

**IN THE MATTER OF LAND AT WARMLEY, EAST BRISTOL,
SOUTH GLOUCESTERSHIRE**

BARRATT HOMES (BRISTOL) LIMITED

BLOOR HOMES (SOUTHWEST) LIMITED

**IN THE MATTER OF THE WEST OF ENGLAND JOINT
SPATIAL PLAN (NOVEMBER 2017)**

OPINION

INTRODUCTION

1. I am instructed by Barton Willmore who are themselves instructed jointly by Barratt Homes (Bristol) Limited and Bloor Homes (Southwest) Limited. Those parties have interests in land to the east of Bristol, at Warmley. They have participated in the consultation processes to produce the West of England Joint Spatial Plan, which is at its final consultation stage prior to anticipated submission to the Secretary of State for independent examination.
2. I am asked to consider and advise upon the relevant legal requirements for the making of the Plan and to review the

evidence base which is presently available in the context of those legal requirements. I am asked to give my opinion on the extent to which that supporting material satisfies those legal requirements.

3. There are two principal points which I am asked to address:
 - (i) Is there sufficient evidence to show that the relative sustainability of the proposed spatial options has been considered in accordance with the legal requirements? In particular, I am asked about the extent to which the Plan and evidence base fulfils the requirements in the SEA Regulations¹. In that regard, my attention has been drawn to the assessment of reasonable alternatives and also the requirement in plan making to contribute towards the achievement of sustainable development²;
 - (ii) Whether the guidance and policy in respect of Green Belt review has been applied in respect of identifying Strategic Development Locations, particularly by reference to paragraph 84 of the NPPF.
4. These questions are general in nature in that they apply to the process and reasoning which informs the production of the Plan.

¹ Environmental Assessment of Plans and Programmes Regulations 2004

² See in particular Section 39(2) Planning and Compulsory Purchase Act 2004

Those instructing are particularly concerned with one strategic development location, but I have relatively little to say in this Opinion about that particular location because the focus of the questions is much more general, being about the approach, process and reasoning behind the emerging Plan. However, there is a particular feature of my instructions which relates to transportation effects. In that regard, I have been provided with detailed appraisals of future transport infrastructure improvements which are relevant to potential development to the east of Bristol. I deal more specifically with that below.

5. In the above context, the structure of this Opinion is:
 - (i) To outline the legislative and policy requirements for the production of the emerging Plan;
 - (ii) To review the stages of preparation of the emerging Plan and the supporting evidence;
 - (iii) To provide my opinion as to the compliance of (ii) with (i).

LEGISLATIVE AND POLICY REQUIREMENTS

Soundness & SEA/SA

6. The key task of the examination in public is contained in Section 20(5) of the 2004 Act which I have set out in Annex 1 to this

Opinion. The examination is concerned with legal requirements and soundness.

7. One set of legal requirements derives from Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment. The transposition of European law into the domestic regulations, the associated case law and the guidance which is provided via the NPPF, PPG and European Commission Guidance are reviewed in Annex 1 to this Opinion. From those materials, the following key elements may be derived:

1. There is a legal requirement to assess the environmental effects of the draft plan (an SEA);
2. The environmental assessment may be encompassed within a sustainability appraisal (SA);
3. Both the SEA and SA require assessment of reasonable alternatives;
4. The range of reasonable alternatives is case sensitive and a matter of judgment;
5. For both the plan and the reasonable alternatives, the likely significant effects on the environment must be identified, described and evaluated;
6. It is essential that the likely significant effects are identified, described and evaluated in a comparable way;

7. It is also essential that an accurate picture is presented of what reasonable alternatives there are, and why they are not considered to be the best option;
8. The sustainability appraisal should outline the reasons the alternatives were selected, the reasons the rejected options were not taken forward and the reasons for selecting the preferred approach in light of the alternatives.

Green Belt Review

8. Examination of soundness will require consideration and application of paragraphs 83 and 84 of the NPPF, which provide:

“Local planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. Once established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period.

When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development. They should consider the

consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt or towards locations beyond the outer Green Belt boundary.”

9. In my opinion, paragraphs 83 and 84 are to be read together.

10. The case law on Green Belt review and exceptionality which arose from national planning policy which was in place prior to March 2012 was reviewed in *Gallagher Homes Ltd v Solihull Borough Council* [2014] EWHC 1283 (Admin), per Hickinbottom J³

"124. There is a considerable amount of case law on the meaning of "exceptional circumstances" in this context. I was particularly referred to *Carpets of Worth Limited v Wyre Forest District Council* (1991) 62 P & CR 334 ("Carpets of Worth"), *Laing Homes Limited v Avon County Council* (1993) 67 P & CR 34 ("Laing Homes"), *COPAS v Royal Borough of Windsor and Maidenhead* [2001] EWCA Civ 180; [2002] P & CR 16 ("COPAS"), and *R (Hague) v Warwick District Council* [2008] EWHC 3252 (Admin) ("Hague").

