Neutral Citation Number: [2014] EWHC 2440 (Admin)

Case No: CO/1049/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2014

Before :

MRS JUSTICE PATTERSON

- -

Between :

I.M. PROPERTIES DEVELOPMENT LIMITED	**Claimant**
- and -	
LICHFIELD DISTRICT COUNCIL	**Defendant**
(1) TAYLOR WIMPEY (UK) LIMITED	**Interested**
(2) PERSIMMON HOMES LIMITED	**Parties**

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- -

Anthony Crean QC (instructed by **Shoosmiths LLP**) for the **Claimant**
Gary Grant (instructed by **Democratic, Development and Legal Services**) for the **Defendant**
Morag Ellis QC and Hereward Phillpot (instructed by **Berwin Leighton Paisner LLP**) for the **First Interested Party**
Jeremy Cahill QC, Satnam Choongh and James Corbet Butcher (instructed by **Squire Patton Boggs (UK) LLP**) for the **Second Interested Party**

Hearing dates: 1st and 2nd July 2014

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Approved Judgment

Mrs Justice Patterson :

Introduction

1. This is an application by the claimant for judicial review of a decision by the defendant dated 28th January 2014 to endorse the main modifications to the draft Lichfield Local Plan Strategy. The claimant seeks a quashing order of the decision.

2. The main modifications endorsed by the defendant include proposals to release areas of land known as Deans Slade Farm and Cricket Lane from the Green Belt. The former site is subject to an interest by Taylor Wimpey UK Limited, the first interested party, and the latter site is subject to an interest by Persimmon Homes Limited, the second interested party. Both Deans Slade Farm and Cricket Lane lie to the south of Lichfield and are close to the urban area.

3. Throughout the local plan process the claimant has been interested in, and has promoted, a new village concept on land to the North East of Lichfield known as land to the north east of Watery Lane, Curborough. In January 2014 the claimant submitted a planning application for up to 750 dwellings, primary school, care village, local neighbourhood facilities to facilitate retail development, community building, parking, comprehensive green infrastructure and landscaping, new access points to Watery Lane and Netherstone lane and improvements to Netherstone Lane. That was refused by the defendant, the Local Planning Authority on the 20th May 2014 for seven reasons (including one that referred to the site being outside the settlement boundaries and not being allocated in the emerging local plan strategy). The Watery Lane site is not within the green belt.

4. The examination into the Lichfield Local Plan currently stands suspended whilst the Local Authority carry out further work to prepare main modifications to the Local Plan to seek to remedy the defects identified by the Local Plan Inspector at his interim examination. The defects meant that the Inspector was unable to find the submitted Local Plan sound.

5. Counsel for the claimant contends that his challenge raises the following issues. They are,

    i) Whether the defendant has persistently misunderstood the approach to revisions of the green belt as a matter of law?

    ii) Whether the defendant has adopted an unfair process in dealing with the claimant's land?

    iii) Whether the actions of the Leader of the Council amount to pre-determination in the local plan context.

6. The defendant and the interested parties raise a fundamental and prior issue which is whether the court has jurisdiction to determine the claim at all by reason of the wording of Section 113(2) of the Planning and Compulsory Purchase Act 2004.

7. I propose to structure this judgment to deal with matters in the following order;

    i) Jurisdiction;

ii) Predetermination;

iii) The approach to green belt boundaries;

iv) The fairness of the process adopted by the defendant.

8. To address those matters it is first necessary to set out the not entirely straightforward factual background of the emerging Local Plan. To that I now turn.

Factual background

9. In 2007 the Core Strategy Issues and Options document was published for consultation. Four alternative draft spatial options for how the district could develop up to 2026 were set out. They included a town focused development option which acknowledged that Green Belt release was likely to be required and a new settlement option. An advantage of the new settlement option was that it would not require any alteration to Green Belt boundaries.

10. In 2008 the Core Strategy Preferred Options was published for consultation. That included option 4 which was for a new settlement. It had one realistic location for development only that would be deliverable to meet identified housing needs: that was the claimant's land. The new settlement option was said also to require totally new infrastructure investment rather than making the best use of existing infrastructure.

