

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

In the matter of a claim under Section 113 of the Planning and Compulsory Purchase Act  
2004

BETWEEN:

COGENT LAND LLP

Claimant

v

ROCHFORD DISTRICT COUNCIL

Defendant

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PARTICULARS OF CLAIM

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Time Estimate – 2 days (including judgment).

[The use of bold or underlining is used for emphasis unless otherwise attributed.]

**Section 1 – Introduction**

1. This is an application to quash the adoption of parts of the housing chapter of the Rochford Core Strategy ("RCS") pursuant to Section 113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). The RCS was adopted by the Defendant ("the Council") on 13 December 2011. The adoption followed an Examination in Public ("EIP") into a draft version of the same document by a planning inspector ("the Inspector") appointed by the Secretary of State for Communities and Local Government ("the Secretary of State").
2. The Claimant owns the freehold interest of land to the south of Stambridge Road ("the Claimant's site") which is situated about 500 metres to the east of Rochford on land

within what is known for these purposes as East Rochford. The Claimant's site was acquired in February 2008 when the RCS was in the early stages of evolution and no decisions had yet been taken (in the RCS) as to where new housing allocations should be made save that new housing development should be focussed on the highest tier settlements (see below). These highest tier settlements include Rochford where the Claimant's site lies.

3. The Claimant's site has an area of approximately 20 hectares with a developable area having been identified by the Claimant of just less than 12 hectares. The Claimant's site has historically been used for agriculture and is currently within the Green Belt.
4. The Defendant is the local planning authority for the administrative area in which the Claimant's site is located and is under a statutory duty (pursuant to the 2004 Act) to produce a development plan for that area. The RCS forms part of the development plan.
5. There is a current planning application for residential development relating to the Claimant's site before the Council. It is yet to be determined. An earlier planning application for residential development on the Claimant's site was refused by the Council (see below).
6. The Claimant contends that the Council has acted unlawfully in relation to the production of the RCS by:
  - 6.1. Unlawfully pre-determining the areas which would be allocated for housing.
  - 6.2. Purporting to undertake sustainability appraisals/strategic environmental assessment of such areas which fail to meet the necessary legal requirements for such documents.
  - 6.3. Purporting to undertake a further 'remedial' sustainability appraisal/strategic environmental assessment which was done at a time and in a manner which also failed to comply with the necessary legal requirements.

- 6.4. Adopting the conclusions of the Inspector in relation to the soundness of the RCS which clearly failed to have regard to a material consideration or were perverse in the light of the facts.
  - 6.5. Adopting the reasoning of the Inspector who failed to properly understand the representations of the Claimant.
  - 6.6. Adopting the conclusions of the Inspector who had failed to comply with the basic requirements of natural justice.
  - 6.7. Adopting the reasoning of the Inspector who failed to give adequate reasons as to why the Council had not acted unlawfully.
7. In summary the Claimant submits that the Council has acted unlawfully within the meaning of Section 113(3) of the 2004 Act by:
    - 7.1. Ground 1 – failing to comply with the legal requirements for sustainability appraisal ("SA") and strategic environmental assessment ("SEA") of proposals in the RCS in respect of the allocation of housing sites within the housing chapter by reference both to European and domestic legislation; and
    - 7.2. Ground 2 – adopting the failures, alternatively failing to remedy the errors and omissions of the Inspector and/or the EIP process.

## **Section 2 – The Legal Framework**

8. The validity of development plan documents can be challenged expressly by way of Section 113 of the 2004 Act if the challenge falls within the requirements of the Section.
9. Section 113 provides where relevant:

*“(1) This section applies to*

*...*

*(c) a development plan document.*

*(2) A relevant document must not be questioned in any legal proceedings except in so far as is provided by the following provisions of this section.*

(3) *A person aggrieved by a relevant document may make an application to the High Court on the ground that:*

*(a) the document is not within the appropriate power;*

*(b) a procedural requirement has not been complied with*

(4) *But the application must be made not later than the end of the period of six weeks starting with the relevant date.*

(5) *The High Court may make an interim order suspending the operation of the relevant document-*

*(a) wholly or in part;*

*(b) generally or as it affects the property of the applicant.*

(6) *Subsection (7) applies if the High Court is satisfied-*

*(a) that a relevant document is to any extent outside the appropriate power;*

*(b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.*

(7) *The High Court may-*

*(a) quash the relevant document;*

*(b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.*

(7A) *If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.*

(7B) *Directions under subsection (7A) may in particular –*

*(a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;*

*(b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;*

*(c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);*

*(d) require action to be taken by one person.*

*(7C) The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document –*

*(a) wholly or in part;*

*(b) generally or as it affects the property of the applicant.*

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

*(9) The appropriate power is –*

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

*(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document.*

*(11) References to the relevant date must be construed as follows:*

*(c) for the purposes of the development plan document (or a revision to it) the date when it is adopted by the Local Planning Authority or approved by the Secretary of State (as the case may be).*

10. A core strategy is a development plan document by virtue of regulation 7 of the Town and Country Planning (Local Development) (England) Regulations 2004 ("the 2004 Regulations").