³ These principles not being disturbed on appeal: *Gallagher Homes Ltd v Solihull DC* [2014] EWCA Civ 1610

125. From these authorities, a number of propositions are clear and uncontroversial.

i) Planning guidance is a material consideration for planning plan-making and decision-taking. However, it does not have statutory force: the only statutory obligation is to have regard to relevant policies.

ii) The test for redefining a Green Belt boundary has not been changed by the NPPF (nor did Mr Dove suggest otherwise).

a) In Hunston, Sir David Keene said (at [6]) that the NPPF "seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that 'the general extent of Green Belts across the country is already established'". That appears to be a reference to paragraphs 83 and 84 of the NPPF. Paragraph 83 is quoted above (paragraph 109). Paragraph 84 provides:

"When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development?".

However, it is not arguable that the mere process of preparing a new local plan could itself be regarded as an exceptional circumstance justifying an alteration to a Green Belt boundary. National guidance has always dealt with revisions of the Green Belt in the context of reviews of local plans (e.g. paragraph 2.7 of PPG2: paragraph 83 above), and has always required "exceptional

circumstances" to justify a revision. The NPPF makes no change to this.

b) For redefinition of a Green Belt, paragraph 2.7 of PPG2 required exceptional circumstances which "necessitated" a revision of the existing boundary. However, this is a single composite test; because, for these purposes, circumstances are not exceptional unless they do necessitate a revision of the boundary (COPAS at [23] per Simon Brown LJ). Therefore, although the words requiring necessity for a boundary revision have been omitted from paragraph 83 of the NPPF, the test remains the same. Mr Dove expressly accepted that interpretation. He was right to do so.

iii) Exceptional circumstances are required for any revision of the boundary, whether the proposal is to extend or diminish the Green Belt. That is the ratio of *Carpets of Worth*.

iv) Whilst each case is fact-sensitive and the question of whether circumstances are exceptional for these purposes requires an exercise of planning judgment, what is capable of amounting to exceptional circumstances is a matter of law, and a plan-maker may err in law if he fails to adopt a lawful approach to exceptional circumstances. Once a Green Belt has been established and approved, it requires more than general planning concepts to justify an alteration."

11. In considering the issues of exceptionality (§83 NPPF) and sustainability, Patterson J held as follows in *IM Properties Development Ltd v Lichfield DC* [2014] EWHC 2440 (Admin) at [98]:

“[Paragraph 84] is clear advice to decision makers to take into account the consequences for sustainable development of any review of green belt boundaries. As part of that patterns of development and additional travel are clearly relevant.”

12. In a similar fashion, in *Calverton Parish Council v Nottingham City Council, Broxtowe Borough Council and Gedling Borough Council* [2015] EWHC 1078 (Admin), per Jay J said:

“The second sentence of paragraph 84 is not altogether clear. On the face of things, it might well be argued that it appears to reinforce the need to protect the Green Belt, but in my view it is capable of being interpreted slightly more broadly. The consequences for sustainable development may require revision of the Green Belt. Nonetheless, I do not readily agree with Miss Ellis that paragraph 84 throws any light on the meaning of “exceptional circumstances” within paragraph 83, or should be taken as somehow diluting this aspect. Sustainable development embraces environmental factors, and such factors are likely to be negatively in play where release of Green Belt is being considered. The

second sentence of paragraph 83 supplies a fetter or brake on development which would, were it not for the Green Belt, otherwise be sustainable; but in deciding whether exceptional circumstances pertain regard must be had to the whole picture, including as I have said the consequences.”

13. From the above, it is plain that there is an exceptionality test. It is also plain that the policy requires that sustainability is to be assessed. None of the above cases gave any consideration to the impact of SEA on the policy, nor the interaction of the NPPF with SA, both of which are underpinned by law, not policy.
14. For my part, I would say that any decision maker must first of all gather the necessary information about the sustainability of the options which are reasonably in play. If none of the Green Belt options shows itself to be amongst the most sustainable, i.e. more sustainable than non Green Belt options, then the policy question goes no further. If the need can be met in the most sustainable ways without amendment of the Green Belt boundaries, then exceptionality cannot possibly be shown.
15. If there are Green Belt locations which perform well against the sustainability criteria, and better than the non Green Belt options, then a judgment has to be made as to whether the totality of circumstances is exceptional.