11. In April 2009 a Policy Directions document was published. The strategy proposed was for town focused development. It was said to be a balanced form of growth across the district focused primarily on Lichfield and, to a lesser extent, Burntwood and the key rural settlements. Although growth was to take place where possible within settlements the document recognised that there would be a need for new sustainable communities and extensions to Lichfield. In the reasons for the preferred spatial strategy the document said,

> "Lichfield city is considered to be by far the most sustainable community within the context of the district and should play the most significant role in the development strategy. In terms of creating sustainable communities this justifies the exceptional circumstances for removing land from the green belt to the south of Lichfield that would be required to follow the strategy.

In dealing with the alternative options the document said,

> "1.17 Alternatively, the strategy could be amended to one that promotes a new settlement as a means of meeting the majority of housing requirements, but taking into account that the only identified proposal for a new settlement is the proposal at Curborough. Many consider that this strategy is not the most appropriate to meet the needs across the district, including those who exist in communities and that in light of the scale of

> the new settlement proposals and its proximity to the city, there is a risk of harm to the character of Lichfield."

12. In 2010 the defendant published "Shaping the District". That recognised that about 41% of the district's housing growth to 2026 would take place in and around Lichfield city. 59% of that was to be within the urban area with the remaining 41% to be delivered through the development of sustainable urban extensions to the south of the city.

13. The important role of the Green Belt was recognised,

> "With the majority of new development being channelled towards the most sustainable urban areas of Lichfield and Burntwood which are excepted from the Green Belt."

The document continued,

> "Detailed changes to the green belt boundary around the edge of Lichfield city urban area to meet the longer term development needs beyond 2028 will be considered through the local plan allocations document."

14. In November 2010 the defendant published a draft Core Strategy. That was subject to consultation until February 2011.

15. In November 2011 the claimant submitted a strategy report to promote a new village opportunity. That was followed up with a transportation study in January 2012.

16. In March 2012 the National Planning Policy Framework (NPPF) was published. The claimant updated its submissions to take into account the contents of the NPPF in May 2012.

17. A pre-submission Lichfield district Local Plan Strategy was published for consultation between July and September 2012.

18. In November 2012 a revised sustainability appraisal of the proposed Local Plan strategy was published. That included an appraisal of updated information for the proposed new village to the north east of Lichfield for 2,000 dwellings.

19. On the 22nd March 2013 the draft Lichfield Local Plan Strategy was submitted to the Secretary of State. No Green Belt sites were included for development as part of that strategy because of the volume and strength of earlier objections to Green Belt releases.

20. In May 2013 the defendant published, as part of the examination into the soundness of the Lichfield Local Plan Strategy, a paper on the Green Belt. As part of that study it was noted that a strategic review of Green Belt boundaries had been undertaken in arriving at the preferred spatial strategy for Lichfield city and Burntwood. The earlier study had considered whether there were sustainable development needs within the plan period which required amendment to existing Green Belt boundaries and provided suggestions as to where they may be. It suggested that detailed changes as a result of housing growth in the longer term which required review of the Green Belt

boundaries were deferred to the allocations stage of the plan. The council considered that its approach of deferring a full review of the detailed Green Belt boundary was justified as the changes would be non-strategic and may involve community participation. It was satisfied that its housing needs could be met without Green Belt release.

21. Examination hearings into the draft local plan took place between 24th June and 10th July 2013. One of those hearings was on the Green Belt. During that session the issue of whether there needed to be further release of land to meet future needs within the plan period was raised.

22. On the 3rd September 2013 the Inspector, Mr R Yuille, wrote to the defendant with his preliminary views. He was satisfied that the defendant had discharged its duty to co-operate, that the submitted sustainability appraisal was a reliable piece of evidence, that the strategic development areas, the adopted strategy and the broad development locations identified were soundly based. However, he was concerned that the submitted plan was unsound as it did not make adequate provision for the objective assessment of housing need contained in its own evidence base.

23. The Inspector considered that finding a site or sites for an additional 900 houses was a strategic matter that should be dealt with through the plan itself. The Inspector continued,

> "The council indicated at the hearings that it would be willing to identify a further site or sites to address such a shortfall, carry out the necessary sustainability appraisal, make any resulting main modifications to the plan and consult on these - and that this process would not take more than 6 months or so. The Inspector sought confirmation that was the case and invited a revised timetable to be submitted to him."

24. In the Annex attached to the Inspector's letter he considered the appropriateness of the spatial strategy which the defendant was pursuing. He considered that it was sustainable as it made use of existing facilities and infrastructure in the urban area and provided opportunities to travel by means other than private car and reduced the need to travel.