11. A core strategy is defined in Regulation 6(1)(a) of the 2004 Regulations. Regulation 6(1) deals with the contents of a core strategy and Regulation 6(2) sets out the matters that are dealt with in other development plan documents such as area action plans and site allocations documents.

12. Once adopted by the local planning authority a development plan document becomes part of the statutory development plan with the consequence that Section 38(6) of the 2004 Act applies which states that:

*“if regard is to be had to the development plan for the purposes of any determination to be made under the planning acts the determination must be in accordance with the plan unless material considerations indicate otherwise”*

13. The Claimant, as an owner of land that has not been identified as suitable for housing in the RCS, is an aggrieved person for the purposes of this challenge. This claim has been made within the statutory time period of six weeks and the actions of the Council in the view of the Claimant fall within the grounds of statutory challenge as set out in Section 113(3) of the 2004 Act.

14. The Court of Appeal in *Blyth Valley BC v Persimmon Homes (North East) Ltd and others* [2009] JPL 335 have confirmed that, as with Sections 287-289 of the Town and Country Planning Act 1990, Section 113 of the 2004 Act *“in effect amounts to an assertion that the adoption of the document in question was ultra vires and it brings into play the normal principles of administrative law (per Keene LJ at para.8).*

### **Section 3 – The Factual Background**

15. The factual background is set out in 2 sections:

- 15.1. Summary of the key dates.
- 15.2. The factual background in detail.

### **Summary of the key dates**

DATE	EVENT
2005	Defendant commences preparation of the Core Strategy

September 2006	Defendant publishes <b>Core Strategy Issues and Options</b>
September 2006	Defendant publishes Strategic Environmental Assessment and Sustainability Appraisal (as undertaken by Essex County Council)
May 2007	Defendant publishes <b>Core Strategy Preferred Options</b>
June 2007	Defendant publishes Preferred Options Document Sustainability Appraisal and Strategic Environmental Assessment
February 2008	Claimant purchases freehold interest in the Claimant's site
October 2008	Defendant publishes revised <b>Core Strategy Preferred Options</b>
November 2008	Defendant publishes Sustainability Appraisal/Strategic Environmental Assessment in respect of the Preferred Options
17 December 2008	Claimant submits representations to the Defendant in respect of the Core Strategy Preferred Options
4 September 2009	Claimant submits a planning application to the Defendant for the proposed development of the Claimant's site (up to 326 dwellings)
September 2009	Defendant publishes <b>Pre-Submission Core Strategy</b>
September 2009	Defendant publishes Sustainability Appraisal/Strategic Environmental Assessment in respect of the Pre-Submission Core Strategy
14 October 2009	Claimant submits representations to the Defendant in respect of the Pre-Submission Core Strategy
19 November 2009	Defendant refuses to grant planning permission for the proposed development of the Claimant's site
14 January 2010	<b>Defendant submits Core Strategy for Examination by the Secretary of State</b>
5 February 2010	Statement of Common Ground, as between the Claimant and the Defendant, in relation to the Claimant's planning appeal

3 March 2010	Claimant submits representations to the Defendant in respect of the Submission Draft Core Strategy and requests that the Examination be suspended
March 2010	Inspector refuses to suspend the Examination [notified to Claimant on 8 April 2010]
13 April 2010	Addendum Statement of Common Ground, as between the Claimant and the Defendant, in relation to the Claimant's planning appeal
11 – 21 May 2010	Examination hearings into the Submission Draft Core Strategy
17 June 2010	Defendant publishes Core Strategy Housing Locations – Audit Trail (including map)
26 June 2010	Letter from Councillor Mason (of the Defendant) to the Inspector (unsoundness of the Core Strategy)
19 July 2010	Claimant requests the Inspector to suspend the Examination
22 July 2010	Secretary of State dismisses Claimant's planning appeal
7 September 2010	Examination hearings into the Submission Draft Core Strategy
9 December 2010	Claimant submits first request for information to the Defendant
December 2010	Secretary of State consents to judgment, quashing his previous dismissal of the Claimant's planning appeal
1 – 2 February 2011	Examination hearings into the Submission Draft Core Strategy
24 February 2011	Claimant submits second request for information to the Defendant [this was responded to on 24 March 2011]
2 March 2011	Meeting between the Claimant and the Defendant
25 March 2011	Judgment handed down in <i>Forest Heath</i>
7 April 2011	Claimant requests that the Examination be suspended following the judgment in <i>Forest Heath</i>
11 May 2011	Defendant requests that the Inspector's report not be issued to allow the Defendant to carry out a review of the Sustainability Appraisal/Strategic Environmental



