Claim No. CO/ 605/ 2012

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

PARTICULARS OF CLAIM

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 **Core Strategy Issues and Options**
September 2006	Defendant publishes Strategic Environmental Assessment and Sustainability Appraisal (as undertaken by Essex County Council)
May 2007	Defendant publishes **Core Strategy Preferred Options**
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 **Core Strategy Preferred Options**
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 **Pre-Submission Core Strategy**
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	**Defendant submits Core Strategy for Examination by the Secretary of State**
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 *Forest Heath*
7 April 2011	Claimant requests that the Examination be suspended following the judgment in *Forest Heath*
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[1]. 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

[1]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.

43. At a closed meeting of the LDF Committee on 1 April 2009, the Council resolved to pursue the preferred options as identified in the 2008 SA. Again, despite requests, no information has been provided to indicate that alternative sites were properly considered at this meeting.

The Core Strategy Submissions Document September 2009

44. The next draft of the core strategy was the Core Strategy Submissions Document September 2009 ("the 2009 CS") i.e. the version considered by the Inspector. A revised draft of Policy H2 increased the allocation of housing within West Rochford to: (i) 450 for the period to 2015; and (ii) 150 from 2015-21. The revised draft policy did not include any forecasted allocation after the plan period. Therefore, the version considered by the Inspector planned 600 units at West Rochford.

45. The 2009 CS was itself subject to a further Sustainability Appraisal Technical Report, as prepared by Enfusion, which was issued in September 2009. Again, this document did not include any specific appraisal or consideration of alternative sites. Therefore, prior to June 2011 none of the SAs or SEAs undertook any material consideration of alternative sites.

Claimant's Planning Application

46. In September 2009 the Claimant submitted a planning application ("the Application") for the residential development of the Claimant's site to provide 326 dwellings and related infrastructure. It is material to note that neither the local education authority nor the local highway authority objected to the Application.

47. Nevertheless, the Application was refused by the Council (acting by its Development Committee) on 19 November 2009; the Claimant appealed; and that appeal was subject to a public inquiry in April 2010.

48. In the course of the appeal process, the Claimant and the Council signed a Statement of Common Ground ("SoCG") and Addendum Statement of Common Ground which between them noted that they agreed that (amongst other things): (i) the highway authority had no objection to the development of the Claimant's site on traffic or congestion grounds; and (ii) any traffic increase in the centre of Rochford would not warrant refusal of the proposed development [paragraph 6.3.6 of the SoCG].

49. This latter acknowledgment by the Council confirmed that it no longer relied upon the main concerns it had previously articulated as to constraints to development in the area of East Rochford (per the previous (and at that stage, current) versions of the core strategy).

50. The appeal in relation to the Claimant's site was dismissed but that decision was quashed by a consent order issued by the High Court on 20 April 2011. Consequently, the appeal was remitted to the Secretary of State for redetermination but it was subsequently withdrawn by the Claimant on 3 June 2011. A new planning application (for the development of up to 251 dwellings on the Claimant's site) was submitted to the Council on 23 December 2011.

The Inspector's examination of the Core Strategy

51. By virtue of Section 20(5) of the 2004 Act the RCS was subject to independent examination.

52. The RCS was submitted to the Secretary of State for independent examination on 15 January 2010. The Inspector held oral hearings into the 2009 CS on 11-21 May 2010, 7 September 2010 and 1-2 February 2011. During the currency of the EIP the Claimant made a number of requests that it be suspended and that the 2009 CS be formally withdrawn by the Council. Each of the Claimant's requests was refused by the Inspector/the Council.

53. During the examination Councillor Mason (an elected Member of the Council) wrote to the Inspector on 26 June 2010 stating that: *"I have looked through the audit trail and I cannot find a trail to the actual evidence that the Council have undertaken a comprehensive and detailed (in planning terms) comparative assessment of the impact of the Core Strategy locations, in that they are identified as areas for housing growth in terms of the impact on the green belt, the effect on the landscape and highways".*

Meeting with the Council on 2 March 2011

54. On 2 March 2011 the Claimant's appointed planning consultants (accompanied by a representative of the Claimant's asset manager) attended a meeting with Councillors Cutmore and Hudson (elected Members of the Council) and the Council's Head of Planning. As recorded in a contemporaneous note of that meeting, Councillor Hudson confirmed that the sustainability work undertaken by Enfusion (for the Council) to date was a post site selection exercise and stated that its appointed consultants were asked to verify Members' own findings and conclusions on those sites they wished to see identified for development.

55. In this context, it is important to note that, by letter to the Council dated 11 May 2011, the Inspector stated:

> *"If you decide to carry out further work on the SA you must bear in mind that it is* ***an integral part of the plan making process,*** *which should be transparent and open to public participation.* ***It must not be undertaken as an exercise to justify a predetermined strategy****. You should therefore draw up a timetable for the further work which ensures adequate opportunities both for public participation, and for the Council to consider, fully, whether the additional evidence gathered gives* ***rise to a need to propose changes to the Plan****.* [our emphasis]"

Sustainability Appraisal Addendum June 2011

56. In March 2011 an important judgment was given in relation to the consideration of alternative sites as part of the SEA process of development plan documents (see *Forest Heath* below).