16. I do not think that it is rational to consider the mere fact of Green Belt designation as a sustainability criterion, nor can it be a bar to consideration of a particular location or site. First, that would risk the fact of Green Belt designation being double-counted. Secondly, it would mix up the elements of the NPPF policy which in my view require a weighing of sustainability, need and other ‘merits’ factors on one side and the protection of the established boundaries by reference to an exceptionality test on the other. Rather, NPPF §§83/84 are a policy criterion and test (exceptionality) to be applied in the local plan process, which is the proper occasion on which to carry out a review, and after conducting the SA. The SA is material to inform the answer to the policy question posed by §§ 83/84 NPPF.

EVOLUTION OF THE PLAN

Essential Chronology

17. This is a case in which key events seem to occur annually, during the course of November. Hence, it was in November 2015 that the issues and options document was published for consultation. That was followed in November 2016 by the second phase of consultation which comprised the West of England Joint Spatial Plan *Towards the Emerging Spatial Strategy Document* (November 2016). This document consulted upon a range of

issues, including strategic transport improvement, employment locations and development locations⁴.

18. Then, in November 2017, the West of England Joint Spatial Plan *Publication Document* was published for consultation. The consultation on that document and its associated documents is open until 10th January 2018.

Issues and Options

19. The identified number of additional homes needed to 2036 was 29,000⁵. In respect of this identified need for additional homes, particular strategic locations were considered by reference to a number of typologies⁶. The document then proceeded to consider a number of examples of spatial scenarios which dealt with, in particular, the protection of the Green Belt and the relative merits of particular typologies, be they within the urban area, outwith it and/or in the Green Belt.

⁴ See in particular the high level plan at Fig 5, pages 24 and 25 of the November 2016 document

⁵ See Table 3.1 at page 22

⁶ See the five typologies set out in Table 5.1 and the respective strategic locations, page

20. The issues and options document was supported by a Sustainability Appraisal: *Revised Scoping Report* (November 2015). This document was intended as “*Stage A*” of the process of assessing sustainability in that it was to set the context and objectives, establishing the baseline and deciding on the scope. It was then intended to:

Stage B: develop and refine options and assess effects;

Stage C: prepare the SA reports;

Stage D: consult on the draft plans and SA reports and;

Stage E: monitor the significant effects of implementing the plans.

21. The typologies and locational options were themselves subject to a form of sustainability appraisal which resulted in the Sustainability Appraisal: *Initial SA report* (November 2015). This document had relatively little to say about land to the east of the urban area of Bristol. Rather, the document addressed each of the typologies in a very high level sense and reported via a series of appendices and tables.

Second Phase Consultation: *Towards the Emerging Spatial Strategy Document* (November 2016)

22. This document progressed from the issues and options stage by identifying strategic development locations and giving reasons for not including some of the alternatives which had been considered.

In respect of the Warmley location, the November 2016 document said:

“Some 13,500 dwellings remain to be constructed on land allocated in the South Gloucestershire Local Plan & Core Strategy across the Bristol North & North East Fringe communities over the next 10-15 years. Further strategic growth in the locality is likely to undermine delivery of these key sites. Moreover Bristol has historically predominantly grown north & eastwards. Strategic growth in the locality towards and also up the escarpments would significantly add to the impression of sprawl undermining the objectives of the Greenbelt. Notwithstanding this, significant growth will severely exacerbate congestion and air quality issues along the A420 corridor into Bristol. Road space along the A420 is significantly constrained by the nature of built form limiting the potential for necessary substantive strategic public transport, walking and cycling interventions along it. The locality is also poorly related to major areas of employment. Strategic growth would also further divorce existing communities to the west from physical and visual access to the countryside and potentially impact on Siston Conservation Area, Siston Lane and Webbs Heath areas of landscape value as well as local ecological interests.”

23. A series of notes was produced which explained the way in which both the Emerging Spatial Strategy was formulated and the way in which the Sustainability Appraisal was undertaken. In respect of the Emerging Spatial Strategy, five stages were used, namely⁷:
- 1) Identify the reasonable alternative strategic locations
 - 2) Clarify what sustainable patterns of development are in the west of England
 - 3) Assess the implications for the Green Belt
 - 4) Select locations
 - 5) Refinement of Spatial Strategy
24. I think that points 2) and 3) are in the correct order, per my opinion on the correct approach to Green Belt review at paragraphs 14-16 above. For the reasons explained below, it appears to me that the application of the NPPF per point 4) is problematic.
25. A matrix was produced, entitled “*Sustainability Appraisal of the Emerging Spatial Strategy – Summary of Findings for Strategic Locations*”. This is an appraisal against the particular criteria for assessing sustainability and undertaken for each of the principal strategic development locations.

⁷ This process is summarised at paragraphs 35 to 43 of the November 2016 document.

