Neutral Citation Number: [2016] EWHC 3028 (Admin)

Case No: CO/1246/2016 and CO/1901/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2016

Before :

THE HON. MR JUSTICE HOLGATE

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Between :

Trustees of the Barker Mill Estates	**Claimant**
- and -	
Test Valley Borough Council	**Defendant (CO/1246/2016)**
	Second Defendant (CO/1901/2016)
- and -	
Secretary of State for Communities and Local Government	**First Defendant (CO/1901/2016)**

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Jeremy Cahill QC and James Corbet Burcher (instructed by **Clyde & Co LLP**) for the **Claimant**
Richard Honey (instructed by **Government Legal Department**) for the **Secretary of State**
Michael Bedford QC (instructed by **Sharpe Pritchard**) for **Test Valley Borough Council**

Hearing dates: 19 and 20 October 2016

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Approved Judgment

MR JUSTICE HOLGATE :

Introduction

The Challenge to the Revised Test Valley Local Plan

1. In their first claim, CO/1246/2016, the Trustees of the Barker Mill Estates bring a challenge under section 113 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") to the Revised Test Valley Local Plan ("RTVLP") adopted by the Defendant, Test Valley Borough Council ("TVBC"), acting as the local planning authority ("LPA"). The Claimants are the freehold owners of a very substantial land holding within the area of TVBC and are promoting various sites for residential and commercial development.

2. Test Valley covers over 650sq km of land in western Hampshire and abuts (in a clockwise direction starting from the north) Basingstoke and Deane Borough Council, Winchester City Council, Eastleigh Borough Council, Southampton City Council, New Forest District Council and Wiltshire Council. In the southern part of Test Valley, the Borough adjoins Southampton. The Claimants own land at Adanac Park, Nursling, which is directly adjacent to the boundary between TVBC and Southampton City Council.

3. In 2006 TVBC adopted as a statutory development plan for its area the Test Valley Borough Council Plan. In the same year TVBC began work on a replacement for that plan. A draft Core Strategy was submitted for statutory examination in 2009, but withdrawn as a result of concerns expressed by the Inspector. Public consultation took place on the RTVLP in March to April 2013. Following revocation of the South East Plan on 25 March 2013 a further pre-submission draft was published in November 2013 and public consultation took place between January and March 2014.

4. The Claimants objected to the housing growth and spatial strategy proposed in policy COM1 on the basis that TVBC had identified too low a requirement for housing and the policy approach was too constrained. They also objected to the draft employment policies, particularly LE6 which restricted development at Adanac Park to B1 uses. The Claimants sought to have the policy amended to allow for B2 and B8 uses in addition to B1.

5. TVBC considered making amendments to its draft plan and on 31 July 2014 submitted the document to the Secretary of State for Communities and Local Government ("SSCLG") for statutory Examination. The Claimants submitted representations and took part in hearings held by the examining Inspector. The hearings took place between 11 December 2014 and 22 January 2015. The purpose of the independent Examination is to determine whether (inter alia) the plan qualifies as "sound" and whether the LPA complied with its duty to co-operate with other authorities under section 33A of PCPA 2004 (section 20(5)).

6. By sections 20 and 23 of PCPA 2004, an LPA may not adopt a local plan unless (in summary) *either* (a) the Inspector considers it reasonable to conclude, firstly that the authority complied with its section 33A duty and certain statutory requirements for the preparation of the plan, and secondly that the plan is "sound", *or* (b) the Inspector considers that the LPA complied with its section 33A duty and he recommends "main

modifications" to the plan in order to make it sound and/or satisfy the requirements for plan preparation. If the "main modifications" procedure is followed, then the authority may not adopt the plan unless the final version includes those modifications.

7. The concept of "soundness" is not defined in the legislation. However, section 19(2) of PCPA 2004 provides that in preparing the plan, the LPA must have regard to (inter alia) national policies issued by the Secretary of State. They would include the National Planning Policy Framework ("NPPF"). Paragraph 182 of the NPPF explains that a plan may be considered "sound" if 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*." (emphasis added)

8. In the case of the RTVLP the "main modifications" procedure was followed. TVBC published a schedule of proposed main modifications in April 2015. There was an opportunity between 24 April and 5 June 2015 for representations to be made on those proposals. The Claimants did so.

9. On 15 December 2015 the Inspector's report on his Examination of the draft plan was published. He concluded that the duty to co-operate under section 33A had been satisfied (paragraphs 7 to 14). He stated that shortcomings in the "submitted" version of the plan prevented it from being recommended for adoption. However, the Inspector recommended that the plan, as amended by the "main modifications", was sound and capable of adoption.

10. A report was presented to the meeting of TVBC's Cabinet on 13 January 2016 recommending that the plan be adopted on the basis of the Inspector's report. That recommendation was accepted by the Cabinet and then by the full Council. The RTVLP was adopted on 27 January 2016, thereby replacing the former local plan and becoming part of the statutory development plan.

11. On 8 March 2016 the Claimants issued a challenge under section 113 of PCPA 2004 to the RTVLP. Paragraph 82 of the Claimants' Statement of Facts and Grounds asks the Court to:-

(i) Quash the decision to adopt the plan;

(ii) Quash policy COM1 and the OAN figure at paragraph 5.12;

(iii) Quash Table 9 and policy LE6 relating to Adanac Park; and

(iv) Remit "both matters" to the Defendant for further preparation before publication and submission for examination of further policies.

It would appear that (ii) to (iv) relate to only two aspects of the plan and are to be treated as an alternative to (i) which would affect the whole plan. Either way, on the Claimants' own case it would be unnecessary for the whole plan to be quashed and for it to be prepared all over again from the outset.

12. On 17 May 2016 Patterson J granted permission under section 113(3A) for the bringing of the application.

The Challenge to the SSCLG's Decision on the Planning Appeals

13. In their second claim, CO/1901/2016, the Trustees of the Barker Mill Estates challenge under section 288 of the Town and Country Planning Act 1990 ("the TCPA 1990") the decision of an Inspector acting on behalf of the First Defendant, the Secretary of State for Communities and Local Government ("SSCLG"), to dismiss appeals on two sites which they own within Adanac Park.

14. Adanac Park comprises about 29 hectares of land which was formerly used for agriculture. Part of the Park has been developed for the headquarters of the Ordnance Survey under the umbrella of an outline planning permission granted on 16 June 2008. The rest of the land is mainly used for grazing and market gardening. The M271 runs north-south along the western boundary of the Park and connects Southampton with the M27 a short distance to the north.

15. In January 2014 the Claimants made 12 applications for planning permission or listed building consent in respect of 10 different plots within the Park. In December 2014 TVBC refused planning permission for 4,100 sq m of B8 and some B2 development on plot AP2, 27,600 sq m of B8 development on plot AP3 and for B1 development on plot AP5.

16. The Claimants appealed to the SSCLG against these refusals. An Inspector was appointed to determine the appeals on his behalf. A public inquiry was held between 26 November and 11 December 2015. In her decision letter dated 9 March 2016 the Inspector allowed the appeal on site AP5 and granted permission for B1 development, but dismissed the appeals on sites AP2 and AP3.

17. On 11 April 2016 the Claimants issued the claim challenging the dismissal of the appeals in respect of plots AP2 and AP3. On 17 May 2016 Patterson J ordered that the paper application for permission under section 288(4A) be adjourned to be dealt with as a "rolled up hearing" and heard at the same time as the challenge to the RTVLP. The Judge decided that a rolled-up hearing of the application for permission should take place because of the inter-relationship of the section 288 claim with the challenge to the local plan for which she had already granted permission. She stated that the

proposed nine grounds of challenge were "somewhat diffuse" and would benefit from re-assessment.

18. In a skeleton argument relating to both claims, Mr Jeremy Cahill QC and Mr James Corbet Burcher, who appeared on behalf of the Claimants, condensed their arguments to 4 grounds. They further refined the grounds in both claims during oral submissions.

19. Mr Michael Bedford QC appeared on behalf of TVBC in both claims and supported the SSCLG's submissions in the section 288 proceedings. Mr Richard Honey appeared on behalf of the SSCLG in the section 288 proceedings to resist the challenge to the Inspector's decision on the appeals. I am grateful to Counsel for their written and oral submissions.

20. In this judgment I will deal firstly with the grounds of challenge to the RTVLP in the claim under section 113 of PCPA 2004, before dealing with the grounds in the section 288 claim challenging the decisions on the planning appeals.

The Challenge to the Revised Test Valley Local Plan

Legal Principles

21. It is common ground that the legislative framework and case law concerning the general principles for challenges to development plans under section 113 of PCPA 2004 have been well-summarised by Hickinbottom J in Gallagher Estates Ltd v Solihull MBC [2014] EWHC 1283 (Admin) at paragraphs 10-34. I gratefully adopt the Judge's summary of the well-known principles relevant for resolving the issues in the present challenge. There is no need for them to be rehearsed here.

22. Part of the Claimants challenge suggests that the NPPF has been misinterpreted. In Tesco Stores Limited v Dundee City Council [2012] PTSR 983 the Supreme Court held that the construction, or interpretation, of a planning policy is a question of law for the Court to determine objectively in accordance with the language used (paragraph 18). However, the Court went on to state that development plans and other policy documents are not analogous in their nature or purpose to a statute or contract and should not be construed as if they were. Moreover, many policies are framed in language the application of which to a given set of facts requires the exercise of judgment. Matters of that kind fall within the jurisdiction of planning authorities as decision-makers and their exercise of judgment can only be challenged in the Courts if it is irrational or perverse (paragraph 19). Therefore, in a case where the decision-maker has had regard to a policy which he was required to take into account, it is essential for practitioners to keep in mind the distinction between *interpretation* and *application* of policy and the very different functions of the court in each area.

23. The public law principles which the courts have developed to deal with challenges to planning decisions on grounds of irrationality are equally relevant to a challenge of that type under section 113 to, for example, the policies in a local plan or the report of an examining Inspector. It is convenient to summarise those principles at this stage, as they affect my decisions on the complaints of irrationality in both the challenge to the

RTVLP and the challenges to the Inspector's appeal determination of the planning appeals.

24. A complaint of irrationality does not give a claimant an opportunity to revisit the planning merits of his appeal or of the Inspector's decision. "The Court must be astute to ensure that such challenges are not used as a cloak for a rerun of the arguments on the planning merits" (Newsmith v Secretary of State for Environment, Transport and the Regions [2001] EWHC (Admin) 74 at paragraph 6). In any case where an expert tribunal such as a planning Inspector is the fact-finding body, the threshold for Wednesbury unreasonableness is a high and difficult hurdle for a claimant to surmount. This is greatly increased in most planning cases because the Inspector is not simply determining questions of fact, but is also concerned with making a planning judgment or a series of planning judgments. Because a substantial degree of judgment is involved, there will usually be scope for a fairly broad range of possible views by different decision-makers presented with the same materials, none of which could be categorised as unreasonable in the *Wednesbury* sense (Newsmith at paragraph 7). Against this background, a Claimant alleging that an Inspector has reached an irrational or perverse conclusion on matters of planning judgment "faces a particularly daunting task" (Newsmith at paragraph 8).

25. Similarly, in Wychavon District Council v Secretary of State for Communities and Local Government [2009] PTSR 19 Carnwath LJ (as he then was) stated that the courts should guard against undue intervention in policy *judgments* by expert tribunals, such as planning Inspectors, acting within their areas of specialist competence. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law (see paragraphs 31, 33 and 43). The same approach applies when the Court reviews the policy judgments of experience planning committees, whether in relation to the formulation and adoption of local planning policy or taking decisions on planning applications (see eg. R (Bishops's Stortford Civic Federation) v East Herts DC [2014] PTSR 1035 at paragraph 40; R (Trashorfield Limited) v Bristol City Council [2014] EWHC 757 (Admin) at paragraph 13).

26. However, irrationality challenges are not confined to the relatively rare example of a "decision which simply defies comprehension". They also include a decision which proceeds from flawed logic (R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213, 214 at paragraph 65).

Ground 1

27. In summary, the Claimants complain that TVBC failed to comply with the requirements of the NPPF that, in preparing and adopting a local plan, the plan-making authority must identify the full objectively assessed housing need ("FOAN") for its district. This was described by the Claimants as a failure in relation to both the interpretation and application of policy (see e.g. paragraph 65 of skeleton) without appreciating the need to make the essential distinction to which I have already referred between the two types of error. They must not be elided, but that is what happened in certain parts of the Claimants' argument in this case. Unfortunately, this error is increasingly common in claims brought before this court.

The National Planning Policy Framework

28. For plan-making, the presumption in favour of sustainable development contained in paragraph 14 of the NPPF requires (inter alia) that "local plans should meet objectively assessed needs…" unless either:-

> "…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."