25. He considered as an alternative the proposed new village promoted by the claimant. The Inspector said that a scheme for 750 dwellings had been subject to pre-application discussions and would form the first phase of a new village. There was nothing to suggest such a scheme would not be viable. It was common ground that such a proposal would be developable and it may well be that 750 dwellings was deliverable. He noted that there was disagreement as to whether the site was more sustainable than the strategy proposed by the council. There was a divergence of view between the claimant and the defendant. The Inspector remarked that there was no substantial evidence to suggest that the judgments in the defendant's sustainability appraisal were awry or that they were based on inaccurate information.

26. The Inspector concluded that a strategy which proposed to focus housing development in one location rather than in a variety of locations as proposed by the defendant would have difficulty in meeting the planned strategic priorities of

consolidating the sustainability of, and supporting regeneration initiatives, in Lichfield, Burntwood and key rural settlements. The promoters of the new village were noted to "have an eye" on a scheme for 2000 houses. There was relatively little information about the master planning of the new village. That had an effect on the depth to which the proposal could be assessed. He concluded,

> "On the information available there is no clear indication that the proposed new village at north east Lichfield would be a more suitable or sustainable alternative than the strategy selected by the council in the plan."

27. On the 1st August 2013 the defendant had written to the Inspector making a formal request that if the submitted Local Plan Strategy required modifications to make it sound the Inspector make recommendations on those modifications. It was a specific request under section 20(7C) of the Planning and Compulsory Purchase Act 2004.

28. That was followed by an email of the 22nd August 2013 in which the defendant said that it was aware that any main modifications may require further sustainability appraisal work to be undertaken and consulted upon.

29. The defendant whilst being aware of the need to progress additional work foresaw a potential issue with regard to the submission of further technical information by the development industry. The defendant had accepted a considerable amount of further information during the examination and sought some indication from the Inspector as to whether that additional information needed to be considered through further sustainability appraisal work and whether any subsequent technical submissions should also be considered. As a result, it was minded to apply a cut off date of the 10th July, being the end of the hearing sessions, for the submission of additional information by third parties but wanted an indication as to how the Inspector would respond.

30. On the 4th September 2013 the defendant wrote to the Inspector thanking him for his interim findings and confirmed that it was willing to identify a further site or sites to address the identified current housing shortfall. That required further sustainability appraisal work which had been commissioned. That was to be undertaken on the basis of the information supplied and available to the council by the close of the hearings sessions on the 10th July. No further information was to be accepted.

31. In December 2013 the defendant published a Supplementary Green Belt Review. That recorded that the defendant had carried out initial work on options for meeting the additional housing requirement and taking into account the potential for additional housing requirements as a result of extending the plan period by one year. The scale of the housing requirements had the potential to impact on Green Belt within the district.

32. The Review continued that its scope was to examine specific parts of the Green Belt with the Lichfield district rather than to examine the Green Belt as a whole. It was a necessary exercise to enable difficult decisions that may need to be taken to meet the scale of the future housing needs identified up to 2029. The Review then set out its methodology which was to identify parcels of land around individual settlements where housing growth could be considered at a scale where it may make a

contribution or impact on the overall development strategy for the district. Those areas were then judged against the purposes of the green belt as set out in the NPPF. In relation to each of the purposes a judgment of important, moderate or minor was ascribed in relation to that purpose. There was then an overall assessment. Principles to be applied were recommended if changes to the Green Belt were required to meet development needs.

33. On the 7th January 2014 the Environment and Development (Overview and Scrutiny) Committee met.

34. Members had before them a report of the planning officer and recommendations in relation to the main modifications.

35. They had also a letter from a Gary Cadin of Deloitte LLP dated 6th January 2014. In the Deloitte letter significant concern was raised as to how the claimant's proposals, as Deloitte were acting for the claimant, had been considered in the officer report. The letter continued to inform members of the pending planning application for 750 dwellings on the Curborough site, told them that a full environmental impact assessment had been finalised and that there was a master plan which was attached to the letter. Deloitte's were concerned that their proposal had been almost entirely excluded from the assessment of potential key strategic sites. They set out the positive attributes which, in their judgment, attached to the claimant's site and pointed out that their proposal would not result in the loss of Green Belt land. That was a significant comparative advantage to the strategy being promoted by the defendant which required release of large amounts of Green Belt land at Deans Slade Farm and Cricket Lane. The letter concluded,

> "National planning policy only permits the release of green belt land in exceptional circumstances. Whilst the local plan is the most appropriate process to consider such changes, in this case land to the north east of Lichfield city offers a sustainable and deliverable alternative. As such, there is no exceptional justification to support the release of green belt land."