26. Further, a Sustainability Appraisal was undertaken in the sense that each location was assessed against sustainability objectives numbered 1A through to 5B.
27. Nowhere in this material is there any comparative evaluation or other form of comparison of the overall assessment of sustainability. In other words, the sustainability appraisal of each strategic location is to be found in a silo of its own and the reader is left to consider and work out the merits of one location in relation to another.

The Joint Spatial Plan *Publication Document* (November 2017)

28. This document is supported by appraisal tables⁸. For each strategic development location the material in respect of sustainability objectives is rehearsed, much as it was in respect of the 2016 document.
29. Nowhere in the appraisal tables is there any comparative material, as between particular sites nor as between particular strategic development locations.

⁸ See Appendix D

TRANSPORT ASSESSMENT

30. There is a West of England Joint Transport Study *Final Report* (October 2017). Its production followed a similar timeline and process of consultation as the JSP. This was intended⁹.
31. The overview of the West of England Transport Vision includes ten components, one of which is Mass Transit¹⁰. There is a strong ambition for a higher-capacity mass transit system to serve key corridors, including Bristol city centre to the North Fringe, East Fringe and South Bristol / Airport. It is likely that a form of rail-based system would most effectively meet future needs. Constraints on the road network mean that underground running should be considered in places.
32. ‘East Fringe Mass Transit’ is a scheme to improve connectivity between the East Fringe and Bristol city centre. It is a fully segregated scheme with options to be considered for underground running¹¹. Estimated capital cost including risk is £480M. It represents ‘medium’ value for money.

⁹ See the description of the evolution of the two documents on page 2 of the JTS Final Report

¹⁰ JTS Final Report at Table 4-1 on page 34

¹¹ See §7.2.1 on page 63 and the Assessment at Appendix A, pages A38 and A39.

OPINION

33. In my opinion, further comparative assessment and reasoning is necessary in order for an Inspector to find the JSP to be legally compliant and/or sound because:

- (i) The environmental assessment (SEA) does not evaluate or compare, either sufficiently or at all, the impacts of development at each of the locations considered;
- (ii) The same point as at (i), but in respect of the SA;
- (iii) The outcomes of the JTS Final Report have not been integrated into the JSP;
- (iv) The Green Belt review has not been adequately informed.

34. I take each of the above points in turn.

Environmental Evaluation and Comparison

35. It is a legal requirement to evaluate and compare the environmental impacts of the proposed plan and reasonable alternatives (see the key elements of the process at paragraph 7 above, particularly those listed at 6, 7 and 8). The purpose of the exercise is to understand the different environmental impacts and them to compare them.

36. I am not able to detect any comparison of the environmental impacts of the strategic locations which were considered. The assessment has used a reasonable scope of matters to consider and recorded them faithfully. However, it stops short. It does not go on to analyse the results in the way which is intended. There is no prescribed method by which this must be done – but it must be done, one way or another. If it is not done, then much of the value of the assessment work is lost because the plan is not tested and justified by reference to the merits of the reasonable alternatives.
37. The interim document does explain why alternatives were not selected. I have set out the reasons given at paragraph 22 above. Some of those reasons are environmental (landscape; air quality). However, there is no material which links the environmental assessment to the decision as to which strategic locations ‘make the cut’ and which do not.
38. There are categories of impact which amount to something close to an absolute bar on development, e.g. development of a European Site protected by reason of the habitat it provides; functional floodplain; destruction of a heritage asset of the highest order. In other words, there may be a show-stopper. However, most environmental impacts are not in such a category and require both careful weighing and some kind of comparative exercise.

39. In this emerging plan, there are few show-stoppers which prevent development at particular strategic locations (West of Twerton, Bath, might fall into this category, given the impact on the setting of a World Heritage Site). Rather, there is a range of overlapping impacts, both positive and negative. This calls for a comparison of relative merits of the plan and the rejected alternatives. In this instance there is no: (1) comparative assessment or reasoning as between the plan and the rejected alternatives; (2) ranking, or relative evaluation of rejected alternatives so that one can see how the author of the plan has used the available environmental information, i.e. which impacts attracted what degree of weight.
40. Rather, for the strategic locations which form the plan, there is only an amalgam of reasons for their selection. That amalgam includes elements of environmental impacts, spatial planning merits and application of Green Belt considerations. The author of the plan has not been able to start the process of selecting the strategic locations for the in the knowledge that site 'A' is in the lowest quartile of environmental performance, site 'B' outperforms all locations by every criterion etc.
41. In my opinion, the reasonable alternatives to the Plan have not been considered in accordance with the 2004 Regulations.

