LPA/EXAM/xx

EXAMINATION OF THE HAMBLETON LOCAL PLAN

HDC NOTE ON APPROPRIATE ASSESSMENT PURSUANT TO THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2017

and

THE REQUIREMENTS OF REGULATION 19 OF THE TOWN AND COUNTRY PLANNING (LOCAL PLANNING)(ENGLAND) REGULATIONS 2012

The Timing of Appropriate Assessment

1. The Inspectors have requested confirmation of the position with regard to the timing of appropriate assessment pursuant to the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations").

2. The provisions of Part 8 of the Habitats Regulations address requirements for appropriate assessment in the context of development plans.

3. Regulation 105(1) of the Habitats Regulations states that;

   "(1) Where a land use plan—

   (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 the site,

   the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives."

4. Accordingly, where an appropriate assessment is required, it must occur before the plan is "given effect". In short, the Habitats Regulations require an appropriate assessment to take place (if such an assessment is required) before adoption of the plan.

5. Separately, section 20(3) of the Planning and Compulsory Purchase Act 2004 requires "prescribed" documents to be sent to the Secretary of State when a local planning authority submits its draft plan for examination.

6. The list of prescribed documents is at Regulation 22(1) of the Town and Country Planning (Local Planning)(England) Regulations 2012 ("the 2012 Regulations"). The list

includes (at sub-paragraph (e)), "such supporting documents as in the opinion of the local planning authority are relevant to the preparation of the local plan."

7. The Habitats Regulations Assessment ("HRA") produced by the Council and dated February 2020 (Document LP09) was submitted to the Secretary of State with the draft Local Plan in March 2020.

The Requirements of Regulation 19

8. Production of the HRA was an iterative process undertaken over an extensive period and as the emerging Local Plan was developed. The first draft of the HRA was provided to the Council by its external consultants in October 2018 (LP09.2). A second draft of the HRA was provided to the Council by its consultants in April 2019 (LP09.1) having been revised to take into account changing circumstances. A further exercise of revision by the Council's consultants led to production of the HRA in February 2020 (LP09). It is this document that was submitted to the Secretary of State alongside the draft Local Plan for examination (as referred to above).

9. In accordance with Regulation 19 of the 2012 Regulations, "proposed submission documents" are to be publicised. Proposed submission documents are defined at Regulation 17 of the 2012 Regulations as including, "such supporting documents as in the opinion of the local planning authority are relevant to the preparation of the local plan".

10. Whilst the HRA was a submission document (as noted above, it was submitted to the Secretary of State together with the draft Local Plan), it was still in draft form at the Regulation 19 stage. It is the Council's position that as a draft document, that remained incomplete until February 2020, there was no obligation to publicise the HRA at Regulation 19 stage. Accordingly, there has been no breach of Regulation 19.

11. Even if it is considered that the draft HRA should have been publicised at Regulation 19 stage (at that point, the latest draft of the HRA was that produced in April 2019), the fact of non-publication of the HRA at Regulation 19 stage does not prevent the Local Plan from proceeding through this examination, and ultimately to adoption. The issue of prejudice is relevant as to whether or not any non-compliance with Regulation 19 means that the Local Plan faces a significant legal obstacle.

12. That proposition was confirmed in a judgment of Supperstone J. in the case of **The Queen on the application of CK Properties (Theydon Bois) Limited v Epping Forest District Council** [2018] EWHC 1649 (Admin);

    "Regulation 18 concerns the preparation of local plans and the requirement relating to consultation. Regulations 19 and 20 (and also 22 and 23) are relevant to the examination stage of plan-making. I agree with Mr Beard [counsel for the LPA] that regulation 19 publication is not a consultation exercise. It is the mechanism by which interested persons are provided with an opportunity to make representations on the

draft plan under regulation 20 to enable them to participate in the process of independent examination. In the present case the Claimant has made regulation 20 representations, challenging the soundness and legal compliance of the draft plan that will be considered by the Inspector appointed to examine the local plan. Accordingly the unavailability of Appendix B will not cause any prejudice to the Claimant." (at §85)

13. A copy of the judgment is appended to this Note for ease of reference.

14. In this case, even if the Council was required to publicise the (April 2019) draft HRA at Regulation 19 stage (which is not accepted), there can be no prejudice to any party;

    (i) the HRA (dated February 2020) on which the Council relied at Regulation 20 submission stage was made available to the public through the Council's Local Plan website on 31 March 2020, and,

    (ii) all parties with an interest in the Local Plan have had the opportunity to consider and make representations in the examination on the contents of the HRA. Representations to the examination by participants in the examination have been made in respect of the HRA.

15. Since production of the February 2020 HRA (and its submission together with the draft Local Plan in March 2020), the HRA has been the subject of further updating and consideration (August 2020 and submitted with the Council's Matter 1 Hearing Statement).

16. The contents of the HRA remain a subject of discussion between the Council and Natural England (as referred to during the course of the hearing session on Matter 1). Accordingly, the Council has been requested by the Inspectors, and will be providing to the examination, a note setting out the up to date position with regard to the HRA, the position of Natural England, and any consequent effects on draft policies within the Local Plan.