57. The consistent position of the Council and its consultants was that the decision of the High Court in *Save Historic Newmarket Ltd v. Forest Heath District Council [2011] EWHC 606* represented some change in law and practice concerning the review of development plans and the application of European Directive 2001/42/EC ("the SEA Directive"). For example, we note the following references:

    57.1. *'In the light of the recent Forest Heath ruling, Enfusion advised the Council that it would be prudent to undertake a review of the CS SA, ensuring compliance with the* ***new case law on SEA arising from this ruling*** [our emphasis].*'* [paragraph 1.3];

    57.2. *The Council 'commissioned Enfusion to undertake a compliance review of the SA work undertaken...it also paid particular attention to the recent judgement* [sic] *[in Forest Heath] that now provides case law with regard to assessment of alternatives in SEA'* [2008 SA adoption statement Appendix 1, paragraph 1.1 and 1.3];

    57.3. *'During the examination into the soundness of the Rochford CS* ***new case law*** *in the form of the Forest Heath case provided an* ***additional interpretation of the EU SEA Directive*** [our emphasis]' [page 21 of the Core Strategy Sustainability Appraisal Adoption Statement December 2011];

    57.4. *An addendum to the Core Strategy SA was produced in June 2011 following the Forest Heath ruling which provided an* ***additional interpretation on undertaking SEAs*** [RCS, page 25, 5th bullet point].

58. For this reason, a SA Report Addendum was undertaken in May 2011 and was published for consultation in June 2011 ("the SA Addendum").

59. In the SA Addendum it is stated that:

    59.1. *"in response to the findings of the Forest Heath case this addendum SA report provides a summary of the alternatives considered throughout the production of the plan setting out the reasons for selecting/rejecting those alternatives. It also includes*

consideration of more detailed housing locations ***(than previously appraised)*** [our emphasis]" [paragraph 1.4];

59.2. *"This section of the SA report addendum provides a clear summary of the alternatives considered throughout the SA process and* ***the reasons for selecting/rejecting those alternatives*** [our emphasis]" [paragraph 2.2];

59.3. *"The SA/SEA of the Rochford LDF Core Strategy has been an iterative and ongoing process with plan making since 2006. SA/SEA reports* ***including the consideration of alternatives have been prepared*** *and made available for public consultation at each stage* [our emphasis]" [paragraph 2.5];

59.4. *"the recent publication (in February 2010) of the LDF Allocations DPD Discussion and Consultation Document has also* ***enabled a further consideration of the realistic locations for development,*** *as it incorporates the findings of the call for sites process and SHLAA* [our emphasis]" [paragraph 3.2].

60. Additionally the SA Addendum makes clear that it seeks to *"further develop this appraisal, considering the more detailed locations for development within individual top and second tier settlements"* [paragraph 3.2].

61. In relation to East Rochford (referred to in the document as location 3) it is said that *"it was not selected* ***as it was not considered as sustainable*** *a location as West Rochford. There are greater environmental constraints to the east of Rochford including Natura 2000 and Ramsar sites. Development to the east of Rochford has the potential to be affected by noise from London Southend Airport, given its relationship to the existing runway. Whilst a small quantum of development may be accommodated within this general location avoiding land subject to physical constraints, such an approach is less likely to deliver community benefits, and would necessitate the identification of additional land, diluting the concentration of development and thus reducing the sustainability benefits of focussing development on larger sites. Location 3 is also unlikely to aid the delivery of improvements to King Edmund School. Furthermore it would generate traffic on local networks for non-local reasons i.e. traffic to Southend would be likely to be directed through the centre of Rochford, including through the Conservation Area* [our emphasis]" [page 10].

62. The appendices to the SA Addendum then purportedly set out a specific sustainability appraisal of both West and East Rochford.

Iceni letter of 24 June 2011

63. The Claimant's planning consultants provided a consultation response in relation to the SA Addendum by letter dated 24 June 2011 to the Council. The letter emphasised that the SA Addendum:

63.1. was an inadequate response (at this late stage) to matters which go to the heart of the core strategy process, namely the housing and Green Belt strategy.

63.2. fails to clarify when or how or if the alternatives were considered and the alternatives selection and rejection process occurred.

63.2.1. fails to consider the matters which had been agreed in the SoCG in relation to the Claimant's planning appeal and whether this altered the judgement made in the 2008 CS.

The Inspector's Report to the Council

64. On 27 October 2011, the Inspector submitted her report to the Council.

65. In relation to the SA work carried out by the Council, the Inspector concluded that:

"It is alleged that the Council failed to carry out a comparative assessment of alternative broad locations for growth against certain matters such as the relative contribution to the Green Belt. However the SA is informed by a comprehensive scoping report and I find no reason to conclude that any significant effects have not been taken into account. The SA addendum (July 2011) provides a more detailed appraisal of the alternative locations considered, and was subject to public consultation. I have taken into account criticisms that the Addendum was produced after the submission draft plan, but sustainability appraisal is an iterative process. Overall there is no compelling reason to question the integrity of the SA as a whole, and no convincing evidence to

dispute the conclusion of the SA that the chosen locations are the most sustainable, and therefore the CS is sound in relation to this issue [paragraphs 31 and 32 of the Inspector's report]

The Council's Adoption of the RCS

66. On 13 December 2011, the Council formally adopted the RCS.

Section 4 – The law and policy relevant to Development Plans

67. Under the 2004 Act (as amended), the development plan for an administrative area (such as that of the Council) consists of a Regional Strategy and the local development framework ("LDF") (which has a number of components such as a core strategy and area action plans). The LDF is required to be in general conformity with the RS by Section 24 of the 2004 Act.