	Assessment in respect of the Submission Draft Core Strategy
11 May 2011	Inspector agrees to delay publication of her report
June 2011	Claimant withdraws its planning appeal in respect of the Claimant's site
June 2011	Defendant publishes Addendum to its Sustainability Appraisal /Strategic Environmental Assessment in respect of the Submission Draft Core Strategy
30 June 2011	Claimant submits third request for information to the Defendant [this was responded to on 27 July 2011]
8 July 2011	Claimant submits representations to the Defendant in respect of the Addendum to the Sustainability Appraisal
27 July 2011	Defendant requests the Inspector to suspend the Examination until December 2011
11 August 2011	Inspector refuses to suspend the Examination
27 October 2011	Inspector submits her report in respect of the soundness of the Submission Draft Core Strategy to the Secretary of State
12 December 2011	Claimant repeats request that Defendant withdraws the Core Strategy
13 December 2011	Defendant resolves to adopt the Core Strategy (incorporating changes recommended by the Inspector)
13 December 2011	Defendant adopts the Core Strategy
23 December 2011	Claimant submits revised planning application to the Defendant for the proposed development of the Claimant's site (up to 251 dwellings)

## The factual background in detail

### *The evolution of the Housing Chapter of the RCS*

16. The Council has been required by the provisions of the East of England Plan (being the relevant Regional Strategy for its area ("RS")) to provide an additional 4600 additional dwellings between 2001 and 2021 [RCS paragraph 1.25]. The Council is required to plan for the delivery of housing for at least 15 years from the date of the adoption of the RCS. In essence, based on the RS, the Council is required to provide 250 houses per annum to 2021.
17. The RCS is intended to set out the general locations for housing development and the strategic approach to the delivery of housing.
18. In taking the RCS forward there were two major issues in relation to housing for the Council to deal with: (i) how to meet the requirement for 250 houses per year (i.e. whether to release land from the Green Belt); and (ii) where the housing should be located in terms of the settlements within its district.
19. In relation to the first issue the Council decided that in order to fully meet its housing requirement land was required to be released from the Green Belt. In Policy H2 of the emerging RCS certain areas were identified for future release from the Green Belt. For present purposes, the most relevant being the identification of the area of West Rochford. It was to provide 450 dwellings by 2015 and a further 150 from 2015 to 2021. This was to be achieved by the development of Green Belt land.

### *Draft Core Strategy Issues and Options 2006*

20. In relation to the second issue, the Council decided to grade its settlements into tiers in the Draft Core Strategy Issues and Options in 2006 ("the 2006 CS").

21. The relevant settlement in this matter is Rochford which at all material times was classified within the highest tier along with Hawkwell/Hockley and Rayleigh [i.e. a total of 3 settlements within the district] as being the most suitable for the provision of further housing capable of sustaining some expansion, infilling and redevelopment.
22. In the 2006 CS the option most likely to be adopted in terms of the distribution of housing was identified as being one which allocated 90% of proposed housing units to this top tier of settlements (including Rochford). No further detail beyond that in terms of spatial allocation was set out. The 2006 CS provided no indication as to where within Rochford such housing would be located.
23. Consequently, there was no SEA or SA of reasonable alternative sites in relation to, or in support of, the 2006 CS.

#### *The Core Strategy Preferred Options 2007*

24. The Core Strategy Preferred Options 2007 ("the 2007 CS") re-iterated that the intention was that the three highest tier settlements would be the location for 90% of the new housing required.
25. Importantly, for the first time an exact number of units was attributed to the Rochford/Ashingdon settlement area and **1000 units were thus identified in preferred option 5C**. There was no further identification as to where within the settlement those 1000 units would be situated. There was some comment on the settlement's characteristics and the possible constraints that existed:

*“Rochford/Ashingdon has in theory reasonably good transport links to Southend and the A127, but in practice the area is heavily congested with congestion on the Ashingdon Road being amongst the worst in the district. To the west, Hall Road links directly to the Cherry Orchard Way link road, but the railway bridge at the eastern end of Hall Road is a severe constraint on traffic movements. There are environmental designations to the west side of Ashington north of the railway line and Rochford Town Centre is a conservation area*

*and its setting must be protected. There are some opportunities for expansion, though road infrastructure will need to be carefully considered [our emphasis]" [paragraph 4.6.20]*

26. It is of note that when mentioning constraints in the 2007 CS, there is no identification of any specific concern with East Rochford.
27. In addition, there is no comparative assessment/analysis of any specific sites within Rochford within the SEA and SA accompanying the 2007 CS.