Neutral Citation Number: [2018] EWHC 1649 (Admin)

Case No: CO/997/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 June 2018

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

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Between :

THE QUEEN on the application of CK PROPERTIES (THEYDON BOIS) LIMITED	**Claimant**
- and -	
EPPING FOREST DISTRICT COUNCIL	**Defendant**

\- -
\- -

Christopher Lockhart-Mummery QC (instructed by **Howes Percival LLP**) for the **Claimant**
Mark Beard (instructed by **Epping Forest District Council**) for the **Defendant**

Hearing dates: 23 & 24 May 2018

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Judgment Approved

Mr Justice Supperstone :

Introduction

1. The Claimant challenges the lawfulness of the decision of Epping Forest District Council ("the Council") taken on 14 December 2017 ("the Decision") to agree and publish the Draft Epping Forest District Local Plan (Submission Version 2017) ("the 2017 Draft LP"), in accordance with Regulation 19 of Part 6 of the Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended) ("the 2012 Regulations") and thereafter submission to the Secretary of State for independent examination under s.20 of Part 2 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").

2. The Claimant is a development company which wishes to develop approximately 133 homes on the site owned and promoted by the Claimant known as "Land East of Central Line/North of Abridge Road (including The Old Foresters' Site), Theydon Bois" ("the Site"). The Council is the local planning authority for the area in which the Site is situated. Although the Site was allocated for residential development in the draft local plan for consultation in October 2016, it was excluded from the 2017 Draft LP which was approved at the Council's extraordinary Council meeting ("ECM") on 14 December 2017.

3. On 20 March 2018 Lang J granted the Claimant permission to proceed with its claim for judicial review and restrained the Council from submitting the 2017 Draft LP to the Ministry of Housing, Communities and Local Government until final determination of these proceedings or further order.

The Factual Background

4. Between 30 July and 15 October 2012 the Council consulted on a document referred to as "Issues and Options Community Choices".

5. Between October 2012 and October 2016 the Council prepared a draft local plan, and undertook a sustainability appraisal. In February 2013 the Council published its Statement of Community Involvement ("SCI") pursuant to s.18 of the 2004 Act, which includes the following:

> "**Local Plan**
>
> 7. The Local Plan is a document which outlines policies which will influence development in the District up until 2033. Both the Local Plan and the supporting studies will be available to view on the Council's website.
>
> **Supporting documents**
>
> 8. There are a number of studies which are used as background evidence to the main Local Plan document. The studies are used to help guide the policies that are going to be in the final document and perhaps identify options that are not feasible. These will be available from the Council offices or on the Council's website when they are finalised."

6. There were a number of member and officer workshops relating to the site selection process. On 7 June 2016 at a local plan officer working group meeting a decision was made as to which sites should be allocated in the draft local plan. On 6 August 2016 a member workshop was held to review the sites identified for allocation.

7. Between 31 October and 12 December 2016 there was consultation on the draft local plan (draft October 2016). The draft local plan stated at para 5.5:

> "The Council has identified potential sites for allocation for residential development and traveller accommodation, details of which are provided in the following sections. These sites have been identified following a rigorous application of the site selection methodologies and represent those sites the Council considers to be suitable, available and achievable within the Plan period based on available information."

The Claimant's site was one of those identified for allocation at that stage. It was proposed to be allocated for residential development of approximately 133 homes.

8. In September 2017 the (then) Department for Communities and Local Government issued a consultation paper (Planning for the right homes in the right places: consultation proposals) which proposed to introduce a standard methodology for the calculation of housing need for the purposes, mainly, of local plans. The standard methodology would mean that the Council's housing requirement would rise from 514/518 dwellings per annum to 923 dwellings per annum. Over the plan period this would increase the required housing provision from some 11,400 to 20,306 homes. The proposal was that the standard methodology be used unless the relevant local plan was submitted for examination on or before 31 March 2018.

9. During 2017 the Council held workshops relating to the site selection process, for example, on 17 August and 18-19 October 2017, the latter being an officer workshop which was held in order that the proposed allocation sites could be "identified". The Claimant's site passed all stages of the selection process completed before the officer workshop of 18-19 October 2017. However at the October meeting the Claimant's site was not identified for housing development.

10. On 28 November 2017 the Council conducted an all-member briefing on the local plan.

11. On 6 December 2017 the Non-Technical Summary of the Sustainability Appraisal was published on the Council's website as Appendix 4 to the ECM Report. The full Sustainability Appraisal and Equalities Assessment ("the SA Report") was published on the Council's website on 18 December 2017. However the Council received the final draft on 11 December, before the ECM.

12. A completed version of the Site Selection Report ("SSR") was published on the Council's website on 12 December 2017, together with appendices including Appendix A (Residential and Employment Site Selection Methodology). Appendix B (Assessment of Residential Sites) was not available. The text of the SSR states that this appendix was being finalised and would be published when completed, and that it would explain why each and every site has been included or omitted.

13. The SSR includes the following:

> "2.136 The site allocations proposed for inclusion in the Submission Local Plan are broadly consistent with those contained in the Draft Local Plan. Amendments to the Draft Local Plan site allocations were made in the following settlements for the reasons set out below. If a settlement is not listed below the site allocations remain as proposed in the Draft Local Plan.
>
> …
>
> - **Theydon Bois**: site allocations amended and overall quantum of development reduced to address concerns regarding potential impacts on Epping Forest arising from increased recreational pressure.
>
> 2.137 In total, these 91 sites will support delivery of approximately 9,816 homes across the District. This is in excess of the 8,046 homes needed to meet the housing requirement in the District and ensures sufficient flexibility to respond to changes in the status of the proposed site allocations and the requirements of the market."

14. On 14 December 2017 the Council met and took the decisions the subject of these proceedings.

15. On 18 December 2017 the six-week period of publicity for making representations on the local plan commenced. The period of publicity ended on 29 January 2018.

16. On 30 January 2018 the Ministry of Housing, Communities and Local Government wrote to chief planning officers of local authorities advising that the transitional arrangements in the September 2017 consultation paper would apply to any plans submitted before the final version of the revised NPPF is published (currently believed to be in the summer of 2018).