36. The main modifications were set out in the report to the committee. The relevant parts of MM19 read as follows,

> "The important role of the Green Belt will be recognised and protected, the majority of new development being channelled towards the most sustainable urban areas of Lichfield and Burntwood, parts of which are bounded by the green belt. Changes to the green belt boundary will be made around the southern edge of Lichfield city urban area to meet strategic development needs. The Cricket Lane SDA and the built element of the Deans Slade Farm SDA will be removed from the Green Belt… the important role of the Green Belt is recognised, whilst the spatial strategy seeks to minimise impact upon the Green Belt, this has to be considered in the light of the range of options including the need to locate development in the most suitable settlements where there is easy access to a range of existing services and facilities and supporting

> infrastructure… a strategic Green Belt review and a more detailed second stage review forms part of the evidence base which will underpin policy options identified in the preparation of the Local Plan Allocations Document as well as forming limited release to the green belt to the south of Lichfield city to accommodate essential growth in line with the evidence base."

37. Annexed to the report was appendix D which considered the allocation of additional dwellings where options were tested against the NPPF. Under option 3 which was consideration of the new settlement option either by a new village (the claimant's proposal) or Brookhay Villages and Twin Rivers Park it was noted that neither new settlement option required the use of Green Belt land. Option 4 considered the allocation of all additional dwellings in/around Lichfield city (including Deans Slade Farm and Cricket Lane and urban capacity). Again, the option was judged against the themes of the NPPF. On theme 9 the document said,

> "Dean Slade Park and Cricket Lane would require the release of Green Belt land so very special circumstances would need to be demonstrated."

38. Appendix E considered the opportunities and constraints of potential additional strategic sites. That included an appraisal of both the Cricket Lane and Deans Slade Farm sites. In each, the first constraint that was noted was that they were green belt sites.

39. The minutes of the Economic and Development (Overview and Scrutiny) Committee of the 7th January 2014 record that Neil Cox, the planning policy manager of the defendant, informed members that there had been a review of the green belt and reminded them that they had that at appendix F to the officer report. The best scoring sites were Deans Slade Farm and Cricket Lane. Although Green Belt those sites sat best with the strategy which the planning Inspector had found sound.

40. The minutes record members' discussion which included a councillor raising whether there were exceptional reasons for use of green belt land and other members indicating that the council had been forced to find extra housing and the officers should be commended for doing so. The main modifications were supported.

41. On the 14th January 2014 the main modifications were considered and endorsed by the defendant's cabinet.

42. On the 24th January 2014 councillor Ian Pritchard who was the chairman of the defendant's planning committee sent to the Conservative group members on the committee an email in the following terms,

> "Hello all,
>
> This is to remind group members who attended the last group meeting and inform those who did not, that the group decided in government parlance to have a three line whip in place at the council meeting on Tuesday. In plain terms group members either vote in favour of the report I will be giving regarding the

> local plan or abstain. Also if you are approached by anyone promoting alternative sites, please make no comment. If group members are reported making negative comments it would without any doubt derail our local plan. Sorry if you find this a little heavy handed but there is an awful lot at stake. Have a kind weekend.
>
> Kind regards,
>
> Ian"

43. The matter came before the full council on the 28th January 2014. Members had before them the officer's report with the main modifications. A document link was provided to the strategic green belt review of July 2012 and the green belt review supplementary report. In addition, the full council had all the documents that had been before the cabinet and the scrutiny and overview committee. It endorsed the main modifications proposed.

44. On the 17th January 2014 the Parliamentary Under Secretary for Communities and Local Government made a Ministerial statement about the importance of the protection of the green belt. In it he said,

> "The government's planning policy is clear that both temporary and permanent traveller sites are inappropriate development in the green belt and that planning decisions should protect green belt land from such inappropriate development. I also noted that Secretary of State's policy position that un-met needs, whether for traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the very special circumstances justifying inappropriate development in the green belt."

45. On the 6th February 2014 public consultation on the main modifications and the supporting evidence base commenced. It continued until 20th March 2014.

Issue number one: Jurisdiction

46. The defendant, the first interested party and the second interested party all contend that the claim is barred by reason of section 113(2) of the Planning and Compulsory Purchase Act 2004.