29. In the section of the NPPF dealing with "delivering a wide choice of high quality homes" paragraph 47 states (inter alia):-

> "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…"

30. The section of the NPPF dealing with plan-making explains how a local planning authority is required to prepare a "proportionate evidence base in order to underpin the policies in its plan and to satisfy one of the tests for "soundness" contained in paragraph 182 of the NPPF. In relation to housing development paragraph 159 states:-

> "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. The Strategic Housing Market Assessment should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:
>
> - meets household and population projections, taking account of migration and demographic change;
>
> - addresses the need for all types of housing, including affordable housing and the needs of different groups in the community (such as, but not limited to, families with children, older people, people with disabilities,

service families and people wishing to build their own homes); and

- caters for housing demand and the scale of housing supply necessary to meet this demand;

- prepare a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period."

Planning Practice Guidance

31. More detailed guidance on how the FOAN should be assessed in plan-making is given in the PPG. The assessment of development needs is an objective assessment of need based on facts and unbiased evidence; plan-makers should not apply constraints to the overall assessment of need, such as limitations imposed by the supply of land, historic under performance, viability, infrastructure or environmental constraints (paragraph 004). Although the PPG strongly recommends the use of the standard methodology it sets out, it also points out that "there is no one methodological approach" (paragraph 005). Likewise, it states that "Establishing future need for housing is not an exact science. No single approach will provide a definitive answer" (paragraph 014).

32. In summary, the PPG advises that the starting point for an LPA is to use the household projections published by DCLG. They are based on demographic trends. Accordingly, that estimate may need to be adjusted to reflect factors affecting local demography and household formation rates that are not captured by past trends. An adjustment may also be needed to deal with previous undersupply in an area where that has constrained past household formation rates (paragraph 015). Regard should also be had to employment numbers based on past trends, economic forecasts, growth in the working age population and cross-boundary migration assumptions (paragraph 018). The housing need numbers indicated by such techniques should also be adjusted for market signals, including indicators of the balance between demand for and supply of dwellings such as land prices, house prices, rents, affordability, rate of development and data on overcrowding (paragraph 019). Paragraphs 022 to 027 provide guidance on assessing the need for affordable housing.

33. Plainly the *application* of paragraphs 14, 47 and 159 of the NPPF and also of the PPG involves a good deal of judgment on the part of an LPA. Unless a claimant bringing a challenge under section 113 to the approach taken by an LPA for identifying the FOAN for its area can demonstrate that the complaint does truly relate to the *interpretation* or meaning of text contained in the policy, rather than its *application*, the LPA's approach cannot be challenged unless it is shown to be irrational.

The two-stage approach to identifying the Housing Requirement in a Local Plan

34. In Solihull Metropolitan Borough Council v Gallagher Estates Limited [2014] EWCA Civ 1610 the Court of Appeal held that the NPPF requires a two-stage approach to be followed by the LPA. First, the LPA must establish the housing FOAN as an

objective exercise which disregards policy considerations and other matters such as the availability of land. At the second stage the LPA may consider whether policy or other considerations justify constraining (or increasing) the FOAN so as to arrive at the amount of housing which the policies in the new plan will require to be provided. It is important for the LPA to follow this two-stage approach because the NPPF contains some distinct changes in policy as compared with the former national policy in PPS 3. There is now a focus on the need to "boost" the supply of housing "significantly". Thus, the FOAN stage is simply concerned with the identification of housing need, without any balancing exercise in which, for example, policy considerations might offset the meeting of housing need. That balancing exercise is confined to the second stage and even then the FOAN is required to be met unless, and only to the extent that, other factors of sufficient weight demonstrate that that should not be done (NPPF paragraph 14 and Gallagher at paragraphs 10 to 16).

35. The Claimants also rely upon paragraph 43 of the judgment of Stewart J in Satnam Millennium Limited v Warrington Borough Council [2015] EWHC 370 (Admin) where the Court upheld one out of five complaints that the LPA had failed to identify the FOAN for its district. In relation to affordable housing the Court stated:-

(i) The FOAN for affordable housing should be identified;

(ii) The FOAN should then be considered "in the context of its likely delivery as a proportion of mixed market/affordable housing development";

(iii) An increase in the total housing figures included in the local plan should be considered where it *could* help deliver the required number of affordable homes;

(iv) Then the local plan should meet the FOAN for affordable housing subject only to the constraints in paragraphs 14 and 47 of the NPPF.

36. However, it should be noted that this part of the judgment did not lay down immutable principles of law derived from planning legislation or judicial decisions, but rather it summarised policy currently set out in paragraph 029 of the Planning Practice Guidance ("PPG") on "Housing and Economic Development Needs Assessments". It is also important to note the language used in point (iii) in paragraph 35 above (taken from the PPG) "*could* help deliver" and not *must* help deliver. This language acknowledges (i) that under current policies most of the new affordable housing in this country is delivered as a proportion of the development carried out for disposal at open market values, and (ii) the suggestion that the amount of open market housing should be increased so as to help deliver the FOAN for affordable housing, begs other questions, including whether an increase in open market housing is itself deliverable or desirable.

37. Point (iv) above is also relevant to this issue. It refers to the constraints on meeting FOAN identified in paragraphs 14 and 47 of the NPPF, namely consistency with other policies in the Framework. Those policies must include the tests for whether a local plan is "sound" in paragraph 182 of the NPPF. Thus, a local plan is required to be "effective" in the sense that it should be (inter alia) "deliverable over its period". This is a longstanding policy requirement of central government. Paragraph 173 states that:-

> "Pursuing sustainable development requires *careful attention to viability* and *costs in plan-making and decision-taking. Plans should be deliverable*. Therefore, the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To *ensure viability,* the costs of any requirements likely to be applied to development, such as *requirements for affordable housing,* standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable." (emphasis added)

In my judgment, the NPPF makes it plain that these considerations of deliverability, including viability, are relevant to the *second stage* for the treatment of housing needs identified by the Court of Appeal in Gallagher. That also applies to the advice in paragraph 029 of the PPG, repeated in paragraph 43 of Satnam.

38. Because ground 1 is concerned with a challenge to the making of a local plan, it is necessary for this Court to have well in mind the two stages identified in Gallagher. As the Court of Appeal has recently reminded us in Oadby and Wigston BC v Secretary of State for Communities and Local Government [2016] EWCA Civ 1040 (at paragraphs 9-10, 34-36 and 49-51), the two stage exercise which is required for the preparation of a local plan is different from the one stage FOAN exercise required where the 5 year supply of housing land has to be assessed in the determination of a planning application and a local plan has yet to be adopted.

39. Likewise, the decisions of the Courts must be distinguished according to their context. Both Oadby and Wigston BC and Kings Lynn and West Norfolk BC v Secretary of State for Communities and Local Government [2015] EWHC 2464 (Admin) were concerned with decisions on planning appeals and not with any challenge to a local plan. Accordingly, it would be inappropriate for me to take up the invitation by Mr Cahill QC to resolve the conflict he sees between paragraph 34(ii) of the judgment of Hickinbotttom J in Oadby and Wigston [2015] TWHC 1879 (Admin) and the judgment of Dove J in the Kings Lynn case. They were both dealing with the exercise required by paragraph 49 of the NPPF in a planning appeal. However, I note that the Court of Appeal in Oadby and Wigston did not regard the comments of Dove J as conflicting with the "essential reasoning" of Hickinbottom J (see paragraph 55). For the purposes of the decision in this case I simply record that my views on the relevance of deliverability to the second stage of Gallagher in the context of plan-making (e.g. for the provision of affordable housing) accord with those of Dove J on the same subject (see paragraphs 35-36 of [2015] EWHC 2464 (Admin)).

TVBC's assessment of Housing Needs

40. In January 2014 TVBC issued a Strategic Housing Market Assessment ("SHMA") for its area, although it recognised that that formed part of a larger housing market area covering Winchester, Southampton, Eastleigh and the New Forest (paragraph 1.5). The document followed the guidance in the PPG, for example, by starting with household projections and then making a number of assumptions on such matters as

jobs, commuting and economic forecasts in order to produce a range of projections. At Page 82 the SHMA concluded that in order to meet the FOAN, TVBC should consider a housing requirement figure of between 420 and 590 dwellings a year. The lower end of the range was driven by past demographic trends and the upper level by the highest of the economic projections (based upon an improvement in employment rates in line with labour force trends). Section 7 of the SHMA assessed the need for affordable housing, following the guidance in the PPG, at 292 dwellings a year (page 100). In the concluding section of the SHMA, the bottom end of the range for FOAN was adjusted upwards from 420 to 450 dwellings a year to take into account constraints which had influenced past demographic trends. The upper end of the range remained unchanged at 590 dwellings. The SHMA recommended that a figure at the upper end would meet *all* demographic-led needs and allow for reasonable economic growth (page 142).

41. Paragraph 5.8 of the submission draft of the RTVLP (31 July 2014) stated that the SHMA formed the key evidence for deciding on the amount of housing to be provided. The plan then summarised the demographic and economic projections which had been produced. Paragraph 5.12 stated that a housing led figure of 834 dwellings a year "would deliver the objectively assessed housing need". But this figure simply represented the number of houses needing to be built each year if 35% of that figure were to be delivered as affordable housing in line with policy COM7 (the policy on the delivery of affordable housing) in order to achieve the FOAN for affordable housing of 292 dwellings a year. The figure of 834 dwellings a year never purported to represent an assessment of FOAN for all housing needs in the area. The plan went on to state that the market would not be able to deliver as many as 834 dwellings a year because of a lack of demand in the private sector. TVBC also explained that it would not be viable to increase the requirements set out in COM7 for the proportion of open market development to be delivered as affordable housing, so as to achieve 292 affordable dwellings a year.

42. Ultimately, the plan concluded that 588 dwellings a year should be provided, which would "*fully meet* all household and population projections, taking account of migration and demographic change, and provide for economic growth" (paragraph 5.18). The figure of 588 dwellings a year would deliver 206 affordable houses a year (i.e. 35% of 588), less than the FOAN for affordable housing of 292 dwellings a year (paragraph 5.21).

43. In paragraph 28 of his report on the Examination of the RTVLP, the Inspector recorded TVBC's position that the figure of 588 dwellings a year meets the FOAN for market housing and, in so far as it is realistic and deliverable, for affordable housing. The Inspector reviewed the demographic and economic projections produced by TVBC and considered them to be acceptable and in line with the PPG (paragraphs 29 to 34). He endorsed the figure of 588 dwellings a year as being within the range of economic projections and as meeting the FOAN. "This would fully meet household and population projections, allowing for growth and demographic change, and provide for economic growth" (paragraph 35).

44. The Inspector then explained how the position was different for affordable housing. The FOAN for affordable housing is 292 dwellings a year (paragraph 36). The assumption in the evidence was that 35% of housing completions would be affordable through the combined effect of policy COM7, rural exception sites and schemes by

"registered providers" (paragraph 37). The Inspector accepted the evidence that viability constraints precluded any increase in the overall 35% provision rate on open market developments. The only other way of achieving 292 dwellings a year as affordable housing would be to consider increasing the overall provision of 588 dwellings a year to 834 dwellings a year, but he considered that to be unrealistic because of the lack of market demand to support such a figure. The increased level of out-commuting would also be unsustainable. "An increased *target* would lead to the plan becoming potentially *undeliverable* and *unsound*" (emphasis added) (see paragraphs 38 to 39). He concluded that "the evidence demonstrates that the [RTVLP] housing requirement will meet the full, objectively assessed needs for market housing and, although there would be a shortfall in affordable housing, *this* reasonably takes account of a range of local factors including the consequences for the overall sustainability of the approach" (emphasis added) (paragraph 42).

The Claimants' criticisms under ground 1

45. The Claimants submit that:-

(i) The draft RTVLP treated the figure of 834 dwellings a year as the FOAN figure, but rejected it on grounds of deliverability and viability. TVBC unlawfully elided or merged stages one and two as laid down in Gallagher;

(ii) The RTVLP failed to include affordable housing as part of the FOAN and, in taking into account viability and sustainability considerations, it failed to comply with the first stage identified in Gallagher;

(iii) Having decided not to meet the FOAN for affordable housing, TVBC failed to identify the FOAN for market housing as a separate figure.

46. Unfortunately, it has been necessary to summarise a good deal of legal, policy and factual material in order to provide the context for these criticisms. Having done so, it is possible to reject the Claimants' criticisms briefly. Indeed, the torrential volume of paper and prolix grounds lodged with the application initially obscured the unarguable nature of the grounds.

47. It is perfectly plain that when the documents are read fairly and in context TVBC never identified the figure of 834 dwellings a year as an overall FOAN figure (or indeed any figure greater than 588). The figure of 834 dwellings a year was produced as part of an assessment of the level at which the policy for the annual dwelling requirement would need to be set if, applying the assumption that 35% of all housing development carried out would be provided as affordable homes, the FOAN for affordable housing (292 dwellings a year) were to be achieved. In carrying out this assessment both the Inspector and TVBC were faithfully applying paragraph 029 of the PPG, as repeated in paragraph 43 of Satnam. They both rejected the notion of including 834 dwellings a year as a *policy* requirement in the local plan on grounds of lack of market demand and sustainability objections. But in so doing they were not rejecting 834 dwellings a year as a measure of FOAN. They did not misinterpret either the NPPF or the PPG. More to the point their approach could not possibly be criticised in law as being an irrational application of policy.