17. On 8 March 2018 these proceedings were commenced.

18. On 14 March 2018 the Council published the SSR together with all the appendices to it. The reason for the rejection of the Site is stated in Appendix B:

> "Although the site was proposed for allocation in the Draft Local Plan (2016) and remains available within the first five years of the Plan period it is not proposed for allocation. Responses received through Regulation 18 Draft Local Plan consultation indicated that the site is less preferred by the community as a result of the scale of growth proposed. Additionally the Conservators of Epping Forest raised concerns around the overall scale of growth proposed in Theydon Bois, which is located in close proximity to the Epping Forest SAC, and the potential effects arising from recreational pressure and

air quality. The Conservators identified the need for a SANG [Suitable Alternative Natural Greenspace] to compensate for the scale of growth, which may adversely affect the deliverability of the site. It was considered that other sites in Theydon Bois were more preferable in terms of their overall suitability and if allocated they would provide the desired growth in the settlement. This site is not proposed for allocation."

19. During the last week of March the Council sent to some interested parties, but not to the Claimant, an undated letter offering a period until 23 April 2018 for supplementary representations ("the undated letter"). By e-mail dated 19 April 2018 the Council wrote to some interested parties extending that date for representations to 17 May 2018.

20. The updated position is that the NPPF will not be published until the end of July 2018; that being so the new housing requirements will not take effect before the end of January, early February 2019.

The Statutory Framework

Planning and Compulsory Purchase Act 2004

21. The 2004 Act provides, so far as relevant:

> "**19 Preparation of local development documents**
>
> (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;
>
> (3) In preparing the local development documents (other than their statement of community involvement) the authority must also comply with their statement of community involvement.
>
> (6) The Secretary of State may by regulations make provision—
>
> > (a) as to any further documents which must be prepared by the authority in connection with the preparation of a local development document;
> >
> > (b) as to the form and content of such documents.
>
> **20 Independent examination**
>
> (1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.

> (2) But the authority must not submit such a document unless—
>
> > (a) they have complied with any relevant requirements contained in regulations under this Part, and
> >
> > (b) they think the document is ready for independent examination.
>
> (3) The authority must also send to the Secretary of State (in addition to the development plan document) such other documents (or copies of documents) and such information as is prescribed.
>
> (5) The purpose of an independent examination is to determine in respect of the development plan document—
>
> > (a) whether it satisfies the requirements of s.19 and 24(1), regulations under s.17(7) and any regulations under s.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 s.33A in relation to its preparation.
>
> (6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.
>
> (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 sub-section (5)(a) and is sound, and
> > >
> > > (ii) that the local planning authority complied with any duty imposed on the authority by s.33A in relation to the document's preparation,
>
> the person must recommend that the document is adopted and give reasons for the recommendation."

22. The 2004 Act contains no definition of the term "sound". The term is defined in paragraph 182 of the NPPF which includes the following:

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

Town and Country Planning (Local Planning) (England) Regulations 2012, Part 6

23. The 2012 Regulations include, so far as is relevant:

> "**17 Applications and interpretations of Part 6**
>
> In this Part—
>
> 'proposed submission documents' means the following documents
>
>> (e) such supporting documents as in the opinion of the local planning authority are relevant to the preparation of the local plan;
>
> **18 Preparation of a local plan**
>
> (3) In preparing the local plan, the local planning authority must take into account any representation made to them in response to invitations under paragraph (1).
>
> **19 Publication of a local plan**
>
> Before submitting a local plan to the Secretary of State under s.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…
>
> **20 Representations relating to a local plan**
>
> (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.
>
> **22 Submission of documents and information to the Secretary of State**
>
> [Regulation 22(1) identifies the documents prescribed for the purposes of section 20(3) of the Act]."

24. Regulation 35 provides:

> "**Availability of documents: general**
>
> 35(1) A document is to be taken to be made available by a local planning authority when—

(a) made available for inspection, at their principal office and at such other places within their area as the local planning authority consider appropriate, during normal office hours, and

(b) published on the local planning authority's website.

(2) In relation to any document made available under these Regulations, except a local plan or supplementary planning document which has been adopted or approved, the local planning authority may cease to make the document available once the period specified in paragraph (3) has expired.

(3) The period mentioned in paragraph (2)—

…

(b) where the document relates to a local plan, is the six week period referred to in section 113(4) of the Act that applies as regards the local plan concerned."

The Planning Inspectorate's Procedural Practice in the Examination of Local Plans (June 2016)

25. The Planning Inspectorate's guidance contained in the Procedural Practice advises, so far as relevant:

"**Section 1: Pre Submission**

1.1 LPAs should rigorously assess the plan before it is published for consultation under regulation 19 to ensure that it is a plan which they think is sound. The plan should focus relentlessly on the critical issues and the strategies to address them, paying careful attention to deliverability and viability. This approach may raise uncomfortable questions but the whole point of the plan is to address the critical issues as far as possible.

Additional Written Material

3.15 Additional written material should not be put forward if not requested by the Inspector. For example, topic papers, should form part of the evidence base submitted with the plan. Similarly, representors should ensure that all their evidence is provided with their original representation and should not expect an opportunity to submit further material during the examination."