42. These same difficulties infect the SA in the sense that the SA builds on the SEA and to the extent that the SEA has not been completed (as explained above) neither has the SA. Moreover, the elements of the SA which build on the environmental assessment have not been analysed in any, or any sufficient, comparative way.
43. This brings me to the Transport Strategy. It contains a range of costed and evaluated proposals which do not appear to be a feature of those elements of the SA which might be affected/mitigated by such proposals. So, for example, those SA criteria which are concerned with access, or air quality are potentially affected by the Transport Strategy.
44. It may be that the author of the Plan did in fact take account of the Transport Strategy, but if so, it is far from evident how that was so. For sites east of Bristol, a proposal for a mass transit system seems to me to be potentially relevant. I am unable to see how the potential relevance has either been incorporated into the emerging Plan, nor how it should be disregarded.
45. These features of the emerging Plan are problematic because there is a legal obligation to explain (each of): how environmental considerations have been integrated into the plan or programme; how the environmental report has been taken into account, and; the reasons for choosing the plan or programme as adopted, in the

light of the other reasonable alternatives dealt with. In my opinion, on the material presently available, it will not be possible to comply with these obligations.

46. Section 39(2) Planning and Compulsory Purchase Act 2004 requires that the Plan promote sustainable development. For the above reasons, it is difficult to see how this duty has been discharged.
47. In my opinion, it also follows that the emerging Plan is not sound because it is not justified.
48. I have already referred to the amalgam of reasons which make up the rationale for the strategic locations which feature in the emerging plan. Green Belt review is plainly an important stage in the plan making process.
49. For the reasons given by Patterson J and Jay J in *IM Properties and Calverton Parish Council*, assessment of sustainability is required as a part of national planning policy in respect of review of Green Belt boundaries. In my view, there are two problems with the consideration of Green Belt boundaries in the emerging Plan. First, it is infected by the difficulties in assessing sustainability to which I refer above.

50. Secondly, the author of the emerging Plan has decided that exceptional circumstances exist which justify Green Belt boundary amendment but then mixed the protection of the Green Belt into the site selection decision. This problem is best captured in this extract¹²:

“In line with the Strategic Priority to retain the integrity of the Green Belt, which reflects the national priority to safeguard Green Belts, all sustainable options need to be exhausted before Green Belt locations are selected.”

51. That is problematic because it depends on a false binary assessment (sustainable/not sustainable), whereas it is really an assessment along a spectrum of sustainability. It fails to compare the sustainability of Green Belt and non Green Belt sites. That is contrary to national policy. It places the fact of Green Belt designation ahead of the sustainability assessment in an absolute way.

52. Further, and in addition to points made above in respect of the sustainability appraisal, the application of a policy in this way usurps the purpose of the SEA and SA which is to promote the most environmentally acceptable plan. This is not possible if the

¹² West of England Joint Spatial Plan: The Formulation of the Emerging Spatial Strategy at paragraph 37

Green Belt review is undertaken in such an absolute fashion. This does not mean that the most environmentally acceptable site must, as a matter of law, be included in the plan even if it is in the Green Belt. Rather, it means the author of the emerging Plan must engage with the fact that such a site or location exists in the Green Belt, take account of its environmental performance and give cogent reasons to explain its inclusion/exclusion in the Plan.

53. In this instance, the approach to the Green Belt review does not permit this and in my opinion does not reflect the policy in NPPF 83/84 and the law as found in the 2004 Regulations.

REMEDY

54. Most of the material which is needed to complete the SEA and the SA is available. What is required is: (1) completion of the SEA work in the way described; (2) completion of the SA, likewise; (3) account to be taken for the relevant elements Transport Strategy so far as they may affect the assessment of the locations which have been assessed, or explanation given to make clear why it should be disregarded; (4) the Green Belt review should be repeated having regard to the outcomes of (1) and (2), engaging fully with the outcome of the assessment of the sustainability of the sites.

CONCLUSION

55. I advise accordingly. If any point is unclear, those instructing should contact me in any convenient way.

Richard Kimblin QC

4th January 2018

No. 5 Chambers
London • Birmingham • Bristol
Tel: 0845 210 5555
Email: rk@no5.com

Annex 1

Examination of Development Plan Documents

1. Development Plan Documents are submitted to the Secretary of State for independent examination. Experienced Inspectors are appointed to examine the soundness of the Plan and whether it satisfies the relevant legal requirements.
2. By Section 20(5) of the 2004 Act, the purpose of an independent examination is defined as:
 - “(a) Whether it satisfies the requirements of Sections 19 and 24(1), Regulations under Section 17(7) and any regulations under Section 36 relating to the preparation of Development Plan documents;*
 - (b) Whether it is sound.”*
3. The Inspector is required to (Section 20(7)):
 - “(a) Make recommendations;*
 - (b) Give reasons for the recommendations.”*
4. The requirements under Section 20(5)(a) include the legal requirements under the Environmental Assessment of Plans and Programmes Regulations 2004.
5. The assessment of “soundness” requires, NPPF [182], an assessment of whether the plan is “positively prepared, justified, effective and consistent with national policy.”