48. The Claimants' second criticism is also untenable. TVBC did produce and justify a FOAN figure for affordable housing (292 dwellings a year). No criticism has been made in these proceedings of that figure. It was produced as an additional part of the Council's analysis following paragraphs 022 to 029 of the PPG. The reasoning given for why 834 dwellings a year could not be provided also explains why the FOAN figure of 292 dwellings a year for affordable housing was not going to be met in accordance with the second stage identified in Gallagher. It is well established that sustainability and deliverability considerations are relevant considerations in that second stage.

49. It follows from the material I have previously summarised and the analysis above that neither the Inspector nor TVBC can be criticised for eliding the first and second stages in Gallagher.

50. As a belated recognition of the flaws in the first two criticisms, Mr Cahill QC sought to introduce a third, namely that TVBC failed to identify a separate FOAN for market housing alone. I accept the short answer given by Mr Bedford QC that there was no requirement to do so. TVBC complied with the guidance in the PPG for producing projections and analysis to arrive at an *overall* FOAN taking into account demographic and economic factors. By definition that exercise *included* the need for market housing. The figure of 588 dwellings a year, endorsed by the Inspector, includes open market housing.

51. The *derivation* of that figure did not address "affordability" of homes as a separate issue. Therefore, a further exercise was carried out, in accordance with the PPG, to identify the amount of housing needing to be provided for those who cannot afford accommodation at open market prices (including current unmet housing need) in order to see whether, at the second stage in Gallagher, the *overall* FOAN of 588 dwellings a year should be increased to enable that affordability FOAN to be met. It was decided that it should not be. But it does not follow from the decision not to provide the FOAN for *affordable* housing (or otherwise) that the FOAN for *open market* housing needed to be separately identified. No policy or legal authority was identified by the Claimants to support their submission, nor any reason advanced as to why this exercise should be necessary as a matter of law, *a fortiori* where the Claimants are unable to show any legal error in the LPA's assessment of the FOAN for *overall* housing need.

52. In summary, the Claimants have failed to identify any misinterpretation of any planning policy by either TVBC or the Inspector. In my judgment there was nothing irrational about the way in which TVBC and the Inspector applied the NPPF and the PPG. For all these reasons ground 1 must be rejected.

Ground 2

53. The Claimants submit that TVBC failed to comply with its duty to co-operate under section 33A of PCPA 2004 by failing to consider taking any action with neighbouring LPAs to deal with the shortfall in meeting the FOAN for affordable housing in Test Valley by the provision of additional housing in other areas. For the same reasons the Inspector erred in law by concluding that the duty under section 33A had been met, which vitiated his recommendation under section 20 that the RTVLP be adopted and TVBC's decision under section 23 to adopt the plan.

54. Section 33A provides (in so far as is relevant):-

> "**Duty to co-operate in relation to planning of sustainable development**
>
> (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, and
>
> (b) to have regard to activities of a person within subsection (9) so far as they are relevant to activities within subsection (3).
>
> (3) The activities within this subsection are-
>
> (a) the preparation of development plan documents,
>
> (b) …
>
> (c) …
>
> (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, and
>
> (b) …
>
> (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.
>
> (7) A person subject to the duty under subsection (1) must have regard to any guidance given by the Secretary of State about how the duty is to be complied with."

The Court was informed that the current guidance under section 33A(7) is to be found in paragraphs 178 to 181 of the NPPF.

55. In Zurich Assurance Limited v Winchester City Council [2014] EWHC 758 (Admin) Sales J (as he then was) dealt with the content of the duty and the appropriate standard of review to be applied by the Courts (paragraphs 108 to 114). Mr Cahill QC accepted the correctness of the principles set out in those paragraphs and for my part I entirely agree with the Judge's analysis.

56. Issues such as what would amount to sustainable development, what would have a significant impact on two or more planning areas, what should be done to "maximise effectiveness" with regard to the preparation of a development plan, what measures of constructive engagement should take place and the nature and extent of any co-operation are all matters of judgment for the LPA. The requirement in section 33A(6) to consider joint approaches to strategic planning matters is also a matter of judgment for the LPA. Each of these issues is highly sensitive to the facts and circumstances of the case. The nature of these functions is such that a substantial margin of appreciation or discretion should be allowed by the Court to the LPA.

57. PCPA 2004 makes the examining Inspector responsible for making the initial determination as to whether the LPA has complied with its duty to co-operate. Unless he is so satisfied and recommends the adoption of the local plan the LPA has no power to adopt the plan. In the present case these requirements were satisfied and so TVBC was entitled to adopt the RTVLP unless the Inspector's conclusion under section 20(7B)(b) was vitiated by a public law error. However, it is significant that

under that provision the Inspector was only required to decide whether it was "reasonable to conclude" in all the circumstances that the LPA complied with any duty under section 33A relating to the preparation of the plan. Once again this language confirms that compliance with section 33A involves matters of judgment for the LPA for which a margin of appreciation is to be given.

58. In agreement with Sales J I consider that:-

(i) The question posed by section 20(7B)(b) of PCPA 2004 is a matter for the judgment of the Inspector;

(ii) The Court's role is limited to reviewing whether the Inspector could rationally make the assessment that it would be "reasonable to conclude" that the LPA had complied with section 33A;

(iii) It would undermine the structure of PCPA 2004 and the procedure it provides for review by an independent Inspector if, on a challenge made under section 113, the Court sought to apply a more intrusive form of review in its assessment of the underlying lawfulness of the LPA's conduct or performance;

(iv) The Inspector's conclusion cannot be impugned unless irrational or unlawful.

59. The challenge under ground 2 is therefore directed to the Inspector's report, in particular paragraphs 10 to 14 where he stated:-

> "10. On the first day of the Hearing a submission was made by a representor to the effect that the Council had failed in relation to the DtC [the duty to co-operate]. This was discussed in some detail at the Hearing, and in public correspondence between the representor, the Council and myself. The most important element of this submission was that the Council's identified affordable housing need figure is 292 dwellings per annum (d.p.a.) (clarified by **MM/5/1**), with certain caveats, whereas the expected provision is 206 d.p.a. The Council put forward reasons for this position, but the DtC issue relates to the fact that the Council had not asked neighbouring authorities whether they could accommodate some or all of the identified shortfall.
>
> 11. There is nothing to suggest the extent to which any shortfall in affordable housing provision within Test Valley would lead to displaced demand affecting some or all of the eight adjoining authorities.
>
> 12. The objective of the DtC is to maximise the effectiveness of the plan making process. In this case the overall manner in which the Council has worked with other authorities, particularly but not exclusively in the southern part of the Borough, is impressive. In the light of their considerable experience, Council officers

> presented me with a very clear picture of the position of adjoining authorities in relation to affordable housing. To have made a formal request to adjoining authorities for assistance with affordable housing, when the Council knew full well what the answer would be, would not have been effective or productive.
>
> 13. In subsequent correspondence the representor also stated that there would be a shortfall in market housing, and that the DtC would additionally be triggered in this respect. However, as I conclude (below) that the RLP will meet the full OAN for market housing, this matter does not trigger the DtC.
>
> 14. The Council has clearly taken into account the wider strategic context and the interrelationships with neighbouring areas, particularly in terms of housing markets and employment patterns. I am satisfied that the Council has engaged constructively, actively and on an ongoing basis with relevant local authorities and organisations, and I conclude that the DtC has been met."

60. The Claimants submit that where an LPA cannot meet its own FOAN for affordable housing then it must "explore under the ambit of the duty to co-operate whether any unmet needs can be met within adjacent LPAs" (paragraph 68 of skeleton). The proposition is said to be based upon paragraphs 104 and 106 of the judgment of Hickinbottom J in Gallagher. But in fact the Judge did not determine any issue in relation to section 33A nor did he lay down the proposition for which the Claimants contend.

61. It is to be noted that the Claimants' proposition is limited in scope. This is not a case where non-compliance with section 33A is said to have occurred because the Defendant failed to address the inclusion of a policy in its plan for meeting needs arising outside its area. The Claimants simply argue that TVBC should have "explored" with other LPAs the issue of whether the shortfall in meeting the FOAN for affordable housing in its area could be dealt with in their areas. In essence, this is the same complaint as that raised at the Examination, namely that TVBC failed to put this question to the other authorities.

62. The Claimants were not at all precise as to what the use of the term "explore" should be taken to mean, although it lies at the heart of the ground of complaint. By implication the Claimants recognise that TVBC was not in a position to compel other authorities to provide for TVBC's shortfall and that they might legitimately say that they were unable to assist. Here the word "explore" suggests obtaining sufficient information about affordable housing needs in the areas of other LPAs and their ability to satisfy their own needs and any additional needs from other areas. In the light of that information a plan-making authority could decide, as a matter of judgment, whether it would be worthwhile to pursue negotiations with one or more other authorities to assist with its shortfall.

63. In this case the Claimants made no attempt to show the Court that TVBC either lacked this information or that, in the light of the information it had, TVBC's judgment that there was no point in pursuing negotiations with other authorities on this point was irrational. In his reply, Mr Cahill QC confirmed that the only criticism of the Inspector's report is one of irrationality and is limited to the last sentence of paragraph 12, in which he had said that there had been no need for TVBC to make a "*formal* request" to adjoining authorities when it knew full well what the answer would be. He also stated that no legal criticism is made of the penultimate sentence of paragraph 12 in which the Inspector said that TVBC's officers had given him a very clear picture of the position of adjoining authorities in relation to affordable housing.

64. In fact, paragraph 12 is a summary of what the Inspector had been told during the Examination. In inquiry document IN009 (dated 19 December 2014) the Inspector explained that the extent of cross-boundary working had been explained by TVBC not only in its "Duty to Co-operate Statement" but also in the Hearing sessions, including one devoted to affordable housing. TVBC had been actively engaged in the production of a number of informal strategies and evidence based studies with other authorities and stakeholders. The extent of the working with other authorities was described by the Inspector as "impressive". It was from this information that he reached the judgment that TVBC's officers were "fully aware that other authorities would not be in a position to assist with any shortfall". Plainly the Inspector relied upon this information when writing paragraph 12 of his Report on the Examination.

65. When paragraph 12 of the Report is read properly in the context of the material which was before the Examination, the Inspector, in his review of TVBC's performance, was entitled to reach the conclusions that (i) they had obtained sufficient information from the cross-boundary work which had in fact taken place on whether adjoining authorities would be able to provide affordable housing to meet any part of needs arising within TVBC's area and that (ii) it would have been pointless to make a "formal request" for assistance in meeting TVBC's shortfall. It is impossible for the Court to treat the Inspector's conclusions as irrational and so ground 2 must be rejected.

Ground 3

The Claimants' argument summarised

66. Mr Cahill QC submitted that TVBC failed to adopt a plan which was "sound" so as to comply with section 20(5)(b) of PCPA 2004, because the RTVLP did not allocate sufficient land to meet the full objectively assessed need for B8 (storage and distribution) development, so as to comply with the requirements of the NPPF. But this formulation of ground 3, clarified during the Claimants' reply, does not give the full legal picture. TVBC adopted the RTVLP in accordance with the recommendations of the examining Inspector and he concluded that the plan, subject to the Main Modifications, was sound. To that extent TVBC's actions under section 23 of PCPA 2004 were intra vires the statutory framework summarised in paragraphs 5 and 6 above. In deciding to adopt the RTVLP the LPA generally adopted the reasoning in the Inspector's report on the Examination (certainly in so far as is relevant to ground 3). So it turns out that the Claimants' criticisms are really directed at the content of the plan itself and essentially that is because nobody raised the point

with which ground 3 is concerned in the Examination of the plan for the Inspector to consider.

67. The Claimants rely not only upon paragraph 14 of the NPPF (see paragraph 28 above), but also paragraphs 17(3), 156, 159, 160, 161 and 182. So, for example, paragraph 17(3) provides that "every effort should be made objectively to identify and then meet … business and other development needs of an area". Plans should "set out a clear strategy for allocating sufficient land which is suitable for development in their area, *taking account* of the needs of the … business communities" (emphasis added). Paragraphs 160-161 specifically deal with business development in the context of plan-making. Having prepared the evidence base described in paragraph 160, LPAs should use the evidence base to "assess" the needs for land or floorspace for all foreseeable types of economic activity. They should also "assess" the existing and future supply of land available for economic development and its sufficiency and suitability to meet the identified needs.