68. The Government has indicated its wish to abolish RSs and is empowered to do so by commencement order pursuant to the provisions of the Localism Act 2011, subject to the outcome of a process of SEA as to the effects of such revocation (per the requirements of the SEA Directive).

69. The 2004 Act sought to distinguish between different types of development plan documents. Core strategies are intended to set out the authority's general strategic policies such as the broad location for development. They can also identify large scale strategic allocations.

70. National policy guidance as encapsulated within PPS 12 emphasises that the purpose of core strategies is to set out the *"overall vision and strategic objectives for the area"* (as opposed to specific site allocations) [paragraph 4.1]. The guidance also states that *"core strategies may allocate strategic sites for development where they are considered central to the achievement of the strategy"* [paragraph 4.6] and *"it may be preferable for the site area to be delineated in outline rather than detailed terms, with site specific criteria set out to allow more*

precise definition through master planning using an area action plan or through an supplementary planning document (SPD)".

71. The production of development plan documents are guided by fundamental legal principles as follows:-

71.1. **Independent examination is required prior to adoption** - Section 20(1) of the 2004 Act requires that every local planning authority submit every development plan document to the Secretary of State for independent examination.

71.2. **The core strategy is required to be sound** - Section 20(5)(b) of the 2004 Act deals with the question of soundness and states that one of the purposes of the independent examination of a development plan document *"is to determine ...whether it is sound"*. The concept of soundness is not defined within the 2004 Act or within the Regulations but further guidance is provided within PPS 12. Paragraph 4.52 of PPS 12 provides that *"To be sound a Core Strategy should be JUSTIFIED, EFFECTIVE, and consistent WITH NATIONAL POLICY"*.

71.3. **The core strategy must be founded on a robust and credible evidential base** - In order to be justified in the terms of PPS 12, the core strategy must be founded on a robust and credible evidence base [PPS 12 paragraph 4.52]. The core strategy needs to be based on thorough evidence [PPS 12, paragraph 4.37]. As part of that process the SA should perform **a key role in providing a sound evidence base for the plan and form an integrated part of the plan preparation process** [paragraph 4.43] and the SA **should inform the evaluation of alternatives** [paragraph 4.43].

72. **The proposals within a core strategy must be subject to a SA** - Section 19(5) of the 2004 Act requires a local planning authority to *"carry out an appraisal of the sustainability of the proposals in each development plan document"* and to *"prepare a report of the findings of the appraisal"*. This is known as a SA. In summary a SA must assess the economic, social and environmental sustainability of the proposals in a draft development plan document (including a draft core strategy) and **consider those proposals against reasonable alternatives** [our emphasis]" [see PPS 12 paragraphs 4.38-4.43]. Consequently, where a proposal is included in a proposed core strategy whether in detailed or outline terms the

economic, social and environmental sustainability of the site, including a comparison with reasonable alternatives **must** be addressed **within the SA** of the core strategy.

Section 5 - Legal submissions

73. The Claimant challenges the adoption of the RCS on two grounds, namely that:

73.1. Ground 1 – The Council failed to comply with the legal requirements for SA and SEA of proposals in the RCS in respect of the allocation of areas for future housing development within the Housing Chapter; and

73.2. Ground 2 – The Inspector in carrying out the EIP failed to comply with the legal requirements imposed upon her by both statute and natural justice. The Defendant adopted and/or failed to rectify these errors.

Ground 1 – The Council failed to comply with the legal requirements for sustainability appraisal and strategic environmental assessment of proposals in the RCS in respect of the allocation of areas for future housing development within the Housing Chapter

Legal Principles

74. The relevant legal principles are set out in the SEA Directive, the 2004 Act and the Regulations. Guidance on their application is contained within both EC Guidance and UK guidance as set out below.

The SEA Directive

75. The requirement for SA of development plan documents is intended to meet the requirements of the SEA Directive as transposed into domestic law by the

Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"). Preamble (2) to the SEA Directive affirms the importance of assessing the likely environmental effects of plans and programmes.

76. The SEA Directive applies to any plans and programmes and their modifications. It is trite law that a core strategy is one to which the SEA directive applies and therefore a SA is required.

77. It is important to note that Article 1 sets out the objective of the SEA Directive, namely: **to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans**.

78. The SEA Directive states in Preamble (4) that *"Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the member states because it ensures that* ***such effects of implementing plans and programmes are taken into account during their preparation and before their adoption*** (our emphasis)"

79. Article 2 defines an *"'environmental assessment' [it] shall mean the preparation of an environmental report, the carrying out of consultations,* ***the taking into account of the environmental report and the results of the consultation in the decision making*** *and the provision of information on the decision in accordance with Articles 4 to 9* (our emphasis)"

80. Article 4(1) entitled *"general obligations"* requires the environmental assessment to be carried out during the preparation of the plan and before its adoption.