26. In *Samuel Smith Old Brewery (Tadcaster) v Selby DC* [2015] EWCA Civ 1107, Sales LJ, delivering the judgment of the court, described at para 28 the various stages of plan making:

> "The stages of the plan making process constituting, respectively, the preparation of a local development document, as provided for in section 19, and independent examination, as provided for in section 20, are distinct and separate from each other. … The concept of plan preparation by the local planning authority and independent examination by an inspector being in any sense concurrent and overlapping stages of the process is alien to the statutory scheme. They are sequential stages. Preparation comes to an end before examination begins. The former is an activity undertaken by the local planning authority, the latter an activity undertaken by the inspector, albeit with scope for him to call for further work to be done by the authority with a view to making the plan sound. As Ouseley J observed [2015] PTSR 719, para 29, once the plan passes from the stage of preparation to the stage of examination, it leaves the authority's hands – save for the authority's power of withdrawal under section 22 – until it is able within the constraints of section 23 to adopt it."

27. Sales LJ continued at para 33:

> "Section 20(5) poses for the Inspector conducting an independent examination three specific questions, namely, first, whether the development plan document 'satisfies the requirements of sections 19 and 24' and the relevant regulations relating to the preparation of development plan documents (section 20(5)(a)); secondly, whether the development plan document is 'sound' and thirdly, whether the local planning authority 'complied with' its duty under section 33A 'in relation to its preparation'. It is to be noted that sub-section (5)(a) is expressed in terms of the development plan document itself satisfying the relevant statutory requirements, rather than in terms of the local planning authority having complied with the relevant procedural requirements of the specified statutory provisions. As Ouseley J observed in [2015] PTSR 719, para 116, albeit when dealing with a different ground of the challenge:
>
> > 'The statutory issue for the Inspector was whether it was reasonable to conclude that the plan satisfied the requirements of section 19. There is a marked contrast between the language of section 20(7)(b)(i) and (ii), to be found elsewhere in section 20 as well. The Inspector had to consider whether the council has complied with any section 33A duty, but not with any section 19 duty. It is the *plan* which the Inspector has reasonably to conclude satisfies section 19.'"

Grounds of Challenge

28. Mr Christopher Lockhart-Mummery QC, for the Claimant, advances four grounds of challenge:

    i) Failure to comply with adopted Statement of Community Involvement (**Ground 1**).

    ii) Failure to make proposed submission documents available in accordance with regulation 19 (**Ground 2**).

    iii) The decision made on 14 December 2017 was based on an incomplete evidential basis (**Ground 3**).

    iv) The decision of 14 December 2017 was procedurally unfair (**Ground 4**).

Jurisdiction

29. Before turning to the grounds of challenge it is necessary to consider a jurisdiction issue that has been raised by the Council. Mr Mark Beard, for the Council, contends that this claim for judicial review is excluded from the court's jurisdiction by s.113 of the 2004 Act.

30. Under the heading "Validity of strategies, plans and documents" s.113 of the 2004 Act provides, so far as relevant:

> "(1) This section applies to—
>
> (c) a development plan;
>
> (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.
>
> (3A) An application may not be made under sub-section (3) without the leave of the High Court.
>
> (3B) An application for leave for the purposes of sub-section (3A) must be made before the end of the period of six weeks beginning with the day after the relevant date.
>
> (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 sub-section (7)(b) it may give directions as to the action to be taken in relation to the document.

(7B) Directions under sub-section (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;

(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)."

31. Section 37(3) of the 2004 Act provides:

"A development plan document is a local development document which is specified as a development plan document in the local development scheme."

32. Section 17 of the 2004 Act deals with "Local development documents". Sub-section (8) provides, so far as relevant:

"A document is a local development document only in so far as it or any part of it—

(a) is adopted by resolution of the local planning authority as a local development document;

(b) is approved by the Secretary of State under section 21 or 27…"

33. Mr Beard submits that, properly construed, the term "development plan document" within ss.20 and 113 of the 2004 Act, considered in the context of Part 6 of the 2012

Regulations, includes the "submission version" or "submission draft" of such a document.

34. He contends that the decisions of the High Court in *The Manydown Company Ltd v Basingstoke and Deane Borough Council* [2012] EWHC 977 (Admin) and *I.M. Properties Development Ltd v Lichfield District Council* [2014] EWHC 2440 (Admin) support this construction of s.113(2).

35. In *Manydown* proceedings for judicial review were brought to challenge, inter alia, a decision of the Council's Cabinet affirming its selection of sites proposed for allocation in its pre-submission draft Core Strategy, and approving that document for consultation. At paragraph 77 Lindblom J (as he then was) noted that

> "… it is well settled law that the scope of an ouster provision such as s.113(2) of the 2004 Act must be determined by the words of the provision itself…, and the fact that a particular action on the part of a local planning [authority] might later expose an adopted plan to challenge by a statutory challenge does not, of itself, debar an earlier claim for judicial review."

36. The judge continued (at para 81):

> "As with any statutory ouster of the court's jurisdiction, one must interpret this provision strictly in accordance with the words Parliament has chosen for it. This principle was recognised in *Hinde*, where it was stressed that s.113 must be construed according to its own terms. I also think it is important to notice the difference in statutory language between the ouster provision in s.113 and the one that previously applied to challenges to local plans. Section 284(1) of the 1990 Act applied to a local plan 'whether before or after the plan… has been approved or adopted'. Such words do not appear in s.113 of the 2004 Act."

37. The claimant in *Manydown* did not seek to question a "relevant document" of the kind to which s.113 refers. The decision of the Council's Cabinet is described by the judge as one which "affects the parameters of the process that will culminate in the adoption of the Core Strategy under s.23 of the 2004 Act" (para 82). Lindblom J stated (at para 83):

> "Under the provisions of s.113(1)(c), (2), (3), (4) and (11)(c) it is a development plan document that may be questioned only upon its adoption, and within six weeks of that date – not some prior step on the part of the local planning authority, even one that might vitiate the development plan document itself once it has been adopted. Adoption – or approval, as the case may be – is of more than merely formal significance. It is a defining characteristic of the 'strategies, plans and documents' embraced in the statutory jurisdiction under s.113."