6. Assessment of soundness requires a planning judgment: *Cooper Estates Strategic Land Ltd v Royal Tunbridge Wells BC* [2017] EWHC 224 (Admin) per Ouseley J at [24]¹³. The Court will not impugn a planning judgment save in a case of irrationality.

The 2004 Regulations and Sustainability Appraisal

7. The 2004 Regulations implement Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment.
8. By Regulations 8 and 9, the planning authority must determine whether the plan will have significant environmental effects and must prepare an environmental report.
9. Regulation 12 provides:

“12 Preparation of environmental report

(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

(2) The report shall identify, describe and evaluate the likely significant effects on the environment of--

¹³ See also: *Oxsted Residential Ltd v Tandridge DC* [2016] EWCA Civ 414

- (a) *implementing the plan or programme; and*
- (b) *reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.*

(3) *The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of--*

- (a) *current knowledge and methods of assessment;*
- (b) *the contents and level of detail in the plan or programme;*
- (c) *the stage of the plan or programme in the decision-making process; and*
- (d) *the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.*

(4) *Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making or through other [EU] legislation.*

(5) *When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies.*

(6) *Where a consultation body wishes to respond to a consultation under paragraph (5), it shall do so within the period of 5 weeks beginning with the date on which it receives the responsible authority's invitation to engage in the consultation.”*

10. Regulation 16 is concerned with the actions to be taken by the authority upon adoption of a plan. It provides (emphasis added):

“16 Information as to adoption of plan or programme

(1) As soon as reasonably practicable after the adoption of a plan or programme for which an environmental assessment has been carried out under these Regulations, the responsible authority shall--

(a) make a copy of the plan or programme and its accompanying environmental report available at its principal office for inspection by the public at all reasonable times and free of charge; and

(b) take such steps as it considers appropriate to bring to the attention of the public--

(i) the title of the plan or programme;

(ii) the date on which it was adopted;

(iii) the address (which may include a website) at which a copy of it and of its accompanying environmental report, and of a statement containing the particulars specified in paragraph (4), may be viewed or from which a copy may be obtained;

(iv) the times at which inspection may be made; and

(v) that inspection may be made free of charge.

(2) As soon as reasonably practicable after the adoption of a plan or programme--

(a) the responsible authority shall inform--

(i) the consultation bodies;

(ii) the persons who, in relation to the plan or programme, were public consultees for the purposes of regulation 13; and

(iii) *where the responsible authority is not the Secretary of State, the Secretary of State; and*

(b) *the Secretary of State shall inform the Member State with which consultations in relation to the plan or programme have taken place under regulation 14(4),*

of the matters referred to in paragraph (3).

(3) *The matters are--*

(a) *that the plan or programme has been adopted;*

(b) *the date on which it was adopted; and*

(c) *the address (which may include a website) at which a copy of--*

(i) *the plan or programme, as adopted,*

(ii) *its accompanying environmental report, and*

(iii) *a statement containing the particulars specified in paragraph (4),*

may be viewed, or from which a copy may be obtained.

(4) *The particulars referred to in paragraphs (1)(b)(iii) and (3)(c)(iii) are--*

(a) *how environmental considerations have been integrated into the plan or programme;*

(b) *how the environmental report has been taken into account;*

(c) *how opinions expressed in response to--*

- (i) *the invitation referred to in regulation 13(2)(d);*
- (ii) *action taken by the responsible authority in accordance with regulation 13(4),*
- have been taken into account;*
- (d) *how the results of any consultations entered into under regulation 14(4) have been taken into account;*
- the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with; and*
- (f) *the measures that are to be taken to monitor the significant environmental effects of the implementation of the plan or programme.”*

11. Sales J provided a useful review of the European Commission Guidance in *Ashdown Forest*¹⁴:

“95 The European Commission has issued guidance in relation to the [SEA Directive](#) : Implementation of [Directive 2001/42](#) on the Assessment of the Effects of Certain Plans and Programmes on the Environment . Paragraph 5.6 emphasises the importance of review of alternatives under [Article 5](#) : “The studying of alternatives is an important element of the assessment and the Directive calls for a more comprehensive review of them than does the [EIA Directive](#) .” Paragraphs 5.11 to 5.14 and 5.28 deal with the assessment of alternatives, as follows:

“Alternatives

5.11 The obligation to identify, describe and evaluate reasonable

¹⁴ *Ashdown Forest Economic Development Llp v Secretary of State for Communities and Local Government, Wealden District Council, South Downs National Park Authority*
[2014] EWHC 406 (Admin)

alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

5.12 In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the draft plan or programme and for the alternatives [footnote: Compare [Article 5\(3\)](#) and [Annex IV of the EIA Directive](#) which require the developer to provide an outline of the main alternatives studied and an indication of the main reasons for his choice taking into account the environmental effects]. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in [Article 5\(2\)](#) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in [Annex I](#) should thus be provided for the alternatives chosen. This includes for example the information for [Annex I \(b\)](#) on the likely evolution of the current state of the environment without the implementation of the alternative. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects.

5.13 The text of the Directive does not say what is meant by a reasonable alternative to a plan or programme. The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not

specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (e.g. different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes covering long time frames, especially those covering the very distant future, alternative scenario development is a way of exploring alternatives and their effects. As an example, the Regional Development Plans for the county of Stockholm have for a long time been elaborated on such a scenario model.

5.14 The alternatives chosen should be realistic. Part of the reason for studying alternatives is to find ways of reducing or avoiding the significant adverse environmental effects of the proposed plan or programme. Ideally, though the Directive does not require that, the final draft plan or programme would be the one which best contributes to the objectives set out in [Article 1](#). A deliberate selection of alternatives for assessment, which had much more adverse effects, in order to promote the draft plan or programme would not be appropriate for the fulfilment of the purpose of this paragraph. To be genuine, alternatives must also fall within the legal and geographical competence of the authority concerned. An outline of the reasons for selecting the alternatives dealt with is required by [Annex I \(h\)](#). ...”

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

5.28 Information on the selection of alternatives is essential to understand why certain alternatives were assessed and their

relation to the draft plan or programme. A description of the methods used in the assessment is helpful when judging the quality of information, the findings and the degree to which they can be relied upon. An account of the difficulties met will also clarify this aspect. When appropriate, it would be helpful to include how those difficulties were overcome.”

12. The guidance uses strong terms: it is essential understand how alternatives relate to the draft plan. The purpose is to understand the impacts in comparable way, and then to actually compare them.

Legal Challenges to the adoption of Development Plan Documents

13. A plan, or part thereof, which has been adopted under the 2004 Act procedure may be quashed on application to the High Court: s113.
14. The number of such challenges per year is relatively modest. Those challenges which are founded in the legal requirements have had a higher quashing rate than those which are not founded in such hard-edged points. Below, I draw attention to and set out the essential facts of some such cases.

*Heard v Broadland DC*¹⁵

15. The claimant challenged the defendant local authorities' adoption of their Joint Core Strategy (JCS). The JCS was a development plan document created under the Planning and Compulsory Purchase Act 2004 for the local authorities' areas. In order to meet its statutory obligation to conform with the regional spatial

¹⁵ *Heard v Broadland BC* [2012] EWHC 344 (Admin); [2012] Env. LR 23

strategy, the JCS had to provide for stipulated levels of growth in development, but it was for the JCS to decide where that should take place. H was a resident in an area earmarked for major growth in the JCS. He challenged the JCS under s.113 of the Act.

16. In adopting a Joint Core Strategy development plan document earmarking a certain area for major urban growth, which was subject to a Strategic Environmental Assessment under Directive 2001/42, three local authorities had failed to comply substantially with the Directive's requirements since they had not explained their reasons for selecting certain reasonable alternatives and failed to examine those reasonable alternatives in the same depth as the preferred option which had emerged.
17. Judgment for claimant.

*Save Historic Newmarket Ltd v Forest Heath DC*¹⁶

18. The High Court quashed a local authority's core strategy, which proposed an urban extension near to the horse racing town of Newmarket, on the basis that it had failed to comply with the requirements of Directive 2001/42 and the Environmental Assessment of Plans and Programmes Regulations 2004.
19. The claimants (S) sought to quash a core strategy adopted by the defendant local authority. The strategy proposed an urban extension to the north-east of Newmarket for 1,200 dwellings. Before putting forward its final draft strategy for approval, the local authority had produced several reports on the environmental impact of the urban extension and had rejected any alternative

¹⁶ *Save Historic Newmarket Ltd v Forest Heath District Council* [2011] EWHC 606 (Admin); [2011] JPL 1233

locations for the development. S believed that the urban extension would have a serious adverse effect on the horse racing industry in the town and argued that the local authority had failed to comply with requirements laid down in Directive 2001/42 and the Environmental Assessment of Plans and Programmes Regulations 2004.