81. Article 5 of the SEA Directive states:

81.1.1. "[1] *Where an EA is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme,* ***and reasonable alternatives taking into account the objectives and geographical scope of the plan or programmes, are described, evaluated and identified.*** *The information to be given for this purpose is referred to in Annex I*

81.1.2. *[2] The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment,* ***the contents and level of detail in the plan or programme, its stage in the decision making process and the extent to which matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment*** "

82. Article 6(1) deals with consultation. Article 6(2) states that "*the public referred to in paragraph 4 shall be given* ***an early and effective opportunity within an appropriate time frame to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan...*** "

83. Annex 1 of the SEA Directive sets out in detail what is required by way of information and it includes the likely significant effects on the environment, the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme and by item (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 difficulties (such as technical difficulties or lack of know-how) encountered in compiling the required information.*"

84. As stated by the Director General of the Environmental Directorate of the Commission in the foreword to the Commission's Guidance to the SEA Directive[2] ("the SEA Guidance")

[2] *Implementation of Directive 2001/42 on the Assessment of the effects of certain plans and programmes on the environment*

the *SEA* process is designed to ensure sustainability enters **consideration before site specific allocations are made.**

85. This is of critical importance.

86. A purposive approach is to be taken to the interpretation of the SEA Directive and the SEA Regulations (see, for example, *R (CALA Homes (South) Limited) v. SSCLG* [2010] EWHC 2866 (Admin) ("CALA No.1")).

The SEA Regulations

87. In order to be lawful, the adoption of a core strategy must comply with the requirements of the SEA Directive and the SEA Regulations.

88. This includes an appropriate consideration of:

88.1. the likely significant effects on the environment of implementing the plan or programme [Regulation 12(2)(a)];

88.2. the **likely significant effects of reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme** [Regulation 12(2)(b)];

89. Also Regulation 12 sets out what the environmental report should contain as set out in Schedule 2.

90. Paragraph 6 of Schedule 2 requires consideration of the *"likely significant effects on the environment"* and Paragraph 8 states *"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"*

91. Regulation 13(1) requires that every draft plan or programme for which an environmental report must be made available for the purposes of consultation and states that the period for consultation shall be such length as *"will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents".*

92. Regulation 12 was considered in *Re Seaport Investments Ltd Application for Judicial Review* [2008] Env LR 23 where Weatherup J held that the Directive required parallel consultation on the draft plan and environmental report:

    92.1.1. *"49. Once again the environmental report and the draft plan operate together and the consultees consider each in the light of the other.* ***This must occur at a stage which is sufficiently early to avoid in effect a settled outcome having been reached and to enable the responses to be capable of influencing the final form****. Further this must be effective in that it does in the event actually influence the final form. While the scheme of the Directive and the Regulations does not demand simultaneous publication of the draft plan and the environmental report is* ***clearly contemplates the opportunity for concurrent consultation on both documents.***

    92.1.2. *50. It must be borne in mind that there should be parallel development of the plan and the environmental aspects and that the stage has not been reached where elements of the plan may become sufficiently settled without being subjected to the appropriate environmental examination "*

The SEA Guidance

93. The SEA Guidance (as published by the EC Commission) notes:

    93.1. The directive plugs the gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they may be taken into

account while **plans are actually being developed, and in due course adopted** [see Foreword];

93.2. As a matter of good practice, the environmental assessment of plans and programmes should **influence** the way plans themselves are drawn up [paragraph 4.2];

93.3. Article 4(1) places a clear obligation on authorities to carry out the assessment during the preparation of the plan or programme [paragraph 4.2];

93.4. If certain aspects of the plan have been assessed at one stage of the planning process and the assessment of the plan uses those earlier findings then those findings must be up to date and accurate for them to be used in the new assessment. If those conditions cannot be met, the later plan or programme may require a fresh or updated assessment [paragraph 4.6];

93.5. In order to form an identifiable report the relevant information must be brought together: it should not be necessary to embark on a paper chase in order to understand the environmental effects of a proposal. [paragraph 4.7];

93.6. The studying of alternatives is an important element of the assessment [paragraph 5.6];

93.7. It is **essential** that the Authority is presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option [paragraph 5.12].

The UK guidance – A practical guide to the Strategic Environmental Assessment - 2005

94. The UK government through the (former) Office of the Deputy Prime Minister has issued a practical guide to the SEA Directive. The following points are worthy of note:

94.1. In conducting SEAs, responsible authorities must appraise the likely environmental effects of implementing the plan or programme and **any reasonable alternatives**. [paragraph 5.B.4];

94.2. Where a plan or programme includes proposals for individual projects, these need to be assessed at sufficient level of detail to enable significant environmental

effects to be broadly predicted. This is particularly helpful when the plan sets the context for decision making on whether to proceed with the project or where alternatives are excluded [paragraph 5.B.12];

94.3. Evaluating alternatives – is each alternative likely to have a significant adverse or beneficial effect in relation to each of the environmental objectives or targets from Stage A [paragraph 5.B.14];

94.4. **The Environmental Report** should contain why other alternatives considered **and why they were rejected** [Figure 7 on page 36];

94.5. The assessment of alternatives may be made in broad terms against the SEA objectives, provided there is sufficient detail to identify the significant environmental effects of each alternative [page 69].

Recent Case Law on Development Plans and the SEA Directive

95. *An application by Seaport Investments Limiteds* [2008] Env LR 23 (although an Northern Ireland case) deals with the requirements of Article 5(2) of the SEA Directive and the relevant timings of the progression of development plans and the environmental information. As mentioned above, Weatherup J stated:

> ""*While the scheme of the Directive and the Regulations does not demand simultaneous publication of the draft plan and the environmental report it clearly contemplates the opportunity for concurrent consultation on both documents…it must be borne in mind that there should be parallel development of the plan and the environmental aspects of the plan and the stage has not been reached where elements of the plan may become sufficiently settled without being subjected to the appropriate environmental examination*"

96. In that case the Respondent Council had published the environmental report in May 2005 which came too late to inform the development of the draft plan which had by then reached an advanced stage. Accordingly they had not acted in accordance with the scheme of Articles 4 and 6 of the Directive.