38. Accordingly such a decision that had the effect of approving a pre-submission draft of the Core Strategy for consultation "does not … constitute a local development document being adopted as such by resolution of the local planning authority" (para 85).

39. It was thus not necessary to decide in that case whether a pre-submission draft of a core strategy qualified as a "relevant document" within s.113, but the judge said that he would hold that it does not. Lindblom J did however add (at para 86):

> "Admittedly, the requirement in s.20(1) of the 2004 Act that the local planning authority must submit a development plan document to the Secretary of State for independent examination implies that, according to the particular statutory context, the concept of a development plan document can include the submission draft of such a document. This is also effectively acknowledged in the 2004 Regulations. However, I do not believe one can infer from any of the relevant statutory provisions that a pre-submission draft, published – or about to be published – for consultation, qualifies as a development plan document within s.113(1)."

40. At paragraph 87 the judge observed that:

> "In a case such as this, an early and prompt claim for judicial review makes it possible to test the lawfulness of decisions taken in the run-up to a statutory process, saving much time and expense – including the expense of public money – that might otherwise be wasted. In principle it cannot be wrong to tackle errors that are properly amenable to judicial review, when otherwise they would have to await the adoption of the plan before the court can put them right."

41. In *IM Properties* the challenge came at a much later stage in the process, at the making of modifications.

42. At paragraph 71 Patterson J said:

> "Once a document becomes a Development Plan document within the meaning of section 113 of the 2004 Act the statutory language is clear: it must not be questioned in any legal proceedings except in so far as is provided by the other provisions of the section. Sub-section (11)(c) makes it clear that for the purposes of a Development Plan document or a revision of it the date when it is adopted by the Local Planning Authority is the relevant date from when time runs within which [to] bring a statutory challenge."

43. The judge continued at para 72:

> "It is quite clear, in my judgment and not inconsistent with the *Manydown* judgment, that once a document has been submitted

> for examination it is a Development Plan document. The main modifications which have been proposed and which will be the subject of examination are potentially part of that relevant document. To permit any other interpretation would be to give a licence to satellite litigation at an advanced stage of the Development Plan process."

44. Mr Lockhart-Mummery submits that s.113(2) precludes, and only precludes, a challenge to an adopted local plan otherwise than by a challenge made under the provisions of s.113. No local plan has been adopted in the present case. In any event, Mr Lockhart-Mummery contends, these proceedings do not seek to challenge the local plan. They seek to challenge the unlawful procedure and decisions which led to that document (the "prior steps").

45. The Claimant's challenge, Mr Lockhart-Mummery contends, is to the antecedent procedural steps. The Claimant's complaints of breaches of procedural requirements relating to the preparation of the local plan cannot be brought under s.113 because of s.113(10) which relates to the adoption of a plan. Mr Lockhart-Mummery observes that in the cases of *Manydown* and *IM Properties* it does not appear that reference was made to sub-sections (5), (6), (7B), (9) and (10) of s.113.

46. Mr Beard submits that once a document becomes a development plan document (sound and legally compliant, and ready for examination) under s.20, then a challenge must await adoption; were it otherwise everything that happens before adoption after the regulation 18 stage has been completed could, on the Claimant's analysis, be characterised as a preparatory step and subject to judicial review. Mr Beard submits that once a document has the character of a development plan document it may only be questioned once adopted. He contends that s.20(5) and (7), in particular, supports this analysis. The person with primary responsibility for deciding whether the "soundness" test has been satisfied is the Inspector. Once the development plan document has "crystallised" (see *Manydown*, per Lindblom J at para 85) the local planning authority has no power to modify the document before submitting it to the Secretary of State for independent examination. If asked to do so by the local planning authority, shortcomings can and must be rectified by the Inspector recommending modifications of the document to make it sound and legally compliant, but only where the Inspector considers the duty to co-operate to have been met (see s.20(7A)-(7C)).

47. Mr Beard observes in relation to regulation 18(3) that there is no corresponding provisions in regulation 19. The Claimant is wrong, he submits, to characterise the regulation 19 process as involving consultation. Regulation 19 is to be read with regulation 20, not with regulation 18. The pre-submission draft document in *Manydown* was at the regulation 18 stage.

48. Plainly the factual situations in *Manydown* and *IM Properties* were very different from the present case. *Manydown* concerned the contents of a pre-submission draft of the core strategy. That was not a local development document. *IM Properties* concerned modifications. By contrast the draft local plan in the present case has not yet been submitted for examination.

49. It is not the role of the Inspector to determine whether the Council has complied with its duties of preparation under s.19 (*Samuel Smith*, see para 27 above). Mr Beard contends that the Claimant has ignored the fact that the purpose of publication under Regulation 19 and making representations under Regulation 20 is to allow interested persons to participate in the statutory process of independent examination; it is not for the purposes of consultation, the results of which are intended to inform the preparation of the draft local plan.

50. The "particular statutory context" (*Manydown*, at para 86, see para 39 above) in relation to the present issue of jurisdiction is the specific provisions referred to at paragraphs 30-32 above. Section 37(3) provides that "a development plan document is a local development document which is specified as a development plan document in the local development scheme". Section 17(8)(a) provides that "a document is a local development document only in so far as it or a part of it… is adopted by resolution of the local planning authority as a local development document". Accordingly, only a challenge to an adopted local plan is precluded by s.113(2) otherwise than by a challenge made under the provisions of s.113.