#### *Meeting between Claimant's planning team and the Council*

28. In July 2008 the Claimant's appointed planning consultants met with the Council's Head of Planning (amongst others) at which the Claimant's site was discussed. It was indicated that the next version of its core strategy might more precisely identify the general distribution of the district's housing allocation.
29. There was no mention of any constraint that might impact upon the ability of the Claimant's site to meet housing need or any identification of any concerns which might be identified in the next version of the core strategy.
30. A further meeting was held with the Council's Head of Planning on 24 September 2008 when it was revealed that officers of the Council had submitted a report to the Council's Local Development Framework sub-committee the previous day (23 September 2008) and that the Claimant's site had not been identified as a preferred site for housing by Members. The officer stated that the Claimant's site had not been so identified for housing due to concerns about infrastructure and education.
31. No evidence of such concerns was provided. No analyses of these issues had been contained in any SA, SEA or any other document.

#### *The Core Strategy Revised Preferred Options*

32. The Core Strategy Revised Preferred Options 2008 (as published in October 2008) ("the 2008 CS") continued to identify a need for Green Belt land to be released to meet future housing requirements. It was now the expectation that in meeting the housing requirement, 30% of new housing would be on previously developed land and 70% on green field urban extensions [page 24].
33. Draft Policy H2 of the 2008 CS identified the land required to be allocated for the provision of new housing and totalled the identification of 2500 new units and attributed a number of units within this number to specific areas within the district.
34. For the first time the number of units was broken down into specific geographic areas.
35. October 2008 marks the point in time where the Council formally identified for the first time a preference for West Rochford for the location of new housing in the core strategy.
36. In particular, draft Policy H2 identified that a total of 400 units were to be provided at West Rochford: 300 by 2015 and 100 by 2021. In addition, draft Policy H3 of the 2008 CS forecast an additional 150 units as being provided within West Rochford post 2021. As such, the 2008 CS identified the West Rochford area for the provision of **550 dwellings**.
37. Draft Policy H2 also specified alternative options to meet the housing need. There is no indication within the 2008 CS as to how these sites were identified, assessed or considered.
38. In relation to East Rochford (within which the Claimant's site is located), the draft policy stated:

*"It is considered that west Rochford is a more suitable location given its proximity to the train station, town centre and its relationship with areas of significant employment growth potential at London Southend airport and its environs. Traffic flows from new development to the east of Rochford would be predominantly through the centre of the town centre resulting in **significant congestion** [our emphasis]" [see page 30 of the 2008 CS]*

39. No indication is given either as to what evidence has been considered or why the housing options in East Rochford have only been considered in a comparative exercise with West Rochford and not the other potential housing sites (including Green Belt sites) identified in the 2008 CS.
40. A sustainability appraisal technical report was produced by Enfusion in November 2008 ("the 2008 SA") on behalf of the Council. In relation to the identification of West Rochford as the preferred housing site within the district, it is said that the: *"actual locations for growth proposed in Policy H2 and H3 are considered to be the most sustainable options available"* [paragraph 5.10]. However, no evidence or comparative analysis of alternatives is to be found within the 2008 SA (or elsewhere) to support this conclusion<sup>1</sup>. At no place does it undertake any consideration of alternative sites/strategies notwithstanding the decision in the 2008 CS to prefer West Rochford.

*The LDF Committee meeting on 9 February 2009*

41. The Council's Local Development Framework sub-committee ("the LDF Committee") met to consider the emerging core strategy at its meeting on 9 February 2009. The 2008 SA was summarised in an officer's report to the LDF Committee which stated that: *"The [2008] SA assessed each of the preferred options against a number of sustainability criteria including their cumulative effects.*
42. There is, however, no comparative assessment of options in the 2008 SA. There is no meaningful analysis of reasonable alternatives.

*The LDF Committee meeting on 1 April 2009*

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<sup>1</sup>It is notable that the Claimant requested sight of such documentation of the Council in writing on six occasions since December 2008 pursuant to the Freedom of Information Act 2000/Environmental Information Regulation 2004.