20. Judgment for claimants.

*Shadwell Estates Ltd v Breckland DC*¹⁷

21. The claimant company (S) challenged the defendant local authority's decision to adopt the Thetford Area Action Plan (TAAP).
22. There were no public law deficiencies in a local authority's adoption of an area action plan confirming the designation of an area for strategic urban expansion. A sustainability appraisal and assessments under the Environmental Assessment of Plans and Programmes Regulations 2004 and the Conservation of Habitats and Species Regulations 2010, relating to the presence of stone curlews in the area, had been adequate.
23. Judgment for defendant.

¹⁷ *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin)

*Ashdown Forest*¹⁸

24. An appeal against the first instance judgment of Sales J was allowed and relief was granted¹⁹. The appeal was allowed in respect of a policy in a core strategy aimed at preserving the ecological integrity of a forest by the creation of a 7km zone around it where new residential development would be required to contribute to "Suitable Alternative Natural Greenspaces". The policy was vitiated by the local planning authority's failure to comply with its duty under the 2004 Regulations to assess reasonable alternatives to the 7km zone.

NPPE

25. In respect of plan making and sustainability, the NPPF provides:

151. Local Plans must be prepared with the objective of contributing to the achievement of sustainable development². To this end, they should be consistent with the principles and policies set out in this Framework, including the presumption in favour of sustainable development.

152. Local planning authorities should seek opportunities to achieve each of the economic, social and environmental dimensions of sustainable development, and net gains across all three. Significant adverse impacts on any of these dimensions should be avoided and, wherever possible, alternative options which reduce or eliminate such impacts should be pursued. Where adverse impacts are unavoidable, measures to mitigate the

¹⁸ *Ashdown Forest Economic Development Llp v Secretary of State for Communities and Local Government, Wealden District Council, South Downs National Park Authority*
[2014] EWHC 406 (Admin)

¹⁹ [2015] EWCA Civ 681; [2015] JPL 1380

impact should be considered. Where adequate mitigation measures are not possible, compensatory measures may be appropriate.

NPPG

26. SA is addressed in the Planning Practice Guidance, thus (noting that the objective is to ensure that meaningful comparisons can be made and that the overall sustainability of each option should be made clear – emphasis added):

How should the sustainability appraisal assess alternatives and identify likely significant effects?²⁰

The sustainability appraisal needs to compare all reasonable alternatives including the preferred approach and assess these against the baseline environmental, economic and social characteristics of the area and the likely situation if the [Local Plan](#) were not to be adopted.

The sustainability appraisal should predict and evaluate the effects of the preferred approach and reasonable alternatives and should clearly identify the significant positive and negative effects of each alternative.

The sustainability appraisal should identify, describe and evaluate the likely significant effects on environmental, economic and social factors using the evidence base. Criteria for determining the likely significance of effects on the environment are set out in [schedule 1 to the Environmental Assessment of Plans and Programmes Regulations 2004](#).

The sustainability appraisal should identify any likely significant adverse effects and measures envisaged to prevent, reduce and, as fully as possible, offset them. The sustainability appraisal must consider all reasonable alternatives and assess them in the same level of detail as the option the plan-maker proposes to take forward in the Local Plan (the

²⁰ Paragraph: 018 Reference ID: 11-018-20140306

preferred approach).

Reasonable alternatives are the different realistic options considered by the plan-maker in developing the policies in its plan. They must be sufficiently distinct to highlight the different sustainability implications of each so that meaningful comparisons can be made. The alternatives must be realistic and deliverable.

The sustainability appraisal should outline the reasons the alternatives were selected, the reasons the rejected options were not taken forward and the reasons for selecting the preferred approach in light of the alternatives. It should provide conclusions on the overall sustainability of the different alternatives, including those selected as the preferred approach in the Local Plan. Any assumptions used in assessing the significance of effects of the Local Plan should be documented.

The development and appraisal of proposals in Local Plan documents should be an iterative process, with the proposals being revised to take account of the appraisal findings. This should inform the selection, refinement and publication of proposals (when preparing a Local Plan, [paragraph 152](#) of the National Planning Policy Framework should be considered.

**IN THE MATTER OF LAND AT
WARMLEY, EAST BRISTOL, SOUTH
GLOUCESTERSHIRE**

BARRATT HOMES (BRISTOL)

**BLOOR HOMES (SOUTHWEST)
LIMITED**

**IN THE MATTER OF THE WEST OF
ENGLAND JOINT SPATIAL PLAN
(NOVEMBER 2017)**

OPINION

Barton Willmore LLP
101 Victoria Street
Bristol
BS1 6PU

Richard Kimblin QC

No5
CHAMBERS

London • Birmingham • Bristol
Tel: 0845 210 5555
Email: rk@no5.com

Ref: 717101