51. In my view the clear words of the relevant statutory provisions lead to this conclusion. Such a conclusion is consistent with the analysis of Lindblom J in *Manydown* where at paragraph 83 he said: "Under the provisions of s.113(1)(c), (2), (3), (4) and (11)(c) it is a development plan document that may be questioned only upon its adoption and within six weeks of that date…" (see also Patterson J in *IM Properties* at para 71). I agree with Mr Lockhart-Mummery that sub-sections (7B) and (10) of s.113 reinforce that analysis. Mr Lockhart-Mummery observes there is nothing in the *obiter* comment of Lindblom J at paragraph 86 in *Manydown* that is inconsistent with the above analysis of the "particular statutory context". Adopted means adopted by resolution (s.23). S.113(7A) and (7B) only relate to an adopted relevant plan. S.113(10) is clear: it relates to adoption.

52. Further I accept Mr Lockhart-Mummery's submission that the Claimant is challenging the steps taken, or not taken, by way of preparation for submission of the local plan and that this is not a challenge to the development plan document or local plan itself.

53. For the reasons I have given, I have reached the conclusion that these proceedings are not ousted by s.113(2).

The Parties' Submissions and Discussion on the Grounds of Challenge

54. I shall consider the grounds of challenge in the order taken by Mr Lockhart-Mummery in his oral submissions.

Ground 3: the decision of 14 December 2017 was based on an incomplete evidential basis

55. Mr Lockhart-Mummery said that he would take the main point in the claim first.

56. The parties agreed that the principal factual issue for the court is whether "the Members of the Council were … well informed about … the evidence base … justifying … the allocation of [residential] sites".

57. The Council must not submit a development plan for independent examination unless (1) they have complied with the Regulations, and (2) "they think the document is ready for independent examination" (s.20 of the 2004 Act). It is common ground that the decision of the Council of 14 December 2017 was required to be a decision that the local plan was "sound" (see s.19(2)(a), and para 182 of the NPPF). In order to reach such a decision, the Council was required to find that it was, inter alia, the most appropriate strategy, when considered against reasonable alternatives. Mr Lockhart-Mummery submits that in the absence of evidence that the Council themselves considered necessary for residential site selection and deletion, the Council could not lawfully reach the conclusion that the local plan was "sound". The omission of Appendix B from the Report, Mr Lockhart-Mummery submits, meant that the members of the Council did not know the assessed basis on which the residential content of the local plan was being decided.

58. The Claimant's pleaded case is that "in the absence of any available evidence as to residential site selection and deletion, the Council could not lawfully reach a conclusion that the LP was 'sound'" (Statement of Facts and Grounds, para 36).

59. Mr Lockhart-Mummery raised for the first time in his oral submissions the contention that the officers decided site allocation at the meeting on 18/19 October 2017 and then informed members of the decision. He based that submission, as I understand it, on the language used by Ms Blom-Cooper, the Council's Interim Assistant Director – Planning Policy, in her second witness statement at paras 12-14 and in the Report at para 2.132, and the witness statement of Mr Chambers at paras 6(vi) and 10. I reject that submission. It is clear from the evidence, considered as a whole, that the final decision as to site allocations, including the omission of the Claimant's site, was made by members at the meeting on 14 December 2017.

60. I reject the contention that at the time the decision was made on 14 December 2017 the members of the Council had no evidence as to residential site selection and deletion.

61. Councillor Chambers, in his witness statement, gives evidence of a member briefing on 28 November 2017 regarding the version of the draft local plan to be presented to Full Council including the proposed final site allocations. Mr Chambers states:

> "10. … Although the LPSV was published eight days prior to the ECM, members were very well informed about the content of the LPS[V] and the changes that had been made to the Draft Local Plan following Regulation 18 consultation. In particular, at the all-Member Briefing held on 28 November 2017, officers informed Members about the site allocations to be included within the LPSV, highlighting the proposed site allocations that were included in the Regulation 18 Draft Local Plan that had not been allocated in LPSV. This included the Claimant's site to the east of Theydon Bois.
>
> 11. Whilst it is right to acknowledge that some of the Appendices to the Site Selection Report, December 2017, were not available at the ECM, as a result of the information provided at previous Member briefings and workshops, I do not

> agree that councillors were not properly informed about the content of the LPSV and the evidence base informing its preparation before the ECM. …"

62. Mr Girling does not agree. In his first witness statement he states (at para 6) that as Councillors only had eight days to review the SVLP and the supporting documents that were made available prior to the 14 December 2017 meeting, he does not consider that they "had sufficient time prior to the date of the meeting to review this material and make an informed decision as to whether the SVLP was sound and should progress to examination" (para 6). In his second witness statement (at para 27) he states that he remains of the view that "Councillors did not have all the information required to make an informed decision as to whether the SVLP was ready for independent examination". However, Mr Girling did not attend the 28 November 2017 briefing, nor it appears was he in attendance at any of the member briefings in 2017 following the Regulation 18 consultation (see Mr Chambers' witness statement at para 9).

63. Ms Blom-Cooper, in her first witness statement at paragraph 13 and in her second witness statement at paragraph 12(viii), also deals with the all-Member briefing held on 28 November 2017. She says that the briefing provided details on the site selection process undertaken, the changes to the site locations as a result of the further site selection work presented for each settlement, and the factors considered in making the decisions. She also refers to and produces the slide presentation shown to members at the briefing. The briefing was attended by 36 members including Councillor Chambers. She confirms that Councillor Girling did not attend.

64. The Site Selection Report published before the 14 December 2017 meeting provides a summary of the changes that were made to the site allocations proposed in the consultation draft local plan in October 2016 and sets out in brief terms why the site in Theydon Bois was not included in the draft local plan (see paras 12-13 above).

