/SEA report also reinforces the Council's judgement that a purely jobs/economic growth led strategy for the district would not satisfactorily meet other important plan objectives, with some potentially negative effects on the provision of services and facilities too".

113. Overall, the Inspector concluded that the Sustainability Appraisal had been adequate, in the final "Legal Requirements" table: "SA has been carried out and is adequate", [IR151].

114. Those findings/conclusions were erroneous in the light of the flaws observed above.

115. The Inspector further erred in his decision not to recommend that an SA be undertaken to appraise the changes to the Plan, especially in the light of his own increase. The SA had assessed Policy SH3 (Strategic Housing Allocation – North Whiteley) for 3,000 dwellings, not the 3,500 dwellings that were adopted in the Local Plan, therefore this

increase of housing in this policy was never subject to an SA. It was not permissible to rely on the general assessment of larger figures, as the Inspector sought to at [IR50]:

"The higher figure has also been taken into account in the strategic level SA/SEA through the plan process so far."

Adoption

116. An SA of the Adoption Statement was published following the adoption of the JCS and stated that:

"Reasons for choosing the Joint Core Strategy:

"The plan-making and the SA processes established that the adopted LPP1 was the most sustainable approach for implementing the development need that had been locally-derived for the Plan period"

117. In fact, the adopted Plan did not contain "locally derived" housing provision; it was simply an attempt to apply the South East Plan housing provision requirements (notwithstanding the errors observed above under Ground 1) plus an additional 2% as recommended by the Inspector. The 'locally-derived' housing figure proposed by the Council in the Plan (11,000 dwellings) was not accepted by the Inspector as being sound and ultimately not adopted by the Council.

118. In summary, the Inspector should have required further SA/SEA in the light of the errors above. He did not do so, and the Council further erred in adopting the plan approved on an unlawful basis. There is no scope for error with respect to failure to carry out adequate SA/SEA and accordingly, the relevant policies under the JCS fall to be quashed, and/or remitted.

Interim Remedy

119. Sections 113(5) and (8) provide:

(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.

...

(8) An interim order has effect until the proceedings are finally determined.

120. As stated above, the Claimant's application would be determined against the JCS policies, although it has not been lawfully adopted. The Claimant therefore seeks an order suspending the following chapters/policies until trial or further order:

Chapter 3: Development Strategy

Chapter 4: Spatial Strategy – Winchester Town

Chapter 5: Spatial Strategy – South Hampshire Urban Areas

Chapter 6: Spatial Strategy – Market Towns and Rural Area

Core Policies – Active Communities: Policies CP1 and CP3

Core Policies – Prosperous Economy: Policies CP8, CP9 and CP10

Core Policies – High Quality Environment: Policy CP21

121. It is submitted that the Claimant has (a) an arguable case; and (b) that the balance of convenience lies with the claim (*Terry Adams Ltd v Bolton MDC* (1997) 73 P & CR 446, 451).

Final Remedy

122. Section 113(7) PCPA provides:

(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.

123. In summary, the Claimant therefore submits that the Council's resolution to adopt was unlawful, and in accordance with section 113(7) PCPA, respectfully requests that the Court quash the JCS policies set out in paragraph 120 above, and/or remit them to further examination.

124. The Claimant seeks its costs.

JEREMY CAHILL QC
JAMES CORBET BURCHER
No5 Chambers
29 April 2013

Statement of Truth

The Claimant believes that the facts stated in this Grounds of Challenge accompanying its CPR Part 8 claim form are true. I am duly authorised by the Claimant to sign this statement.

Signed: 

Dated: 24.4.13

Full name: James Rigg