97. In *City and District Council of St Albans v SSCLG* [2010] JPL 10 the case concerned policies in a RS which established the principle of urban extensions in the Green Belt whilst leaving the details (such as the precise boundaries of the urban extensions) to be resolved through a green belt review. The accompanying Environmental Report did not identify, describe, or evaluate the reasonable alternatives to the envisaged Green Belt development.

98. In holding that the policies were a breach of the SEA Directive, Mitting J stated at paragraph 21 that:

98.1.1. *"The consequences of omitting to comply with the statutory requirement is demonstrated by the outcome. A decision has been made to erode the metropolitan green belt in a sensitive area without alternatives to that erosion being considered. It is no answer to point to the requirements in the policies in green belt reviews to be undertaken at the local development framework state. All that will do is determine where within the district of the three towns erosion will occur, not whether it should occur there at all."*

99. *Save Historic Newmarket Ltd v Forest Heath DC* [CO/6882/2010] is of particular relevance to the circumstances of this case.

100. The important points which arise are:

100.1. Article 6(2) of the SEA Directive requires that the public likely to be affected by a plan or programme must be given an effective and early opportunity to express their opinion on the plan **and the accompanying environmental report** [paragraph 12];

100.2. It is open to a local planning authority to reject alternatives at an earlier stage of the process, and provided that there is no change in circumstances, to decide that it is unnecessary to revisit them [paragraph 16];

100.3. It is clear from Article 5 of the SEA Directive and the guidance from the Commission that the authority responsible for the adoption of the plan or

programme as well as the authorities and the public consulted must be presented with an accurate picture of what reasonable alternatives there are and why there are not considered to be the best option [paragraph 17];

100.4. **Reasons have to be given for the rejection of alternative sites** [paragraph 17];

100.5. That there must be a consideration of whether those reasons **are still valid** if there has been any change to the draft plan or any **other material change of circumstances** [paragraph 17];

100.6. That if it was **not possible for consultees to know from the assessment what were the reasons for rejecting any alternatives to the urban development then there was an error of law.** In that case, the previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements of the SEA Directive and so relief must be given to the Claimant [paragraph 40].

101. It is also material to consider the general guidance in R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at para 108 as to what is ordinarily required for a consultation process to be adequate in law – *"To be proper, consultation must be undertaken when proposals are* ***still at a formative stage;*** *it must include sufficient reasons for particular proposals to allow intelligent consideration and an intelligent response; adequate time must be given for that purpose; and the product of consultation* ***must be conscientiously be taken into account when the ultimate decision is taken*** *"*

Submissions on ground 1

102. These submissions follow the following structure:

102.1. What the RCS establishes as adopted.

102.2. The legal requirements on the Council in relation to the SEA and SA of a core strategy.

102.3. The failure of the Council to comply with those requirements prior to June 2011.

102.4. The failure of the Council to comply with those requirements post June 2011.

102.5. Those failures amount to unlawful behaviour which requires part of the Housing Chapter to be quashed.

What the RCS establishes

103. Policies H2 and H3 of the RCS clearly establish the provision of 600 houses in the West Rochford area by 2021. There is no provision made in relation to the area of the Claimant's site or for Green Belt release in East Rochford generally.

104. Any site allocation development plan document must be in conformity with the RCS – see Regulation 13 para 6. of the 2004 Regulations.

105. Therefore the principle of housing at West Rochford has been established by the RCS.

The legal requirements on the Council in relation to the SEA and SA of a core strategy

106. The principle of developing land at West Rochford therefore needed to be the subject of a lawful SEA and SA in accordance with Article 5 and Annex I of the SEA Directive.

107. Section 19(5) of the 2004 Act requires a local planning authority to carry out an appraisal of the sustainability of the proposals in each document but it is contended that in relation to the RCS the Council have failed to carry out such a lawful appraisal and in particular with regard to alternative sites.

The failure of the Council to comply with those requirements prior to June 2011.

108. It is the contention of the Claimant that the work carried out by the Council in relation to SEA and SA of its emerging core strategy completely failed to comply with the legal requirements of the 2004 Act and the SEA Directive.

109. A detailed examination of the SEA and SA work undertaken prior to June 2011 shows a complete absence of many of the requirements imposed under the SEA Directive and in particular Annex I namely:

109.1. There is no consideration of the merits of West Rochford as against East Rochford in terms of the effect of developing both areas in relation to all the considerations set out in Annex I.

109.2. There is no consideration of why West Rochford was considered superior to East Rochford. At no place in any of the four SAs carried out by the Council prior to June 2011 is there any evidence of any assessment of either area, let alone a comparative assessment.

109.3. There is no consideration of East Rochford against the other areas identified as suitable for housing development.

109.4. Critical factors have never been considered by the Council namely the effect on the Green Belt, the effect on visual amenity, the effect on landscape, the effect on traffic and sustainability rating/ranking.

109.5. The only potential reference to a consideration of alternative sites does not reflect the reality of a comparative assessment but is a mere assertion unsupported by evidence and not contained in any SEA or SA document that "*the actual locations for growth proposed in the policy are considered to be the most sustainable options available*" [paragraph 5.10 of the 2008 CS].