65. At the ECM on 14 December 2017 the Claimant's land was expressly considered by members during the debate, as a proposed amendment to the LPSV. A transcript of the discussions at the meeting has been produced by Mr Girling (which is accepted by the parties as an accurate record).

66. During the course of the debate Ms Blom-Cooper said:

> "We considered various alternatives for the site at Theydon Bois. We did receive an objection to the regulation 18 draft local plan from the Conservators, as in the Corporation of London, to the plan on the basis of the impact on recreational pressure on the Forest from putting that whole site forward. That was the reason why officers took it out of the plan. We did look at other alternatives and there is a potential for a smaller site to come forward with a country park which has the potential of being found sound and we have done some work on that alternative, so we can have a look at that one. But, in terms of putting the whole thing in, no we can't. In terms of taking out potential sites, it will blow a hole through the whole of the Council's strategy which was consulted on as part of the

> draft local plan. It came out of the Community Choices Consultation that people wanted to protect green belt and green space, and this is a compromise that has been put forward and consulted on. We have taken out of the draft local plan both one of the sites in Loughton, Debden, the smaller public open space site of 54 homes and we have reduced the quantum of development on Jessel Green from 75% of the site to 50% of the site so it is now 154 homes, so we have taken account of the consultation. It is on that basis that we have undertaken the transport and sustainability appraisal work and as Mark Beard has explained, if we have to change, make considerable changes to the plan that will essentially mean that we can't submit by the end of March, because that work will take time to get our transport consultants and all the other people on board to do it and for us to feed into a revised version of the plan."

67. It is clear from that passage that members of the Council were told at the meeting the reason why the site at Theydon Bois, and other sites, were taken out of the plan. It is equally clear from a reading of the transcript as a whole that there was a robust debate as to whether the Claimant's and other sites should have been taken out and what could now be done about it. Mr Beard attended the meeting and provided legal advice to members. He told them that if there were to be any material changes to the draft plan, by taking sites out or putting them back in, then a sustainability appraisal would be required, and it would take weeks, if not months, for that work to be done. Mr Beard concluded by saying:

> "If you miss your publication date next week, you do not make the 31 March. It's impossible. So, if Members decide to make material amendments tonight you will have to adjourn this meeting with no decision as to, as to the plan being ready for independent examination. If that is the case you will be planning for in this District not 11,000 homes for the plan period but 20,000 homes for the plan period. That is the position. That's the advice. It's unfortunate, but I'm afraid to say that if the Council makes changes and attempts to submit, the [plan] the attempt to do so will fail and will not be lawful."

68. Some members felt that they had been "pushed into a corner" and that this was "the equivalent of having a gun put to your head". Councillor Chambers said that he "probably would have supported [the] motion, but after the legal advice… we cannot support it". Some others expressed a similar view. The amendment moved (with the alternative wording proposed during the debate) was lost 29 to 18, with 4 abstentions.

69. Undoubtedly some members were concerned about the position the Council was in by reason of the deadline for submission of the plan for examination if, on the Secretary of State's then timeframe, an increase in housing in the District was to be avoided. However what is equally clear from the transcript is that during the course of the debate members were told, if they did not already know, of the reason why some sites, including the Claimant's site, had been taken out of the draft plan, members discussed and debated that issue, and at the conclusion of the debate a vote was taken on the report as amended. Significantly no member suggested that they did not understand

the reason why the Claimant's site had been taken out of the draft plan or that because of the omission of Appendix B they lacked the information they required to reach a proper decision on the allocation or non-allocation of residential sites.

70. Mr Lockhart-Mummery observes that the expressed reasons for the proposed decision in the report to Council for the 14 December 2017 meeting are not that the local plan is "sound", but the imperative to submit the plan to the Secretary of State before 31 March 2018.

71. Mr Lockhart-Mummery accepts that the Claimant had no right to address the Council on 14 December 2017, but, he says, Mr Sullivan, a director of the Claimant, could have raised points with his local member to raise at the meeting if he had known of the reasons for omitting the Claimant's site (see Mr Sullivan's second witness statement at paras 12-15, and para 90 below).

72. I am satisfied on the evidence that at the time members of the Council took the decision on 14 December 2017 they were well informed about the evidence base justifying the allocation of residential sites.

73. I am further satisfied that the documentation before the members at the time they took the Decision, taken together, contained sufficient evidence for them to come to a conclusion as to whether or not the draft plan is sound. Whether or not it is reasonable for the Council to reach that conclusion, Parliament has decided is a matter for the Inspector to consider.

74. In the context in which the Council found itself, the advice given by Mr Beard cannot, in my view, be criticised.

Ground 1: failure to comply with adopted Statement of Community Involvement

75. The Claimant contends that in the absence of access to Appendix B "during the consultation process", the Claimant, and others, "has been effectively excluded from full participation in the consultation, in direct conflict with the requirements of the Statement of Community Involvement and in breach of the requirements of s.19(3) of the 2004 Act" (Statement of Facts and Grounds, paras 31 and 32).

76. Mr Lockhart-Mummery submits that there is a continuing duty to make documents available at the appropriate time, otherwise it defeats the objective of the provision.

77. He contends that, irrespective of what happens before the Inspector, breach of the SCI in itself justifies quashing the Decision.

78. I reject these contentions for a number of reasons.

79. Paragraphs 7 and 8 of the SCI require supporting studies to be made available on the Council's website "when they are finalised". As a matter of fact, the Council complied with this requirement as it made all supporting studies available on its website, including the finalised SSR and Appendices when they were finalised. In particular, for present purposes, Appendix B was put on the Council's website on 14 March 2018 when it was finalised. At the time the decision was taken on 14 December 2017 it had not been finalised as the Report made clear.