68. The Claimants refer to paragraphs 6.9 to 6.11 and Table 9 in the submitted version of the RTVLP. The draft plan identified a total need for 59,500 sq m net of additional employment floorspace within the Southern Test Valley. That figure was split between 19,000 sq m for B1 floorspace, 7,500 sq m for B2 and 33,000 sq m for B8. Paragraph 6.11 of the draft plan stated that to meet the development required new allocations of land were proposed in table 10. Three sites were identified to provide 30,000 sq m of B1 space (as against the need for 19,000 sq m). Two sites were identified to provide 8,000 sq m of B2 floorspace (compared to the need for 7,500 sq m) and one allocation was identified to provide 25,000 sq m of floorpsace for B8. As against the need for 33,000 sq m, the B8 allocation left a shortfall of 8,000 sq m (but I was told that a subsequent grant of planning permission on the site allocated for B8 reduced that shortfall to 6,823 sq m).

69. Essentially, the Claimants' complaint is that the RTVLP failed to address this alleged under-allocation of land to meet the objectively assessed need for B8 development in compliance with the NPPF (notably paragraph 14). Consequently, the RTVLP should not have been treated as "sound" under section 20(5)(b) and qualifying for adoption under section 23. This "soundness" issue is an essential component of the Claimants' complaint.

The Claimants' failure to raise their point during the Examination of the draft plan

70. It is therefore particularly surprising that during the Examination of the RTVLP the Claimants did not identify this point as something which rendered the plan "unsound" and so could not be adopted under the PCPA 2004, unless that unsoundness were to be cured through the Main Modifications procedure. The Inspector gave the Claimants the opportunity to identify any points of this nature which they took up in November 2014, and yet this point was not raised by them. Furthermore, no one suggests that it was raised by any other party.

71. The Claimants were represented by highly qualified and experienced planning consultants who made substantial representations at various stages on a range of subjects, including the draft employment policies. Two sets of representations were made in March 2014 dealing with "Employment Growth" policies and Adanac Park (Policy LE6) respectively. Although the policies to which I have referred were

discussed, no objection was made to the soundness of the plan through an under-allocation of land to meet the need for B8 land. Instead, the representations focussed on market demand and allowing a wider range of uses at Adanac Park, notably B8. In November 2014 the Claimants produced further representations which (inter alia) addressed questions raised by the Inspector, in particular whether the employment policies in the RTVLP were consistent with the NPPF and justified by clear and robust evidence. Once again the B8 "under-allocation" or "shortfall" point was not pursued.

72. Although in their Summary Grounds of Defence TVBC objected that the "B8 shortfall" point had not been raised during the Examination process, the Claimants did not refute that objection (see eg. the documents identified in paragraph 96 of the Claimants' skeleton). When asked to confirm that the point had not in fact been raised, Mr Cahill QC belatedly produced an extract from the Claimants' representations on the draft Main Modifications proposed to the RTVLP which contained the following perfunctory observation:-

> "It is noted that even taking account of the 'allocation' of 25,000 sq m at LE4, there is still a shortfall of B8 provision, for which no sites have been identified. Also, given this lack of other identified sites, there is no new provision identified at all for B8 within the Local Plan and implies that despite a clear and identified market need is not being met."

73. It appears that the proposed Main Modifications document was issued by TVBC in April 2015 and the Claimants' representation quoted above was submitted in June 2015. In fact, their comment on "shortfall" did not arise from the proposed modification of policy LE4 to which it purported to be related. But more to the point, the Claimants did not suggest that the proposed allocation of a lower level of B8 floorspace than was needed should result in the RTVLP being treated as unsound. Moreover, the representation did not address other parts of the RTVLP which set out actions for identifying further employment land, including B8 land. It should also be remembered that the Claimants' representations in November 2014, which had responded to the Inspector's request for parties to identify any points they wished to raise on the issue whether the RTVLP was "sound", did not mention the "shortfall" in allocations for B8 at all. The Claimants' representations in June 2015 did not attempt to widen their response on "soundness" given in November 2014.

74. In these circumstances it is hardly surprising that the Claimants' minimal reference to a supposed shortfall in the supply of B8 land, without any suggestion that it affected the "soundness" of the plan, was not the subject of any specific discussion by the Inspector in his report on the Examination. The purpose of the report is for the Inspector to express his conclusions to the LPA on whether the draft plan meets the requirements for adoption, including "soundness". He has no need to comment on other matters.

75. Nevertheless, it should be noted that in paragraph 134 of his report the Inspector considered the overall scope of the employment policies, including policies for new employment sites, to be sound. In paragraph 135 he concluded that the evidence base

on employment growth was robust and provided a sound basis for the level of allocations. He also concluded that the LPA's "general approach is in line with Framework policies to support economic development needs." Between paragraphs 136 and 152 the Inspector dealt with a number of the allocated sites upon which representations had been made. No legal challenge is made to that part of the report. With regard to policy LE6 and Adanac Park, he disagreed with the contention that the range of uses allowed by that policy should be widened. He considered it reasonable that the policy should restrict the range of such uses in view of the "demonstrable need" for this type of development in the area (paragraph 150).

76. It would have been obvious to the examining Inspector from the draft plan itself that more land was allocated for B1 purposes than the identified need for office space, and that the converse applied in relation to B8 development needs. He must also have been aware of paragraph 6.47 of the plan and policy LE10. He could not have been unaware of paragraph 6.12 of the draft plan which stated that the B1 allocations were not intended to be used purely for class B1a office purposes, but could also be used for class B1b and B1c uses, i.e. research and development and light industry. The Inspector must have taken matters of this kind into account when endorsing the soundness of the employment policies of the RTVLP.

77. In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the Inspector or decision-maker. But it is necessary to examine the nature of the new point sought to be raised in the context of the process which has been followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, one factor which weighs strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the Inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the Inspector might have called for more information) (see e.g. Newsmith at paragraphs 13 to 16; HJ Banks Ltd v Secretary of State [1997] 2 PLR 50; R (Tadworth and Walton Residents' Association v Secretary of State for the Environment, Food and Rural Affairs [2015] EWHC 972 (Admin) paragraph 95; R (Kestrel Hydro) v Secretary of State for Communities and Local Government [2015] EWHC 1654 (Admin) paragraphs 66 to 67; Distinctive Properties (Ascot) Limited v Secretary of State for Communities and Local Government [2015] EWHC 729 (Admin) at paragraph 49).

78. How then do these principles apply in a challenge under section 113 of PCPA 2004? The Claimants contend that the Court should act on the point they now raise in these proceedings because it goes to the "soundness" of the plan, one of the statutory qualifications for its adoption. But by definition such a point goes to the very object of the Examination procedure, which is designed to consider all such issues transparently and in public with appropriate participation by interested parties. The Examination then leads to the preparation by the Inspector of a report setting out his conclusions on those issues and the statutory questions which determine whether the LPA may lawfully adopt the local plan, including the test of "soundness" (i.e. sections 20 and 23 and see paragraphs 5 and 6 above). If a point of this kind is raised in the Examination, as it ought normally to be, and the Inspector considers that it has merit such that the plan would be unsound unless amended, then the Main Modifications

procedure may be followed so that the criticism is resolved and the plan may still be adopted. On the other hand, if a new "soundness" point is allowed to be raised in a section 113 challenge following the adoption of the plan, on the Claimants' case at least part of that process would have to be repeated all over again. Time spent and costs incurred in the first Examination process would have been wasted and there would be delay in the plan becoming part of the statutory development plan for the purposes of section 70(2) of TCPA 1990 and section 38(6) of PCPA 2004. These considerations suggest that the case law summarised in paragraph 75 above should apply with equal force, if not more so, to challenges under section 113 of PCPA 2004.

79. It is therefore very difficult to see why, in general, a factual or policy issue affecting the "soundness" of a plan should be allowed to be raised for the first time in a section 113 challenge, *a fortiori* when it could have been raised in the correct forum, the Examination, and there is either no justification for the failure to do so, or not one sufficient to outweigh the disadvantages of allowing a new "soundness" point to be raised after the adoption of the plan. The process of preparing a local plan is costly and time-consuming not only for the LPA but also the many stakeholders and interests involved. In addition, the NPPF emphasises the importance in the public interest of having up to date local plans. The use of a section 113 challenge to pursue new points in this manner should firmly be resisted.

80. It is plain beyond argument that the Claimants could and should have raised their "B8 shortfall" point in their original objections to the plan and during the Examination. No explanation has been put forward to justify their failure to do so. Their contention is dependent upon the factual and policy context and is obviously one where fact finding and the use of judgment by the Inspector in the application of the NPPF would have been called for if it had been raised. These are therefore powerful reasons for not allowing it to be raised as a new point in the High Court. Nevertheless, this ground has been fully argued and I will express my conclusions on it.

The Claimants' challenge

81. In essence the Claimants are complaining about a failure by the Inspector and the LPA to take into account a material consideration, namely whether the "shortfall" in the allocation of land for B8 purposes compared to objectively assessed needs meant that the plan should be treated as "unsound" for failing to accord with *policy* contained in the NPPF. The Claimants' argument is relatively narrow because they accept in paragraph 92 of their skeleton that the objectively assessed need for B8 development could be met by the local plan "either through allocations *or* some concrete policy".

82. I accept that an examining Inspector is not confined to dealing with issues raised by participants in the Examination. He has an important independent role under section 20 which allows him to select topics for examination whether raised by participants or not (which might include whether draft policies accord with the NPPF). Even so, the general principle is that unless a decision-maker is legally obliged to take into account a particular relevant consideration, then it is a matter for his judgment as to whether to do so. Furthermore, the point now raised by the Claimants is essentially concerned with matters of judgment, as to whether TVBC's strategy accords with the NPPF and whether the plan should be treated as unsound. Such judgments may only be challenged in the High Court if shown to be irrational. Thus, the issue would be

whether no reasonable Inspector or LPA could have failed to take into account the particular consideration subsequently relied upon in a legal challenge. In circumstances where the decision-maker was not mandated to take that particular issue into account, his decision could not be impugned as irrational unless the Court considers that it was "obviously material" (Re Findlay [1985] AC 318, 333-4; R (Faraday Development Ltd) v West Berkshire District Council [2016] EWHC 2166 (Admin) at paragraphs 132 to 134). It would normally be difficult to satisfy the "obviously material" test where none of the many participants in the Examination of a local plan saw fit to raise the point for the Inspector to consider.

83. In the present case the NPPF contains a *policy* requirement that local plans should meet objectively assessed needs (e.g. paragraph 14), save in certain circumstances. In a case where a "soundness" point was not raised during the Examination and did not emerge until a subsequent section 113 challenge, the primary material for considering that challenge will be the submitted draft plan, any supporting material produced by the LPA and the adopted plan (if materially different). Assuming that the LPA has had regard to relevant NPPF policies, where that material does not reveal any *misinterpretation* of the NPPF, the only challenge that could be pursued would be to the LPA's judgment when *applying* that national policy. Such a challenge may only be made on grounds of irrationality (Tesco Stores Ltd v Dundee City Council [2012] PTSR 983). Because of the critical difference between these two types of challenge as to the juridical basis upon which a court may intervene, a claimant must not dress up what is in reality a criticism of the *application* of policy as if it were a *misinterpretation* of policy.

84. Normally a claimant fails to raise a genuine case of *misinterpretation* of policy unless he identifies (i) the policy wording said to have been misinterpreted, (ii) the interpretation of that language adopted by the decision-maker and (iii) how that interpretation departs from the correct interpretation of the policy wording in question. A failure by the claimant to address these points, as in the present case, is likely to indicate that the complaint is really concerned with *application*, rather than *misinterpretation*, of policy.

85. The Claimants' "shortfall" complaint provides another example of a legal challenge which falls foul of fundamental principles set out above. Firstly, it is said that TVBC (or the Examiner) misinterpreted the NPPF. But in fact no attempt was made in writing or in oral submissions to identify any particular part of the NPPF which had been misinterpreted, nor the alleged misinterpretation of that text. The Claimants accept that the NPPF should not be interpreted as requiring identified needs to be met entirely by allocations (see paragraph 92 of their skeleton). Instead, their complaint goes only to the *application* of that policy, namely whether the RTVLP fails to make sufficient provision for meeting the need for additional B8 floorspace. That is quintessentially a matter of planning judgment for the examination and adoption process and, is not a matter for the High Court, unless irrationality can be established.

86. Secondly, and as I have noted in paragraphs 72-3 above, although the Claimants commented at a late stage that no site had been *identified* or *allocated* to meet the "shortfall" for B8 floorpsace, they did not argue that the employment policies of the plan *taken as a whole* failed to deal with that "shortfall" adequately or that the plan should be treated as unsound for this reason. In these proceedings the Claimants have not suggested that any other participant in the process raised any concern in this

regard. Whether the Inspector might have chosen to examine that topic, albeit not a matter of controversy, was entirely a matter for him. No legal basis has been advanced for challenging the Inspector's approach to the content of his report as being irrational. In these circumstances, no legal criticism can be made of the absence of any reasoning in his report directed specifically at the soundness of the plan in view of the shortfall in the allocation of sites for B8 purposes.