47. Section 113 entitled 'validity of strategies, plans and documents' reads 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 relevant documents may make an application to the High Court on the ground that-
>
> (a) The document is not within the appropriate powers;
>
> (b) A procedural requirement has not been complied with.
>
> (4) But the application must be made not later than the period of six weeks starting with the relevant date…
>
> (11) Reference to the relevant date must be construed as follows-
>
> (c) For the purposes of a Development Plan document (or a revision of it), the date when it is adopted by the Local Planning Authority or approached by the secretary of state (as the case may be);…"

48. The claimant contends that the submissions of the defendant, first interested party and second interested party are all predicated on the basis that the application is to quash a Development Plan document. It is not. What the claimant is seeking is a quashing order of the main modifications.

49. The claimant relies upon the case of *The Manydown Company Limited v Basingstoke and Deane Borough Council [2012] EWHC 977* and submits that the first sentence of paragraph 84 of the judgement covers the position here. That reads,

> "Under the provisions of section 113(1)(c), (2), (3), (4) and (11)(c) it is a development plan document that may be questioned only upon its adoption, and within six weeks of that date – not some prior step on the part of the Local Planning Authority, even one that might vitiate the development plan document itself once it has been adopted…"

50. The claimant submits that there are two ways in which to quash a resolution to adopt the main modifications. Firstly, through Section 113 and second by an application for judicial review. One does not exclude the other; they are overlapping concepts. There is a policy argument in favour of proceeding which is to enable an error of law to be corrected and a policy argument against, which is to avoid satellite litigation. This is a challenge which is not within Section 113.

<u>The statutory scheme</u>

51. Section 37 of the 2004 Act provides,

> "(1) A Local development scheme must be construed in accordance with section 15."
>
> (2) A Local development document must be construed in accordance with section 17.
>
> (3) A development plan document is a document which—

(a) is a local development document, and

(b) forms part of the development plan."

52. Section 15(1) of the 2004 Act requires a Local Planning Authority to prepare and maintain a scheme to be known as their local development scheme. Section 15(2) (aa) requires the scheme to provide, "the local development documents which are to be Development Plan documents." Section 17(8) provides:

> "The document is a local development document only in so far as it or any part of it-
>
> (a) is adopted by resolution of the Local Planning Authority as a local development document;…"

53. Under section 19(1) Development Plan documents must be prepared in accordance with the local development scheme.

54. Section 20 of the 2004 Act provides,

> "(1) The Local Planning Authority must submit every development plan document to the Secretary of State for independent examination.
>
> (2) But the authority must not submit such a document unless
>
> (a)they have complied with any relevant requirements contained in regulations under this Part, and
>
> (b)they think the document is ready for independent examination.
>
> (3) The authority must also send to the Secretary of State (in addition to the development plan document) such other documents (or copies of documents) and such information as is prescribed.
>
> (4) The examination must be carried out by a person appointed by the Secretary of State.
>
> (5)The purpose of an independent examination is to determine in respect of the development plan document—
>
> (a)whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b)whether it is sound.
>
> (6)Any person who makes representations seeking to change a development plan document must (if he so requests) be given

> the opportunity to appear before and be heard by the person carrying out the examination.
>
> (7)The person appointed to carry out the examination must—
>
> (a)make recommendations;
>
> (b)give reasons for the recommendations.

55. Section 23 of the 2004 Act deals with the question of adoption of local development documents. It provides,

> "(2) The authority may adopt a development plan document as originally prepared if the person appointed to carry out the independent examination of the document recommends that the document as originally prepared is adopted."
>
> (3) The authority may adopt a development plan document with modifications if the person appointed to carry out the independent examination of the document recommends the modifications."

56. The statutory provisions make it clear that the examination process is Inspector led. The critical nature of his role is revealed in that his eventual recommendations are binding upon the Local Planning Authority. Parliament clearly intended that the final planning judgment is entrusted to the Inspector.

57. The other material provision is Section 39. That provides for sustainable development as follows,

> "(1) This section applies to any person who or body which exercises any function—"
>
> (a)under Part 1 in relation to a regional spatial strategy;
>
> (b)under Part 2 in relation to local development documents;
>
> (c)under Part 6 in relation to the Wales Spatial Plan or a local development plan.
>
> (2)The person or body must exercise the function with the objective of contributing to the achievement of sustainable development.
>
> (3)For the purposes of subsection (2) the person or body must have regard to national policies and advice contained in guidance issued by—
>
> (a) the Secretary of State for the purposes of subsection (1)(a) and (b);"

58. The section imposes a duty upon any body exercising its function under part 2. It applies throughout the process to both the Local Planning Authority and to the Inspector.