80. Further, I reject the allegation that in the absence of access to Appendix B of the Report it was, as suggested, impossible for the Claimant or any interested parties or members of the public to have any understanding as to why the Council concluded that certain sites should be included in the draft Plan and others not. The Council's reasons for not allocating the Claimant's site were explained, albeit briefly but in my view adequately, in the Report at para 2.136; and also see the non-technical summary of the sustainability appraisal published on the Council's website on 6 December 2017 as Appendix 4 to the Report at paras 2.36, 2.40 and 2.48.

81. I further reject the contention that the Claimant (and others) has been effectively excluded from full participation in the consultation process. The Claimant has made representations under regulation 20 of the 2012 Regulations and has therefore, pursuant to s.20(6) of the 2004 Act, secured a right to be heard by the Inspector appointed to carry out the examination of the draft plan in due course. Compliance with s.19(3) of the 2004 Act is a matter for the judgment of the Inspector.

Ground 2: breach of regulation 19 of the 2012 Regulations

82. Regulation 19 requires the local planning authority, before submitting a local plan to the secretary of state under s.20 of the 2004 Act, inter alia, to make a copy of each of the proposed submission documents available in accordance with regulation 35.

83. Appendix B is a proposed submission document as defined in regulation 17. It was unavailable at the time of the decision on 14 December 2017, and remained unavailable throughout the entire publicity period. Accordingly the Council has acted in breach of regulation 19. The Claimant contends it also breached s.20(2) of the 2004 Act which prohibits an authority from submitting a local plan unless "(a) they have complied with any relevant requirements contained in regulations under this Part". By reason of s.20(2)(a) the Council must comply with the Regulations.

84. The Council accepts that Appendix B was not available at the time of the Decision and during the six-week Regulation 19 publication period, however it does not accept that that constitutes a breach of section 19(6) and regulation 19.

85. Regulation 18 concerns the preparation of local plans and the requirement relating to consultation. Regulations 19 and 20 (and also 22 and 23) are relevant to the examination stage of plan-making. I agree with Mr Beard that regulation 19 publication is not a consultation exercise. It is the mechanism by which interested persons are provided with an opportunity to make representations on the draft plan under regulation 20 to enable them to participate in the process of independent examination. In the present case the Claimant has made regulation 20 representations, challenging the soundness and legal compliance of the draft plan that will be considered by the Inspector appointed to examine the local plan. Accordingly the unavailability of Appendix B will not cause any prejudice to the Claimant.

86. On 14 March 2018 the Council published the finalised version of the Report and the appendices. Following the grant on 21 March 2018 of permission to apply for judicial review the Council wrote to certain interested persons who had raised the issue of the lack of the appendices in their regulation 20 representations offering them an opportunity to supplement those representations. It will be a matter for the Inspector to decide whether it is appropriate to take those additional representations into

account, or allow interested persons the opportunity to make additional written representations during the examination process. However the Inspector has wide powers to remedy any procedural shortcomings or unfairness. There is in my view no real likelihood of the Inspector refusing to take into account additional representations made by interested persons in relation to Appendix B after that appendix was made available by the Council (so long as they do so without undue delay). The process of independent examination must be undertaken lawfully and fairly before the Inspector makes a recommendation as to the adoption of the submitted local plan in accordance with s.20(7)-(7C) of the 2004 Act.

Ground 4: the decision of 14 December 2017 was procedurally unfair

87. The Claimant contends that the Council's actions in relation to the decision made on 14 December 2017 and the subsequent period of publicity have also infringed the common law duty to ensure that decisions of public bodies are taken fairly. Mr Lockhart-Mummery describes this as a consequential ground.

88. Mr Lockhart-Mummery accepts that this ground adds nothing to the other grounds of challenge. He is correct to do so.

Relief

89. I do not consider that any of the grounds of challenge have been made out. If, contrary to my view, the Council has acted unlawfully as the Claimant alleges, I would not have granted the relief sought, namely an order quashing the Decision.

90. I consider that it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred (SCA 1981, s.31(2A)). Mr Sullivan says that if he had been provided with Appendix B prior to 14 December 2017 he would have been able to explore with his planning consultant and professional advisers the ability to provide a SANG and discuss it with the Council. It appears to me that it is highly likely that the Council would have made the same decision on 14 December 2017 if Appendix B had been available. Even without Appendix B the Council's reasons for not allocating the Claimant's site were clear from the Report, the Sustainability Appraisal, the SSR and the explanation given to councillors who attended the member briefing on 28 November 2017, as demonstrated by the transcript of the debate at the ECM. In any event the Council, having debated the proposed amendment, took its decision on the basis of the legal advice given as they were entitled to do, which was for a reason unconnected with the unavailability of Appendix B.

91. Mr Lockhart-Mummery contends there is no adequate alternative remedy. I do not accept this submission. I agree with Mr Beard that the Claimant has not suffered any prejudice as its concerns regarding the soundness and legal compliance of the draft plan will be addressed through the independent examination process. The essence of the Claimant's complaint is that Appendix B was not made available at the time of the Decision. In my view, whilst it is a matter for the discretion of the Inspector whether to allow further representations, I consider it highly unlikely that he will refuse to have regard to timely representations made by the Claimant now it has had sight of Appendix B. That being so I consider that the independent examination of the draft

plan will provide the Claimant with an adequate alternative remedy. In my view an order quashing the decision would be unnecessary and disproportionate.

Conclusion

92. For the reasons I have given

i) section 113(2) of the 2004 Act does not preclude this claim;

ii) this claim is dismissed.