87. Thirdly, although the Claimants' complaint is said to go to the soundness of the RTVLP, or at least that part which is concerned with meeting the needs for B8 development, they failed to address the strategy in the RTVLP, read as a whole, for dealing with this subject. Mr. Bedford QC referred to a number of policies in the RTVLP which had not been considered by the Claimants and in several instances had been omitted from the documents filed in support of the claim. First, paragraph 6.12 of the plan explains that the floorspace figures in table 10 are based on assumptions as to plot ratios and are therefore indicative. Accordingly, additional floorspace could be accommodated on some sites. Indeed, planning permission has been granted for 26,177 sq m of floorspace on the B8 site allocation and so the B8 shortfall is 6,823 sq m rather than 8,000 sq m. Second, in the section following the allocation of sites in the RTVLP, paragraph 6.47 provides that where there is an identified lack of employment sites being delivered so that the requirement cannot be met, TVBC will take a number of actions such as bringing forward additional sites, keeping under review its own landholdings and reviewing the long term protection of sites identified in the plan. Third, table 9 allocates land for 63,000 sq m of employment uses which exceeds the total need for 59,500 sq m (which itself includes the figure of 33,000 sq m to meet B8 needs). The RTVLP covers a 15 year period running up to 2026. Policy LE10 provides a mechanism whereby sites allocated for one employment purpose may be considered for another where the criteria of that policy are met, for example, where a site is no longer required to meet particular economic development needs (see also paragraph 6.51). Thus, the LPA's judgment is that the RTVLP *read as a whole* meets the objectively identified need for employment development, including B8 floorspace, mainly through allocations but also through a strategy to provide for the residual requirements unmet by the allocations.

88. Mr. Cahill QC identified no public law error in that analysis. His submissions in reply effectively amounted to no more than a challenge to the planning merits of TVBC's policy leading to a submission that TVBC had failed to produce a plan which was sound within section 20(5)(b) of PCPA 2004. That only served to confirm that these points should have been deployed by the Claimants in the Examination process. The question of "soundness" was a matter for the Inspector and the LPA. It is not a matter for the Court unless it can be shown that the LPA's policy strategy is irrational (e.g. as a response to the policy requirements of the NPPF) (see Barratt Developments plc v City of Wakefield Council [2010] EWCA Civ 897 paragraph 11; Oxted Residential Limited v Tandridge District Council [2016] EWCA Civ 414 paragraph 42). Principles relevant to that issue were summarised in paragraphs 23 to 26 above. The Claimants made no attempt in their submissions to the Court to surmount the high hurdle which those principles involve by showing that TVBC's strategy for meeting B8 needs fell outside the range of responses or judgments which an LPA could rationally adopt in order to comply with national policy. For my part, I can see no legal basis for suggesting that the RTVLP's policies on providing for development

needs, whether for B8 or for employment uses more generally, is irrational or flawed by some public law error.

Conclusions on section 113 challenge

89. For all these reasons ground 3 fails and the claim under section 113 in respect of the RTVLP must be dismissed.

The Challenge to the Decision on the Planning Appeals

90. In summary the Claimants raise the following grounds of challenge:-

Ground 1

The Inspector erred in law by deciding that the presumption in favour of sustainable development under paragraph 14 of the NPPF (and to the same effect Policy SD1 of the RTVLP) did not apply because the development plan policies were not "silent" *or* "out of date" in respect of the provision for B8 development;

Ground 2

The Inspector erred in law by failing to apply the general presumption in favour of sustainable development in the NPPF (i.e. a presumption falling outside paragraph 14 of the NPPF as identified in Wychavon District Council v Secretary of State for Communities and Local Government [2016] EWHC 592 (Admin));

Ground 3

The Inspector's findings on the viability of B1 development on the appeal site were internally contradictory and/or irrational and/or inadequately reasoned;

Ground 4

The Inspector failed to assess the economic benefits of the proposed B8 schemes and/or to take into account the "trigger effect" of the B8 proposals and/or to consider granting planning permission on only one of the appeal sites AP2 or AP3, there being separate appeals for each of those sites.

Legal principles

91. The legal principles upon which the Court may intervene under section 288 of TCPA 1990 were summarised by Lindblom J (as he then was) in Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) at paragraph 19.

92. In paragraphs 22 and 33 above I emphasised the need for a clear distinction to be drawn between an allegation that a planning policy has been *misinterpreted* as opposed to a challenge to the use of *judgment in the application* of policy. In the latter case a claimant must show that the decision-maker acted irrationally. Relevant principles for determining whether a challenge of irrationality is made out are summarised in paragraphs 23 to 26 above.

Ground 1

93. Paragraph 14 of the NPPF provides that for decision-taking (i.e. development management) the presumption in favour of sustainable development means:-

> "approving development proposals that accord with the development plan without delay; and
>
> where the development plan is absent, silent or relevant policies are out-of-date, granting permission 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"

It is common ground that the substance of policy SD1 of the RTVLP is to the same effect.

94. It was the Claimants' case before the Inspector that the RTVLP was either "silent" or "out of date" as regards policies for the provision of B8 development and so the presumption in favour of sustainable development, or the "tilted balance" should be applied.

95. The Inspector addressed the application of paragraph 14 of the NPPF in paragraphs 29 to 31 and 62 of the decision letter. But it is necessary to see these conclusions in the light of her earlier analysis of the policies and requirements for employment land. In DL 16-19, 26, 28 and 53 she summarised the effect of RTVLP policies relevant to the proposals. It is plain from those paragraphs and her application of the policies that her understanding of the strategy of the RTVLP accords with the LPA's analysis (as summarised in paragraph 87 above). In DL 21 she referred to the *overall* need for 59,500 sq m of new floorspace for employment purposes and concluded that "the overall figures for existing sites and proposed allocations show that the need would be met". In DL 23 she acknowledged that the allocations in the RTVLP exceeded the requirements for B1 and B2 but fell short of the requirement for B8 development by 6,823 sq m. She recorded that this shortfall in allocation had been before the Inspector who conducted the Examination of the RTVLP. In DL 24-25 the Inspector reviewed the information on the need for different types of employment land and supply. In DL 26 she referred to paragraph 6.47 of RTVLP which identifies the actions which TVBC will take to identify more land and in DL 27 she had regard to the review of employment land provision to be undertaken. She concluded that the difference between the amount of land allocated in the RTVLP and the need figure was known to the examining Inspector, who did not consider that "the contents of the plan as a whole" failed to address that need. In DL 28 the Inspector referred to the conclusion in the report of the Examination that the allocation of Adanac Park needed to be limited to B1.

96. The Inspector's findings on the application of paragraph 14 of the NPPF were as follows:-

"29. The Appellant contends that the RLP is 'silent' as to where sites to remedy the shortfall of B8 land should be located and the failure to deliver the amount of land identified as necessary renders the employment land supply in the RLP 'out of date'. However, these were matters before the Examining Inspector and given that the RLP is only recently adopted and open to challenge, it would be more appropriate for them to be addressed elsewhere.

30. The Appellant further contends that there were events not before the Examining Inspector which would bring Policy SD1 of the RLP into play. One such event is that as a consequence of being unable to implement the outline planning permission on the remaining areas of AP the RLP, in identifying the employment requirements, no longer correctly describes the existing permissions. It is accepted that, as a result of the legal agreement in respect of AP9 signed during the Inquiry, the sites no longer have valid permissions and the various figures with regard to employment land in the RLP may no longer reflect the current position. However, the identification of AP for B1 uses in policy LE6 establishes the principle of such use and its inclusion in the overall provision of employment land. Moreover, there is no requirement to identify a five year supply of deliverable employment sites as is necessary in respect of housing land. On this basis I do not accept the Appellant's contention that the RLP is silent or out of date and I attribute full weight to the relevant policies of the RLP in the determination of the appeals.

31. My attention has been drawn to an appeal decision of August 2011 in which the Inspector found the development plan, which had been declared sound the previous May, to be out of date. Whilst the Appellant contends there are direct parallels between that case and the appeals before me, the reason for the plan being found out of date was due to the absence of a five year housing land supply and more up-to-date information being available to the Inspector at the Inquiry. I do not consider that in the appeals before me the situation regarding the supply of employment land differs significantly from that which was before the Examining Inspector and which led to his conclusion that the restriction of AP to Class B1 use was reasonable. Moreover, the consequences of failing to maintain a five year supply of housing land set out in the Framework are not replicated in respect of employment land.

62. The proposals would fail to provide B1 developments on land allocated for such purposes within the recently adopted RLP and both appeals would therefore be contrary to Policy LE6 of that plan. Although I accept that there is a demand for and a deficit of land allocated for B8 uses in the RLP I am not

> convinced by the evidence that the appeal sites are not required to meet the identified need for land for B1 purposes. Whilst I consider that with careful control the proposed developments on AP2 and AP3 would not cause significant harm to the character of the area or the amenities of residents and would not have a significant detrimental impact on the remaining occupiers of the site, on balance I consider the appeals would be contrary to Policy LE10 of the RLP. I also consider there are no grounds to show the RLP to be silent or out of date on issues relevant to the appeal and on this basis Policy SD1 does not come into play."

It is important to note that when the Inspector referred to a B8 "deficit", she was only referring to a shortfall between the identified need for B8 floorspace and the amount of land specifically *allocated* in the local plan for that purpose. She did not accept that the policies of the RTVLP *read as a whole* failed to address that need (see also DL 27).

97. It is common ground between the parties that the meanings of the terms "silent" and being "out of date" for the purposes of paragraph 14 of the NPPF were correctly set out in Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) paragraphs 45 and 49 – 53 and in South Oxfordshire District Council v Secretary of State for Communities and Local Government [2016] EWHC 1173 (Admin) paragraph 93.

98. Essentially "silence" is concerned with whether the development plan contains a policy or body of policy relevant to the proposal under consideration and sufficient to enable the acceptability of the proposal to be judged in principle. "Sufficiency" for that purpose does not require that the site be the subject of an allocation or a site-specific policy setting out restrictions on development. General development control policies may suffice to enable the decision-maker to say whether the proposal should be approved or refused in principle, subject to other material considerations.

99. As was pointed out by Lindblom J in paragraph 45 of Bloor, whether a local plan is "silent" may be a matter of interpretation of policy, or a matter of fact, or a combination of the two. In his reply Mr Cahill QC confirmed that the Claimants are not suggesting that the Inspector's conclusion on the "silence" issue was vitiated by any misinterpretation of policy. So the challenge can only be to the rationality of the Inspector's judgment that the RTVLP was not "silent".

100. A key fallacy in the Claimants' complaint is revealed by paragraphs 120 and 122 of their skeleton. They submit that first, the Inspector had to consider whether the plan was "silent on a particular issue" and second, that issue was where land to provide for a shortfall of 6,823 sq m of B8 floorspace should be located. The first question was solely based upon Counsels' highly selective and misleading reliance upon a single short passage in paragraph 4.4 of the explanatory text accompanying policy SD 1 of RTVLP which states:-

> "The Local Plan look forward to the next 18 years. Over this time there may be instances where it is silent on a particular issue or where the policy may have become out of date…"

Read properly in context that text is not meant to be interpreted or applied in a manner inconsistent with Policy SD1 itself, which the Claimants accept is to the same effect as paragraph 14 of the NPPF. Indeed, explanatory material could not have that effect (see R (Cherkley Campaign Limited) v Mole Valley District Council [2014] EWCA Civ 567). But in any event, the approach suggested by counsel is inconsistent with the principles set out in Bloor and South Oxfordshire which they profess to accept. Neither paragraph 14 of the NPPF nor SD1 of the RTVLP enable a party simply to select one of the "issues" relevant to the outcome of a planning application or appeal, so that it may be claimed that the plan is "silent" on that particular issue. Instead, the proper question for the decision-maker is whether there is a sufficient policy content in the plan *taken as a whole* to enable the planning application to be determined as a matter of principle. It follows that the Claimants' "silence" challenge is flawed because their argument starts with the wrong legal test.

101. Even if it were to be assumed that the answer to the Claimants' issue is yes (ie. the plan does not say where sufficient land to meet B8 needs should be allocated), it does not follow that the plan is to be treated as "silent" for the purposes of paragraph 14 of the NPPF. The test in Bloor and South Oxfordshire, namely whether there is a sufficient body of policy to enable the principle of the proposed development on the application site to be determined, would still have to be applied. That requires relevant parts of the local plan to be considered in order to see whether it is truly "silent" in the sense explained in those two decisions. The strategy of the relevant policies in the RTVLP taken as whole is to *provide* land to meet all employment development needed, including B8 uses, but not to do so solely by *allocating* sites at the outset of the plan. In paragraph 59 of Bloor Lindblom J explicitly stated that the fact that allocations have yet to be put in place in a development plan (in that case for housing), does not mean that the development plan is "silent". The Claimants did not seek to criticise that part of the judgment.