109.6. **Simply put: prior to June 2011 none (of the four) SA or SEA documents considered the reasonable alternative of East Rochford as a location for housing.**

109.7. The only specific reference found between 2005 when the process started until June 2011 is not in any SEA or SA document at all. This is contained in the 2008 CS when draft Policy H2 identified why certain options were not preferred. It is worth restating what was said:

"It is considered that west Rochford is a more suitable location given its proximity to the train station, town centre and its relationship with area 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]

110. Therefore the Claimant's site and the area in which it falls are dismissed on the basis of only 5 lines in the 2008 CS, a draft development plan document. This statement provides no justification for compliance with the requirements of law because:

110.1. There is no indication of when this process of consideration took place.

110.2. There is no indication of who carried out this appraisal.

110.3. There is no indication of what inputs were considered by the Council.

110.4. There is no indication of why East Rochford was only considered as against West Rochford.

110.5. There is no indication of why East Rochford was not considered against the other sites chosen within Policy H2.

110.6. There is no identification of any evidence base which underpins those conclusions.

110.7. There was no opportunity for the Claimant to make representations prior to that statement being included in the 2008 CS.

110.8. The contention that West Rochford is a more suitable location based on the three factors is an incomplete and inadequate appraisal and is not in any event contained in an appropriate Environmental Assessment.

110.9. Lastly there is an assertion that the development of land at East Rochford would result in significant congestion a conclusion which appears to have been significant in not preferring that location. Yet no evidence has ever been seen which supports that position from the Council or the local highway authority. That conclusion even if considered applicable in October 2008 was clearly superseded during the course of the emergence of the core strategy by events at the Claimant's planning appeal in April 2010 when the Council accepted, in accordance with the

position of the highway authority, that proposed development in East Rochford was acceptable in highway terms.

110.10. Therefore it was clear in April 2010 that an important reason for dismissing the area of East Rochford as an alternative location to meet housing need in the core strategy was unjustified and actually wrong.

111. The failure of the Council to carry out any proper assessment of alternatives prior to June 2011 is reinforced by the failure/inability of the Council to provide any of the information sought by the Claimant pursuant to the Freedom of Information Act 2000 and/or the Environment Information Regulations 2004 to demonstrate how and when a proper appraisal of the alternative sites took place.

112. Indeed the evidence is consistent with the Council predetermining (outside of any SEA/SA analysis) which sites it wanted to come forward as described by the local Councillor in his meeting with the Claimant (see above).

The failure of the Council to comply with those requirements post June 2011.

113. In the light of the decision in *Forest Heath* (as handed down on 25 March 2011) and the representations of the Claimant's planning consultants the Council belatedly realised that the work carried out by the Council was deficient and failed to meet the requirements of the SEA Directive.

114. As a consequence Enfusion were instructed to carry out the SA Addendum notwithstanding that the public hearings of the EIP had closed.

115. Nevertheless, the work carried out in June 2011 still fails to meet the legal requirements of the SEA Directive in particular:

115.1. **It simply seeks to justify previously reached conclusions made outwith the SEA process** – it is noteworthy that this document arises in June 2011, nearly 3 years

after the Council has made its critical decisions in relation to the general areas to be allocated under housing policies H2 and H3. It is instructive and remarkable (in a sense) that all the previous decisions reached by the Council in this appraisal are (ex post facto) endorsed by this work. The work done in June 2011 did not and could not inform the process in the manner anticipated and required by the SEA Directive.

115.2. **The work is too late** - The work simply does not inform the selection of sites and alternatives in any meaningful way.

115.2.1. Contrary to the principles of *ex parte Couglan* the proposals were no longer anywhere near what could be described as a formative stage. One must also reiterate that Article 6 requires the public to have an "*effective*" opportunity to comment on the environmental impact of plans.

115.2.2. It is also material to note the requirement under Article 7 of the Aarhaus convention that public consultation on the preparation of plans should be "*within a transparent and fair framework*" with the authorities "*having provided the necessary information to the public*".

115.2.3. There is simply no indication that the Council ever intended such work truly to inform the core strategy process, but there is clear indication that it intended such work to protect the process from this type of challenge – that is a material difference which makes the approach of the Council unlawful.

115.3. **The document fails to correctly set out the basis on which previous decisions have been taken** – the 2008 CS (and not any SA analysis) set out in 10 lines why the East Rochford area is not preferred. Two factors are identified namely sustainability and traffic flows through the town centre would lead to significant congestion. That judgment (outwith any SEA/SA process) was the apparent basis on which the area appears to have been rejected in 2008 according to what the Council have put into the public domain. The SA Addendum now purports to set out the reasons why the area was rejected. Numerous new factors are revealed for the first time such as environmental constraints, noise, inability to deliver community benefits, the need to identify additional land and inability to deliver improvements

to King Edmund's school. Those concerns are represented as being in existence when the original decision was taken and yet they had previously never been in the public domain and no reference was made to them at all in the 2008 CS or any other relevant document.

115.4. **The document fails to provide the Inspector with an accurate up to date assessment of the areas** – additionally the information set out in the document completely fails to refer to matters dealt with in the context of the Claimant's planning appeal e.g. in April 2010 it was agreed in the SoCG that the grant of planning permission on the Claimant's site was acceptable in terms of traffic impact and yet in June 2011 it is said to be a reason why an allocation in this area could not take place. The references therefore completely fail to reflect what has previously been agreed. Alternatively the references relate to judgements reached in the summer of 2008. If that is the case then no reason is offered as to why they were not set out in the 2008 CS so that the Claimant had knowledge that these were the reasons which precluded an allocation.