102. The Inspector's decision letter shows that she properly understood and took into account the strategy in the RTVLP when coming to the conclusion that the plan was not silent for the purposes of determining the appeals. It is plain from DL 23 and DL 27 that the Inspector had well in mind the fact that the plan allocated less B8 land than would meet the identified needs. In DL 16 she noted that the proposal conflicted with policy LE6, but she also had in mind the criteria in policy LE10 which, if satisfied, would support the proposal (DL 18 - 19). That also has to be read alongside DL 26 and DL 27 which referred to paragraph 6.47 of the local plan and the further work being undertaken. In DL 28 the Inspector summarised the examining Inspector's reasons for accepting that the range of uses at Adanac Park needed to be restricted to B1 purposes, notwithstanding the shortfall discussed in DL 27. Then in DL 30 she referred to LE6 again and gave her overall conclusion that the RTVLP was not "silent" (see also DL 31).

103. There is no need for a decision-maker to follow any particular formula or mantra in reaching such a view. That is not the effect of the South Oxfordshire decision, contrary to what appears to be suggested in paragraph 139 of the Claimants' skeleton. Reading the decision letter fairly and as a whole the Inspector decided that the plan is not "silent", consistently with the approach laid down in Bloor and South Oxfordshire. In other words, the strategy of the RTVLP was sufficient to enable the appeals to be decided in principle. That was a matter for the inspector's judgment and

the court may only intervene if it were shown to be irrational. The Claimants have made no attempt to explain why her findings fell outside the range of rational conclusions which a decision-maker could reach when applying paragraph 14 of the NPPF. Their contentions simply involve rearguing the merits of their case upon which they were unsuccessful before the Inspector.

104. It also follows that the Inspector was entitled to say in DL 28 that the issue selected by the Claimants had been a matter for the examination and adoption procedures of the RTVLP (and any challenge thereto under section 113). In other words, that was the forum in which the Claimants could and should have put forward their contentions that the strategy of the local plan was unsound and should be altered so as to *allocate* sufficient land to meet the B8 needs which had been identified (see ground 3 in the section 113 challenge above). But given the strategy which has been adopted by the LPA, the Inspector was entitled to say that the RTVLP was not "silent" for the purposes of paragraph 14 of the NPPF when determining these individual planning appeals.

105. In my judgment the other limb of the Claimants' argument, namely that the RTVLP was "out of date", also amounts to an attempt to reargue the planning merits that were dealt with by the Inspector. In Bloor it was decided that this phrase in the NPPF (a) is concerned with whether relevant policies have been overtaken by events subsequent to the adoption of the plan and (b) only involves matters of fact and/or judgment (paragraph 45). I agree. Mr Cahill QC did not argue the contrary. Thus, the Claimants must demonstrate that the Inspector's conclusion was irrational in relation to the changes in circumstance relied upon.

106. During his oral submissions Mr Cahill QC confirmed that the Claimants do not challenge the Inspector's treatment of the matters referred to in DL 30. Instead he relied upon the findings made by the Inspector in DL 23 and DL 27 that there was a shortfall between the allocations in the RTVLP and the identified needs for B8 land and that a review was to be carried out by TVBC in 2016 as "new events" post-dating the adoption of the local plan. But in my judgment it is plain from the reasoning in DL 23, 26-27 and 30-31 that the Inspector (a) took these matters into account and (b) did not consider that the situation regarding land supply differed significantly from that which was before the examining Inspector. Accordingly, she did not consider the RTVLP to be "out of date" for the purposes of paragraph 14 of the NPPF. That was self-evidently a matter of judgment for the Inspector to determine and no attempt has been made to show that it was irrational, as opposed to being a conclusion with which the Claimants disagree. For my part, I cannot see how it could be said that her conclusion fell outside the range of rational responses to the material put before her. Furthermore, the Claimants have not succeeded in demonstrating any inadequacy in the reasoning of the Inspector giving rise to a "substantial doubt" as to whether she made any error of public law (South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953).

107. For all these reasons I reject ground 1 of the section 288 challenge.

Ground 2

108. The Claimants argue that whether or not they can succeed under ground 1, the Inspector erred in law because she did not take into account a general presumption in

favour of sustainable development contained in the NPPF but outside the scope of paragraph 14. The effect of this interpretation of the Framework is that even if the presumption, or "tilted balance" in paragraph 14 does not apply in a particular case, there is nevertheless a presumption in favour of a proposal which qualifies as "sustainable development" by reference to the "three dimensions" ("economic, social and environmental") of sustainable development (paragraph 7) and the topic-based policies and criteria in paragraphs 18-219 of the NPPF. This interpretation was accepted by Coulson J in Wychavon District Council v Secretary of State for Communities and Local Government [2016] EWHC 592 (Admin); [2016] PTSR 675.

109. It is common ground that the Inspector did not take into account any wider presumption in favour of sustainable development falling outside the scope of paragraph 14 of the NPPF. The SSCLG in the present case submits that the interpretation accepted in the Wychavon case is incorrect and that the only presumption created by the NPPF in favour of sustainable development is that contained within paragraph 14.

110. Mr. Honey, who appeared for the SSCLG, submitted that the conclusions of Coulson J on this issue were *obiter dicta.* I disagree. It is plain from paragraphs 7-9 of the judgment that paragraph 14 of the NPPF did not apply in that case, but the Inspector went on to grant planning permission for the appeal proposal taking into account "the overarching presumption in favour of sustainable development". The Inspector could simply have said that he considered his conclusions that the benefits of the proposal outweighed the limited harm and conflict with the development plan were sufficient in themselves to justify allowing the appeal within the framework set by section 38(6) of PCPA 2004, without needing to rely upon any "overarching presumption" in favour of sustainable development. But the Inspector did rely upon this additional factor and so the LPA in that case argued that the decision should be quashed because he had thereby misinterpreted the NPPF (paragraph 38 of the judgment). That ground was opposed by the successful developer, Crown House Developments Limited, also represented by Mr. Cahill QC. I do not consider that the reasoning of Coulson J in paragraphs 39 to 40 of his judgment can be treated as rendering his analysis in paragraphs 41 to 44 as *obiter*. It is to be read as a whole.

111. On the other hand, Mr. Honey makes two submissions which I do accept. First, the SSCLG accepted that the Inspector's decision should be quashed but did not attend the hearing or explain his reasons for taking that view (paragraph 1 of the judgment). Consequently, the Judge did not have any assistance from the SSCLG as to the proper interpretation of the NPPF. Although the submissions of the SSCLG on that aspect could not have been conclusive (see eg. the reference to the "world of Humpty Dumpty" in Tesco Stores at paragraph 19), nevertheless assistance of the kind I have received from Mr. Honey might well have led to a different outcome in the Wychavon case.

112. But I would go further than Mr. Honey. It is plainly unacceptable for the SSCLG to state in correspondence that an Inspector's decision should be quashed, or will not be defended, without explaining to the Court and to the other parties involved the precise reasons for taking that view. They are clearly material to the approach which the Court may take to the issues remaining between the other parties and ought to be disclosed under the SSCLG's obligation to assist the court in furthering the overriding objective (CPR 1.3), unless there is a sufficiently strong reason for non-disclosure.

Decisions on planning appeals are taken in the public interest and potentially affect many parties. Therefore, if the SSCLG considers that a particular decision of an Inspector, or of the SSCLG, cannot be defended (and so ought to be quashed by the Court), there is a public interest in knowing precisely why the SSCLG takes that view. If such reasons are given the other parties will be better able to appraise their respective positions and to decide upon whether a challenge, or particular part of a challenge, should be persisted in or defended. It is also necessary that such reasons are given for the proper management of the finite resources of the Planning Court and the efficient listing and resolution of cases in general. An unexplained concession by a defendant that his decision should be quashed is just as unacceptable as a draft consent order put before the Court for its approval where the reasons for seeking the quashing of a decision are unexplained, ambiguous or lack sufficient detail (see Kemball v Secretary of State for Communities and Local Government [2015] EWHC 3338 (Admin); [2016] J.P.L. 359 paragraph 39). It is a practice which should cease.

113. Mr. Honey makes a second criticism of the way the challenge in the Wychavon case was handled. It appears that the judgment by Coulson J was given on the same day as the argument (paragraph 2). On that very same day Jay J handed down his judgment in Cheshire East Borough Council v Secretary of State for Communities and Local Government [2016] EWHC 571 (Admin); [2016] PTSR 1052. That case had been argued as recently as 9 March 2016 and the same Leading Counsel appeared for the developers in Cheshire East, Wychavon and the present case. I agree with Mr. Honey that the issues dealt with by Jay J were sufficiently close to those considered by Coulson J that Counsel owed an obligation in the Wychavon case to refer the Court to the Cheshire East case.

114. Paragraph 152 of the Claimants' skeleton sought to excuse this failure by claiming that "the timing was important" in that the draft judgment of Jay J was "embargoed" until hand down on 16 March 2016. Mr. Honey points out that the final judgment in Cheshire East was circulated by email at 11.03am on 16 March. That has not been contradicted. Counsel ought to have known when that final judgment was being handed down. Even if it was thought that the content (as distinct from the existence) of the judgment was embargoed throughout the morning of the hearing of the Wychavon case (albeit wrongly), Counsel would have known about (or had access to) the contents of the draft and ought at the very least to have (a) checked the position at the luncheon adjournment and (b) drawn the attention of Coulson J to the fact that Jay J was about to deliver, or had delivered, judgment in a case raising very similar issues. Coulson J should not have been deprived of the opportunity to consider the judgment for himself, nor indeed should the claimants Wychavon District Council. I can see that the legal challenge in the Wychavon case could have been rejected by the court on other grounds in any event. But whether or not that is so, the Judge might not have been prepared to give an extempore judgment the same day, he might well have called for submissions from the SSCLG on the interpretation of the NPPF, and he might well have rejected the developer's interpretation of that document.

115. In order to sustain ground 2 Mr Cahill QC simply relies upon the reasoning of Coulson J in Wychavon. In summary, the Judge decided that the NPPF contains a general presumption in favour of sustainable development outside the ambit of paragraph 14 because:-

(i) Paragraphs 6, 7, 12, 47, 49 and 197 of the NPPF refer to the presumption in favour of sustainable development. It is said to be the "golden thread" running through the NPPF. The judge also drew attention to the Secretary of State's decision considered in Crane v SSCLG [2015] EWHC 425 (Admin) (paragraph 41 of Wychavon);

(ii) Wychavon's submissions placed too much emphasis on the word "means" in the phrase in paragraph 14 of the NPPF "For decision-taking this means..." Paragraph 14 does not offer a true definition of the presumption in favour of sustainable development at all. It is simply an explanation of the effect of the presumption. In any event, there are many other places in the NPPF where the word "mean" or "means" is used, for example, the Foreword and paragraph 6 (paragraph 42 of Wychavon);

(iii) In agreement with Mr. Cahill QC, if Wychavon's interpretation were to be correct, the presumption in favour of sustainable development would only apply if the development plan was silent or absent, or if the relevant policies were out of date. That could not possibly be right. It would be such an important limitation on the "golden thread" that, if such had been the intention of the NPPF, it would have said so in the clearest terms (paragraph 43);

(iv) Where there is a conflict between a proposal and a development plan, the policies in the NPPF, including the presumption in favour of sustainable development, are important material considerations to be weighed against the statutory priority of the development plan (paragraph 44).

My reading of the judgment is that point (iv) was not a freestanding reason, but followed on directly from point (iii).

116. With the greatest of respect I am unable to accept the interpretation placed by Coulson J upon the NPPF or his reasoning in support. In my judgment, the *presumption* in favour of sustainable development is solely contained within paragraph 14 of the NPPF. In reaching that conclusion I have borne in mind the approach I should take to the decision of a judge of co-ordinate jurisdiction (Police Authority for Huddersfield v Watson [1947] KB 842, 848). On the other hand, given that Coulson J did not have the opportunity to consider the judgment of Jay J, this present case is not one to which the principle in Colchester Estates (Cardiff) v Carlton Industries plc [1986] Ch. 80, 84F-85H could apply.

117. I will begin with Coulson J's point (iii), which he regarded as being the most important. Mr. Cahill QC submitted that if the SSCLG's interpretation of the NPPF is correct the presumption in favour of sustainable development could only apply if there is no statutory development plan, or if the plan is "silent", or the relevant policies are out of date. He was unable to make good that submission in this challenge. It is completely wrong and it led the Judge in Wychavon into error.