115.5. **The document is not supported by any evidence base** – As can be seen from the last paragraph very important conclusions are reached in the document about noise, environmental constraints, sustainability, traffic and infrastructure without any reference to any other information or evidence which supports those conclusions. Critical conclusions are set out in relation to the area in which the Claimant's site lies and yet there is no referencing to which or any documents that are relied on to support those judgements.

116. Consequently the work carried out by the Council in June 2011 fails to comply with the requirements of law imposed upon the Council by the SEA Directive.

Those failures amount to unlawful behaviour which requires Policy H1, H2 and H3 and the reasoned justification at paragraphs 4.01-431 of the RCS to be quashed.

117. Therefore the Claimant strongly contends that the process followed by the Council in adopting the RCS is unlawful because:

117.1. There is no evidence base which underpins the choice of housing areas within the RCS.

117.2. The areas chosen in the RCS were determined by Members prior to any consideration in accordance with SAs and SEAs.

117.3. The SAs and SEAs undertaken prior to June 2011 completely failed to consider the alternatives to the plan's policies.

117.4. The SAs Addendum carried out in June 2011 still failed to comply with the requirements of the SEA Directive and the SEA Regulations.

117.5. It was done at a time when it had no meaningful influence on the contents of the RCS and therefore does not comply with the requirements of the Directive and the Regulations.

118. Therefore adoption of the RCS was unlawful and *"outside the appropriate power"* for the purposes of Section 113(3)(a) of the 2004 Act.

If the Court determines that the Council have acted unlawfully in relation to Ground 1 then the RCS's relevant policies (and reasoned justification) must be quashed.

119. Given that the breach arises out of a failure to comply with the SEA Directive the Court is bound to quash policies H1, H2 and H3 (and related reasoned justification) of the RCS see *St Albans v SSCLG* per Mitting J at para 21 applying *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603.

120. The law is clear that if the Court is satisfied that there has been a manifest breach of the EU Directive.

121. This is confirmed by *Berkeley* where Lord Bingham states (at page 608):

"In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the EC Treaty , the obligation

of national courts to ensure that Community rights are fully and effectively enforced, the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt and the absence of any power in the Secretary of State to waive compliance (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case."

122. Lord Hoffmann said at 613 - 616:

"...the fact that a court is satisfied that an EIA would have made no difference to the outcome is not a sufficient reason for deciding, as a matter of discretion, not to quash the decision...

A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.

Although section 288(5)(b) , in providing that the court "may" quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfillment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a

court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell LJ in Bolton Metropolitan Borough Council v Secretary of State for the Environment (1990) 61 P & CR 343 , 353 Mr Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

123. It was accepted in *Forest Heath* that the same principle would apply to the application of SEAs.

Ground 2 – The Inspector in carrying out her EIP failed to comply with the legal requirements imposed upon her by both statute and natural justice.

124. It is the contention of the Claimant that in carrying out the independent EIP (as required by Section 20 of the 2004 Act) the Inspector:

124.1. reached a conclusion namely that the RCS was sound that failed to have regard to a material consideration or alternatively was perverse.

124.2. reached a conclusion namely that the RCS had been subject to a proper SA that failed to have regard to a material consideration or alternatively was perverse.

124.3. failed to give adequate reasons as to why the RCS was sound.

124.4. failed to understand the representations that were made to her.

124.5. failed to allow the Claimant an adequate opportunity to make representations to her.

125. In adopting the findings and reasoning of the Inspector, the Defendant erred in law.

The Legal Principles

126. In terms of the submissions set out above the relevant legal principles are as follows:

126.1. **The Inspector reached a conclusion namely that the RCS was sound that failed to have regard to a material consideration or alternatively was perverse.** The Inspector is required by Section 20(5)(b) of the 2004 Act to consider whether the plan is sound. Additionally the Inspector must have regard to a material consideration

and must not act perversely (*Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320).

126.2. **The Inspector reached a conclusion namely that the RCS had been subject to a proper SA that failed to have regard to a material consideration or alternatively was perverse** – the law stated above is also applicable. Section 20(5)(a) of the 2004 Act expressly requires the Inspector to check that the plan has been subject to an appropriate SA.

126.3. **The Inspector failed to give adequate reasons as to why the RCS was sound** - In undertaking the EIP it was incumbent upon the Inspector to give adequate reasons as to why the objections were either accepted or not accepted (*Re Poyser Mills Arbitration* [1964] 2 QB 467). It is also necessary for an Inspector to give reasons in accordance with the principles set out in *South Bucks DC v Porter* [2004] UKHL 33 per Lord Brown at para.36.

126.4. **The Inspector failed to understand the representations that were made to her.** In order to apply a planning policy an Inspector must understand it and not misinterpret it (*Richmond upon Thames LBC v Secretary of State for the Communities and Local Government* [2006] EWHC 3324). By analogy the Inspector in an EIP must understand properly the representations made to her in order to deal with those representations lawfully.