118. Paragraph 14 of the NPPF needs to be read as a whole. The presumption in favour of sustainable development is not just concerned with decision-taking but also with plan-

making. In a development plan led system, plan-making provides the context and starting point for decision-making (section 38(6) of PCPA 2004 and see e.g. Cala Homes (South) Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 639; [2011] JPL 1458 at paragraph 6). The first part of paragraph 14 of the NPPF deals with plan-making *before* moving on to decision-taking. For plan-making the presumption in favour of sustainable development means that (in summary) LPAs should positively seek opportunities to meet the development needs of their area and should meet objectively assessed needs (with flexibility to adapt to rapid change) unless (i) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits (when assessed against the NPPF overall) or (ii) specific policies in the NPPF indicate that development should be restricted.

119. Thus, development plans are expected to allocate and promote sustainable forms of development. This is of great significance for the second part of paragraph 14 which deals with decision-taking. Once again the presumption in favour of development has two limbs. The submission of Mr. Cahill QC and the judgment in Wychavon focussed solely on the second limb. But the first limb states that development proposals which *accord* with the development plan should be approved without delay. This is important for several reasons.

120. First, a proposal which accords with a development plan prepared in accordance with the first part of paragraph 14 is likely to represent sustainable development. This is reinforced by paragraph 182 of the NPPF (see paragraph 7 above) which provides that in order to meet the statutory test of "soundness" in section 20(5)(b) before a local plan can be adopted (sections 20(7) to (7C) and 23(2) to (4)), a plan should be (inter alia) "positively prepared" so as to meet objectively assessed development and infrastructure requirements, "consistent with achieving sustainable development". Second, a development which accords with the development plan benefits not just from the positive presumption contained in section 38(6) of PCPA 2004 (summarised in paragraph 12 of the NPPF) but also from the additional presumption in favour of the grant of permission, or "tilted balance", contained in paragraph 14 of the NPPF. Third, it is incorrect to suggest that on the SSCLG's reading of the NPPF the presumption in favour of sustainable development would be confined to the second limb which only applies where there is no statutory development plan, or the development plan is "silent" or "out of date". Most emphatically that is not what paragraph 14 of the NPPF says. Instead, that paragraph has been correctly drafted so as to operate sensibly within the context of the statutory plan led regime and section 38(6) of PCPA 2004.

121. Likewise, paragraph 44 of Wychavon overlooks the point that under paragraph 14 of the NPPF the presumption in favour of sustainable development also applies where a proposal accords with the development plan, in which case the developer gets the benefit of both the presumption in section 38(6) and the further "tilting of the balance" (from paragraph 14).

122. Turning to point (i) in paragraph 115 above, I do not accept that other parts of the NPPF support the interpretation adopted by the Court in Wychavon. Paragraph 6 of the NPPF merely cross-refers to paragraphs 18 to 219 which, *when taken as a whole,* constitute the Government's view as to what is *meant* by "sustainable development". Paragraph 6 does not create or even refer to a *presumption* in favour of sustainable development. The same is true of paragraph 7 of the NPPF which explains that there

are three dimensions to "sustainable development", "economic, social and environmental". Paragraph 12 states that the NPPF "does not change the statutory status of the development plan on the starting point for decision-making". That is simply a cross-reference to section 38(6) of the PCPA 2004. The remainder of paragraph 12 illustrates the ways in which section 38(6) typically operates. Paragraph 12 does not create or define any presumption relating to "sustainable development": The only presumption it does refer to is the statutory presumption that a planning application should be determined in accordance with the development plan (whether that tells for or against the proposal), unless material considerations indicate otherwise. Paragraph 47 of the NPPF does not lend any support to the Claimants' argument whatsoever. The first, fourth and fifth bullet points are generally directed at plan-making. The second and third bullet points are directed at plan-making and development management. Nothing in paragraph 47 assists in determining when the presumption in favour of sustainable development for *decision-taking* is applicable.

123. Paragraph 49 of the NPPF is to some extent different. In the context of planning applications for housing, it does refer to the presumption in favour of sustainable development, but without providing a definition of the circumstances in which it applies. The real function of paragraph 49 is to treat or deem "relevant policies for the supply of housing" as not up-to-date if the LPA is unable to demonstrate a 5-year supply of deliverable housing sites. The sole object of that provision is to engage that part of paragraph 14 which applies the presumption in favour of sustainable development (Woodcock Holdings Ltd v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin). It is plain that paragraph 49 is consistent with SSCLG's interpretation of the NPPF and lends no support at all for any wider presumption in favour of sustainable development outside paragraph 14 of that document.

124. Paragraph 197 of the Framework merely states that the presumption in favour of sustainable development should be applied when development proposals are assessed and determined. This paragraph is no more than a very general statement which follows the equally generalised content of paragraph 196 summarising the effect of section 38(6) of PCPA 2004 and stating that the NPPF is a "material consideration" in planning decisions. Paragraph 197 does not purport to define the circumstances in which the presumption in favour of sustainable development may arise, let alone indicate that the scope of the presumption is wider than paragraph 14 of the NPPF.

125. I do not find anything in the Secretary of State's decision considered in Crane [2015] EWHC 425 (Admin) which could support the interpretation of the NPPF adopted in Wychavon. In that case the LPA could not demonstrate a 5 year supply of housing land and so the presumption in favour of sustainable development contained in paragraph 14 of the NPPF applied. The Secretary of State, disagreeing with his Inspector, decided that this presumption was significantly and demonstrably outweighed by all the adverse impacts of the proposal, especially the conflict with the Neighbourhood Plan (notwithstanding that that plan's housing supply policies were deemed to be out-of-date by virtue of paragraph 49 of the NPPF). Lindblom J decided that the decision did not contain any error of law. There is nothing in the decision of the Secretary of State or the Court's judgment which could lend any support to the notion that there is a general presumption in favour of "sustainable development"

outside paragraph 14 of the NPPF. I note that in the present case Mr. Cahill QC did not suggest otherwise.

126. The reliance placed upon the phrase "golden thread" in order to justify a wider presumption in favour of sustainable development is wholly misconceived. The term appears only once in the NPPF, that is in paragraph 14. The presumption is seen as a "golden thread running through plan-making *and* decision-taking" which then leads directly into the parts of paragraph 14 dealing with each of these two subjects in turn. As Lindblom J explained in Crane (at paragraph 73), paragraph 14 does require (in some circumstances) regard to be had to the NPPF "taken as a whole", referring back to the concept of "sustainable development" explained in paragraph 6 of the NPPF. But it is one thing to *define* what may amount to sustainable development, it is another to define the circumstances in which a *presumption* in favour of sustainable development will arise. The Claimants' reliance upon paragraph 6 of the NPPF and "the golden thread" erroneously conflates the two, without pointing to anything in the document which could possibly support that interpretation. The cross-reference in paragraph 14 to that definition of sustainable development does not alter the simple point that it is only that paragraph which identifies the circumstances in which the presumption arises (together with the deeming provision in paragraph 49 which itself only has the effect of taking the decision-maker to the presumption in paragraph 14).

127. Mr. Honey pointed to the statements in Crane (e.g. paragraphs 58, 62, 65, 66 and 72) in which references were made to the presumption in favour of sustainable development contained in paragraph 14 of the NPPF. But these passages do not assist me to resolve the present issue as to whether the presumption is exclusively contained in paragraph 14 because that question was not before the Court in Crane and the Judge offered no opinion on it. The same is also true of Mr. Honey's reliance upon paragraphs 12, 30, 40, 45, 53 and 70 of the judgment of Lindblom LJ in Secretary of State for Communities and Local Government v Hopkins Homes Ltd [2016] EWCA Civ 168; [2016] 2 P&CR 1.

128. Mr. Cahill QC also relied upon the following brief passage in the Ministerial Foreword to the NPPF: -

> "Development that is sustainable should go ahead, without delay – a presumption in favour of sustainable development that is the basis for every plan, and every decision. The framework sets out clearly what could make a proposed plan or development sustainable"

In my judgment this passage, if read fairly and in the context of the whole document, is no more than a brief summary of the policy contained in paragraph 14, with its dual focus on plan-making and decision-taking. If the Ministerial Foreword were to be treated as giving rise to a freestanding presumption outside paragraph 14, as contended for by the Claimants, it would apply not only to decision-taking but also to plan-making, and yet there is no wording to that effect in the policies of the NPPF itself (see e.g. paragraph 151).

129. If the Government had intended in 2012 to introduce a broader, freestanding presumption in favour of sustainable development, in addition to that contained in paragraph 14, that would have represented a significant change in national planning

policy. Generally, such a change would need to be introduced by a clear statement to that effect (Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 1386; [2015] PTSR 274 at paragraph 16). That need is all the more evident given that any such presumption would interact with section 38(6) of PCPA 2004.

130. There is one explicit reference in the NPPF which supports the SSCLG's interpretation of the Framework. Paragraph 119 states:-

> "The presumption in favour of sustainable development (paragraph 14) does not apply where development requiring appropriate assessment under the Birds or Habitats Directories is being considered, planned or determined"

This is consistent with footnote 9 to paragraph 14. But the real point is that it would not make sense, in the circumstances where paragraph 119 applies, that the presumption in paragraph 14 should be disapplied but not the broader presumption for which Mr. Cahill QC contends. This is a clear indication that the broader presumption does not exist within the NPPF.

131. I am unable to agree with point (ii) in paragraph 115 above taken from paragraph 42 of Wychavon. It is plain from the above analysis and from authorities such as Crane and Hopkins Homes that paragraph 14 of the NPPF is not simply an explanation of the effect of the presumption to which it refers. It also defines the circumstances in which the presumption in favour of sustainable development applies, both for the two limbs applicable to plan-making and the two limbs applicable to decision-taking. The SSCLG's analysis of the NPPF, which I accept, relies upon the *substance* of the relevant provisions and does not depend, or place too much emphasis upon, the use of the word "means" in paragraph 14.

132. Turning to the decision of Jay J in Cheshire East, I accept Mr. Cahill QC's submission that the main issue in this case was whether, as the LPA contended, paragraph 14 of the NPPF only applies to a proposal which has already been separately assessed so as to qualify as sustainable development (paragraph 7). It was a case where the LPA was unable to demonstrate a 5 year supply of housing land. The developer had responded before the Inspector that there was no requirement for any such freestanding assessment to be carried out and that "paragraph 14 itself provides a sufficient basis to decide whether the proposed development would be sustainable". The Inspector accepted the developer's submission (paragraph 8) which Mr. Cahill QC defended in the High Court.

133. In my judgment the reasoning of Jay J for rejecting the LPA's challenge to that decision is relevant to the issue of interpretation here. He held that:-

(i) The concept of sustainable development itself involves the striking of a balance between a range of different factors potentially pulling in different directions, some towards a grant of planning permission and others against. The weighing of those factors is a matter for the decision-maker (paragraphs 10 and 19);

(ii) The answer as to how that balance is to be struck is not to be found in paragraphs 6-8 of the NPPF or outside paragraph 14 (paragraphs 19 to 26);

(iii) The LPA's interpretation should also be rejected (a) because the assessment of whether a proposal constitutes "sustainable development" would be a "freewheeling exercise of discretion without parameters" and (b) paragraph 14 of the NPPF would be left without any practical utility (paragraph 20 and 26).

(iv) Paragraph 14 of the NPPF is the driver to correct decision-taking, not paragraphs 6 to 8 (paragraph 30).

134. Jay J also accepted the SSCLG's submission that there is flexibility in the application of the process described in paragraph 14 of the NPPF. "It is always subject to material considerations indicating otherwise, thereby introducing an element of flexibility *both ways*" (paragraph 28 with emphasis added). He gave as an example a case where the harmful impact of a proposal is substantial but not such as to outweigh significantly and demonstrably its benefits. In such a case the decision-maker has sufficient flexibility to be entitled to refuse planning permission, provided that the decision is adequately reasoned (see e.g. Crane and section 38(6)). However, it is plain that paragraph 28 of the judgment was not referring to a *presumption* in favour of sustainable development. The word "flexibility" does not carry any connotation of a presumption.

135. On the analysis by Jay J in Cheshire East, I cannot see how there is any room for a *presumption* in favour of sustainable development outside paragraph 14. His analysis undermines the interpretation adopted in Wychavon.

136. Before leaving Wychavon I should refer to the sequential approach to the application of section 38(6) of PCPA 2004 and paragraph 14 of the NPPF set out in paragraphs 20 to 25 of the judgment. It is not clear from what source this sequential approach was derived. However, I agree with Patterson J (Dartford Borough Council v Secretary of State for Communities and Local Government [2015] 1 P&CR2 at paragraphs 52 and 54) that a formulaic, sequential approach to the application of these provisions is *not* required. That would be excessively legalistic. In any event, I am unable to agree with this part of the analysis in Wychavon. In particular paragraphs 22 to 25 overlook the requirement that even if the presumption in paragraph 14 of the NPPF applies, it is nonetheless necessary to apply section 38(6) and evaluate the weight to be given to policies in the development plan (including policies for the supply of housing land which may have been deemed to be "out of date"), and this may result in a refusal of planning permission (as in Crane). The fourth step set out in paragraph 24 of Wychavon is not one which is necessarily anterior to the fifth step (paragraph 25) or is only to be applied where the development plan is not "silent" or the relevant policies are "up to date". It also applies alongside the fifth step (eg. where development plan policies are not "up to date").

137. Finally, Mr. Cahill QC criticised the way in which the Inspector struck the overall balance in DL 62 to 64 for failing to weigh the benefits of the proposal (i.e. providing a trigger for development on the remainder of the site and the provision of jobs)

against the harm. That complaint is utterly unarguable. Those points were explicitly dealt with by the Inspector in her decision letter.

138. For all these reasons ground 2 must fail.

139. During the hearing the parties drew my attention to the fact that the claim in East Staffordshire Borough Council v Secretary of State for Communities and Local Government was soon to be heard and that the correctness of the Wychavon decision would also be an issue for the Judge to consider. After the draft of this judgment was circulated for corrections, the parties sent me a copy of the judgment delivered by Green J in that case on 22 November 2016 ([2016] EWHC 2973 (Admin)). They also stated that they did not wish to make any submissions on the judgment, but understandably did not suggest that I should disregard it. I have considered his judgment and note that Green J has also disagreed with the conclusion in the Wychavon case that there is a presumption in favour of sustainable development outside the ambit of paragraph 14 of the NPPF (see paragraph 33). The Judge also agreed with the analysis of Jay J in the Cheshire East case. We have arrived at the same conclusion on the key issue I have had to decide under ground 2 in this section 288 challenge.

140. I note also from paragraph 4 of the judgment that the Inspector in the East Staffordshire case suffered the misfortune of having cited to him the Wychavon case but not the Cheshire East case. That selective citation of judicial authority was no more acceptable in that inquiry than it was in the hearing before Coulson J in Wychavon. It led the Inspector to produce a decision letter which allowed the appeal by reference to a general presumption in favour of sustainable development, after having decided that the presumption in paragraph 14 of the NPPF was not engaged. That decision had to be quashed by Green J and, subject to the outcome of any appeal, the section 78 appeal will have to be re-determined. Problems of this kind are not atypical. Why might that be so?

141. One factor would appear to be the ingenuity with which lawyers (whether acting for or against a development proposal) put forward interpretations of policy in challenges before the courts, which judges have to decide unless it can properly be said that the issue does not arise for decision in a particular case. The interpretations offered to the courts are sometimes "strained", as can be seen, by way of example. in the submissions which the Court of Appeal was obliged to consider in Suffolk Coastal District Council v Hopkins Homes Limited v Secretary of State for Communities and Local Government [2016] EWCA Civ 168; [2016] P & CR 1 (eg paragraphs 34-41). Such "excessive legalism" does not accord with the approach to interpretation of policy laid down by the Supreme Court in Tesco Stores plc v Dundee City Council at paragraph 19. The decisions of the courts are then subjected to the same sort of exegetical analysis, not only in submissions to judges in other cases but also in the arguments advanced before planning Inspectors. One can only sympathise with Inspectors at inquiries and hearings up and down the country who have to deal with arguments of this nature.

142. The East Staffordshire case provides a further illustration of the difficulties presented by such legal arguments. Because of both the effect of the Wychavon decision upon the Inspector's reasoning and the basis upon which the developer sought to uphold it in the High Court (see paragraph 20 of the judgment), the judgment examines topics

such as whether a "residual discretion" exists outside of paragraph 14 of the NPPF, and the width of that discretion or the degree of exceptionality of that discretion. Fortunately, in the present case Mr Cahill QC did not find it necessary to introduce sophisticated arguments of that kind. Instead, he sought to uphold the reasoning of the Judge in the Wychavon case and therefore I have not needed to go much further than to explain why I have been unable to accept it.

143. But for my part I should make it clear that in interpreting the NPPF and considering the relationship of its policies as "other material considerations" to the policies of the statutory development plan and section 38(6), I see no necessity or justification for decision-makers in the field, whether LPAs or planning Inspectors or the SSCLG, to be concerned with this novel concept of "residual discretion", or whether it is in truth "residual", or the ambit of any such discretion. It is sufficient for them to rely upon the explanation of the relationship between paragraph 14 of the NPPF and section 38(6) which has been set out in established case law, notably by Lindblom LJ in Hopkins (eg. paragraphs 6 to 19). The East Staffordshire case illustrates the risk of this area becoming unnecessarily legalistic. That would hinder rather than promote straight forward and efficient decision-making. I would only add that practitioners should cease to confuse policies of the SSCLG (or LPAs) which *describe* what qualifies as sustainable development with policies which *define particular circumstances in which a presumption* in favour of sustainable development applies. Difficulties caused in recent decision-making and litigation would not have occurred if that distinction had been respected.

Ground 3

144. During the hearing it became apparent that Mr. Cahill QC was not enthusiastic about this ground. I remain surprised that the Claimants did not take up the Court's invitation to abandon it.

145. The Claimants submit that because the Inspector concluded that within the B1 use classes "only B1c light industrial uses would be viable" (paragraph 157 of their skeleton), it was irrelevant or illogical for her to conclude that the sites could meet the needs for office development as identified in the RTVLP.

146. In fact, this ground proceeds upon the Claimants' obtuse misreading of one phrase in DL 36. In the first sentence of that paragraph the Inspector merely stated that in her view there was "no definitive evidence" that rents of £23 per sq ft on Adanac Park (the level at which office development could be viable in that location) would be achieved. The Claimants' assertion that the Inspector concluded that office development was non-viable on the appeal sites is based solely on that passage.

147. In fact, the Inspector made it plain that she had an abundance of viability evidence (DL 32) and in my judgment she carried out a careful evaluation. The Inspector did not simply make an assessment of what could be described as "*definitive* evidence". She placed a good deal of emphasis on probable or likely outcomes as, plainly, she was entitled to do. At DL 38 she concluded that acceptable residual land values would be achievable for all developments considered (which included pre-let office schemes) apart from speculative offices. Likewise, her acceptance that office development would be likely to be viable can be seen from DL 37.

148. For these reasons I reject ground 3.

Ground 4

149. Mr. Cahill QC was also unenthusiastic about the first two limbs of ground 4 in which it had been suggested that the Inspector had failed to take into account the economic benefits of the proposals for sites AP2 and AP3, the differences in the timescales for bringing forward B8 development as compared with B1 development (and the creation of jobs) and the "trigger effect" that early B8 development on the appeal sites could have for B1 development elsewhere in Adanac Park. I agree with Mr. Honey that it is plain from DL 50 and DL 63 that the Inspector did take into account these considerations.

150. The Claimants faintly suggested that the Inspector failed to give adequate reasons for her conclusions. That contention is also unarguable. The Claimants have not pointed to any inadequacy of reasoning giving rise to a substantial doubt as to whether the Inspector made any error of public law. It is perfectly clear from the decision letter that on the material before her the Inspector preferred the approach in policy LE6 of the RTVLP for the two appeal sites and also that sufficient time should be allowed for market signals to be tested for B1 uses on sites AP2 and AP3 before considering any review under paragraph 6.47 of the RTVLP. The reasoning is perfectly clear and adequate and the Claimants are well able to assess the planning position. The legal tests for the adequacy of reasons set out in South Bucks D.C. v Porter (No 2) [2004] 1 WLR 1953 are well satisfied.

151. Lastly the Claimants complain that the Inspector failed to consider allowing the smaller of the two appeal proposals (4,100 sq m of B8 floorspace on AP2) if the appeal on AP3 were to be dismissed. The two proposals were the subject of freestanding appeals. The only evidence put before the Court of the Claimants asking the Inspector to address this alternative to their primary case that both appeals should be allowed, is to be found in the following subliminal reference in paragraph 193 of their closing submissions:-

> "The Council should now seek to pursue growth through other means, namely the certainty of B8 development at AP2 and AP3. A cautious way to enable this *could be* to permit AP2 alone and see what happens..." (emphasis added)"

152. This point is also unarguable. In DL 63 the Inspector expressly recognised the differences in scale and effect of the two proposals and that the proposal for AP2 was much smaller. She decided that it would not be appropriate to allow one appeal but not the other (i.e. to allow the appeal on AP2 alone). She also addressed differences between the two schemes in Dl 39 and DL 41. It is plain from DL 63 that in relation to each of the two appeal proposals the Inspector decided to give greater weight to the conflict with policies LE6 and LE10 and the allocation of the sites for B1 uses.

153. For these reasons I reject ground 4.

Conclusions on the section 288 challenge

154. The claim under section 288 was heard at a rolled-up hearing and so I have considered whether I should refuse permission to apply for judicial review. I do not consider that any of the grounds have any real legal merit but I have had the benefit of full submissions on all grounds. In all the circumstances, I grant permission to apply on grounds 1 and 2, but refuse permission on grounds 3 and 4 which were wholly unarguable. I also refuse the substantive application and so the claim brought under section 288 is dismissed.

Consequential applications

155. I am grateful to counsel for the preparation of a draft consent order. No application has been made for permission to appeal. It is agreed that the Claimants must pay (a) TVBC's costs in relation to the section 113 challenge (CO/1246/2016) and (b) SSCLG's costs in relation to the section 288 challenge (CO/1901/2016). However, the Claimants contest TVBC's application that they should be ordered to pay a second set of costs in the section 288 challenge (CO/1901/2016) in favour of TVBC. I am grateful for the written submissions I have received.

156. The Claimants and TVBC agree that the main principles for dealing with this issue were set out by the House of Lords in Bolton MDC v Secretary of State for the Environment [1995] 1 WLR 1176. A "developer" in a section 288 challenge is not normally entitled to an order for his costs unless he can show *either* that there was a separate issue on which he was entitled to be heard (that is an issue not covered by counsel for the Secretary of State) *or* that he has an interest which requires separate representation. The mere fact that he is the developer (ie. a party having the benefit of a beneficial or valuable planning permission) will not in itself justify a second set of costs. It is implicit in their submissions that TVBC accepts, rightly in my view, that this principle relating to a "developer" also applies to a local planning authority who appears as a second defendant in a section 288 challenge. To justify a second set of costs in that scenario the Council needs to satisfy either the "separate issue" or "separate interest" tests, and the latter is not met simply because it appears as the LPA. Nevertheless, the Council says that it can satisfy the second of those two tests.

157. TVBC relies upon the fact that the Claimants applied successfully to consolidate the hearing of the section 113 and section 288 claims. Not surprisingly Patterson J refused to accept TVBC's contention that any order for consolidation should be subject to a condition that the Council would receive its costs in respect of *both* claims if either or both were to be dismissed. I do not see how the Council could justify attempting to have such a condition imposed at the stage when the proceedings were being consolidated, which would have had the effect of fettering the subsequent exercise of the Court's discretion to deal with costs according to such matters as the arguments ultimately deployed, their success or failure, and the conduct of the parties in the litigation. Instead, the Judge reserved the issue of costs. She ordered that the consolidated hearing be listed for 2 days so as to allow sufficient time overall for the two claims to be heard together.

158. TVBC submits that the consolidation has had consequences which satisfy the "separate interest" test for four reasons, alternatively that it amounts to a sufficient justification for departing from the normal principle that only one set of costs is awarded. I disagree. First, the fact that Claimants submitted a single composite skeleton is of no consequence. It contained separate sections dealing with the two

claims. Second, the arguments concerning the "B8 under-allocation" issue in the two claims were separate, and were handled separately by Counsel for SSCLG and TVBC. The fact that those arguments arose from much the same factual matrix does not justify a second set of costs in favour of TVBC in the section 288 claim. Third, the fact that it would have been an inefficient use of the Court's resources to hear the two claims separately is obviously correct, but that does not explain why the second set of costs sought is justified.

159. Fourth, it is true that TVBC needed to be present throughout the whole of the two day hearing. In my judgment that is a relevant factor in the proper assessment of TVBC's costs incurred in respect of the section 113 claim. It is an undeniable fact that TVBC's team needed to be present in court throughout the whole hearing because of the consolidation obtained by the Claimants. Although that factor should be reflected in the amount recovered by TVBC under the costs order in the section 113 claim for costs incurred *in respect of those proceedings*, it does not help to justify making an additional order for costs, a second order, for work done on behalf of TVBC in connection with the section 288 claim. Likewise, if the consolidation caused an increase in TVBC's costs of preparing *for the section 113 claim*, that can be taken into account by the costs judge in the detailed assessment under the costs order in TVBC's favour in CO/1246/2016. But I do not see why that should justify making a further order for costs for work done on behalf of TVBC *in the section 288 claim.* TVBC has not advanced any sufficient justification for treating the consolidation of the two claims as a proper exception to the normal principle that only one set of costs should be awarded in the section 288 proceedings.

160. For all these reasons I refuse TVBC's application for an order that its costs incurred in the section 288 claim be paid by the Claimants.