126.5. **The Inspector failed to allow the Claimant an adequate opportunity to make representations to her.** Section 20(6) of the 2004 Act states "*Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination*". Therefore there is a right in law to be heard. That right is reiterated in Regulation 34 of the 2004 Regulations. The principles of natural justice require an Inspector holding a public inquiry to act in a manner which is procedurally fair and does not cause procedural unfairness contrary to those principles – *R (on the application of Edward Poole) v Secretary of State for Communities and Local Government and Cannock Chase District Council* [2008] EWHC 676.

Submissions

Ground 2, Submission 1 - The Inspector reached a conclusion namely that the RCS was sound that failed to have regard to a material consideration or which was plainly perverse.

127. A fundamental legal requirement on the Inspector was to consider whether the RCS was sound as required by the provisions of Section 20(5) of the 2004 Act.

128. In her report to the Council the Inspector clearly concluded that the provisions of the RCS were sound [paragraph 63].

129. In the light of the contents of the RCS and the evidence submitted to her she failed to have regard to a material consideration and or acted perversely in that:

129.1. The guidance in PPS 12 makes it clear that in order to be sound the core strategy must be JUSTIFIED, EFFECTIVE and consistent with national policy [paragraph 4.52]. Justified means that the document must be founded on a robust and credible evidence base and the most appropriate strategy when considered against the reasonable alternatives [paragraph 4.36 and Box on page 20 of PPS 12]

129.2. In considering the evidence, the Inspector failed to have regard to the absence of an early formative consideration of the relevant reasonable alternatives through the SA process.

129.3. Alternatively, given the evidence no reasonable person properly directing themselves could conclude that the choice made by the Council in relation to not bringing forward development in the East Rochford area was justified on the basis of evidence before her.

Ground 2, Submission 2 – The Inspector reached a conclusion namely that the RCS had been subject to a proper SA that failed to have regard to a material consideration and/or which was perverse

130. The Claimant repeats the particulars set out under Ground 2, Submission 1.

Ground 2, Submission 3 - The Inspector failed to give adequate reasons as to why the RCS was sound

131. It was a fundamental and consistent contention of the Claimant that the RCS was not sound due to the failure of the Council to carry out a comparative assessment of the areas/locations.

132. The only reasons the Inspector gave for rejecting that contention are as follows [see paragraph 31 of the report] namely:

132.1. *"The SA is informed by a comprehensive scoping report"* – that may be the case but it does not deal in any way with the alternatives and their merits taking into account all the matters set out in the SEA Directive and the SEA Regulations.

132.2. *"I find no reason to conclude that any significant effects have not been taken into account* – that is a completely different point and relates to the chosen areas not whether there has been an appropriate assessment of reasonable alternatives. The allegation of the Claimant related to a complete failure on behalf of the Council to consider the alternatives which is patently a materially different point to that addressed by the Inspector.

132.3. *"The SA Addendum provides a more detailed appraisal of the alternative locations considered and was subject to public consultation. I have taken into account criticisms that the Addendum was produced after the submission draft plan, but sustainability appraisal is an iterative process"* – again, this conclusion misses the main point of the Claimant's submissions. The principal contention of the Claimant was that at the **time it was formulating its plan** the Council had not carried out any meaningful comparative

exercise in relation to alternatives. The SA Addendum came too late to meaningfully assist in the formulation of the policies. It was an ex post facto justification exercise.

133. As such, the Inspector failed to give proper or adequate reasons as to why the contentions of the Claimant were rejected.

Ground 2, Submission 4 – The Inspector failed to understand the representations that were made to her.

134. The Claimant contended that alternative sites had never been assessed in any meaningful way through the SA process (or at all).

135. The Inspector concluded that because the preferred sites were considered in the process then that was acceptable but that was not the nature of the Claimant's contentions.

136. It is clear therefore that the Inspector failed to understand properly the representations being made to her and therefore fell into error.

Ground 2, Submission 5 - The Inspector failed to allow the Claimant an adequate opportunity to make representations to her.

137. Finally the Inspector closed the formal sessions of the EIP in February 2011. In July 2011 the Council produced the SA Addendum which sought to retrospectively justify why the chosen areas had been preferred and why alternatives had not been considered.

138. In the light of that new report produced by the Council it was incumbent upon the Inspector in accordance with the rules of natural justice and the statutory provisions for her to allow the Claimant and other parties an opportunity to be heard on this matter before she reached her conclusions.

139. The ability of the Claimant to make written submissions to her as a consultation response on the SA Addendum was not adequate in law as this issue was a new matter that went to the heart of the RCS. It was legally incumbent upon her to allow the Claimant the opportunity to appear before her and set out their representations in full. The Claimant requested this opportunity.

140. By not acceding to this request, the Inspector failed to comply with the statutory provisions and the 2004 Regulations in this regard.

Section 6 – Conclusions

141. For all of the above reasons, the Claimant seeks an order:

141.1. Quashing Policies H1, H2 and H3 and paragraphs 4.01 to 4.31 of the RCS; and

141.2. Requiring the Defendant to pay the Claimant costs of this claim.

19 January 2012

RUSSELL HARRIS Q.C.
SASHA WHITE
LANDMARK CHAMBERS
180 FLEET STREET
LONDON
EC4A 2HG

Statement of Truth

The Claimant believes that the facts stated in these Particulars of Claim are true. I am duly authorised by the Claimant to sign this statement.

Name: Ian Derek Ginbey

Firm: Clyde & Co LLP, Solicitors

Position held: Partner

Signed..... **Dated: 19 January 2012**