59. When the document is submitted to the Secretary of State for examination under the Town and Country Planning (Local Planning) (England) Regulations 2012 it is to be accompanied by a sustainability appraisal report.

Discussion and Conclusions

60. It can be seen from the statutory scheme that a Development Plan document is submitted by a Local Planning Authority when it is of the view that the document is ready for independent examination: Section 20(2). The examination then occurs into the DPD which is under the direction of the Inspector throughout. As a result of amendments to the 2004 Act, as set out, if a Local Planning Authority request an Inspector to do so he must recommend modifications to the DPD to make it sound.

61. It follows that, at present, the Lichfield Local Plan Development Strategy is undergoing the process of examination. The Inspector has concluded that it would not be sound to adopt the plan as presented to him and has, therefore, recommended that modifications be carried out to enable it to meet the statutory requirements. The process of examination is thus paused whilst further work is being carried out on the main modifications for the Inspector to examine further at the resumption of the examination process.

62. During the consultation period on the main modifications the claimant and first and second interested parties have all submitted further representations for consideration. The Inspector may or may not be satisfied by the main modifications as a result of his examination process. It follows that what is taking place in Lichfield currently is an integral part of an advanced local plan process.

The case of *Manydown*

63. Given the importance that all parties attach to this case I need to deal with it at some length.

64. In the *Manydown* case the local authority held land under a 999 year lease from 1996. It acquired the land for high quality housing development. The claimant was entitled to receive one half of the proceeds of development provided that took place before 2050. The site had been proposed unsuccessfully in a local plan process in 2005 but, after a change in administration, the local authority decided to suspend its involvement in active promotion of the site for development. The claimant relied on those decisions and claimed that the defendant had adopted an unlawful position as its decisions showed,

    i) a determination to hold off promoting the land for development;

    ii) a decision to thwart the development of the site through actively preventing the inclusion of the land in the core strategy.

65. Having set out the statutory scheme Lindblom J considered the jurisprudence. Of relevance here is the case of *R v Cornwall County Council Ex Parte Huntington & another [1994] 1 All ER 694* where Simon Brown LJ (as he then was) identified three categories of case excluded from the statutory review procedure. They were,

    a) A failure by the statutory decision maker to exercise his jurisdiction…

    b) The reasoning underpinning the decision which is otherwise in the applicant's favour…

    c) Some antecedent step quite separate and distinct from the eventual decision reviewable under the statute…

    He then went on to approve what Brooke J had said at first instance,

    > "It is quite clear in my judgment that parliament intended to prescribe a comprehensive programme of the events which should happen from the time the relevant authority sets in motion the consultation process in paragraph 1 of schedule 15, and that once the order is made the prescribed procedure then follows without any interruption for legal proceedings in which the validity of the order is questioned. Until the stage is reached, if at all, when the notice of a decision is given pursuant to the procedure prescribed in paragraph 11. It is then, and only then that parliament intends a person aggrieved by an order which has taken effect shall have the opportunity of questioning its validity in the High Court provided that he takes the opportunity provided for him by paragraph 12(1) of schedule 15…"

66. Simon Brown LJ acknowledged (at page 771) that there were obvious benefits to a procedure that allowed a challenge to be brought only after a statutory decision making process had run its course. The first of these was "that the very fact that an application for judicial review cannot be made at this preliminary stage means that the inquiry will not be delayed thereby." Another was "that the Secretary of State may in any event refuse to confirm the order, thus making unnecessary any legal challenge whatever."

67. Lindblom J recognised that in some cases public law error committed in a plan making process might best be corrected by a timely claim for judicial review (see the example the obiter dicta of Buxton LJ in his judgment in *First Corporate Shipping v North Somerset Council [2001] EWCA Civ 693*, at paragraphs 36-44 (with which Peter Gibson LJ agreed at paragraph 46)).

68. In any event, it was well settled that the scope of an ouster provision, such as Section 113(2) of the 2004 Act, must be determined by the words of the provision itself. Lindblom J pointed to the difference in language between Section 284(1) of the 1990 Act which applied "whether before or after the plan… has been approved or adopted". He noted that those words do not appear in Section 113 of the 2004 Act. He continued,

"85. I cannot see how the preclusive provision in section 113(2) could catch a decision such as that taken by the Council on 15 December 2011. That decision was, in effect, a decision not to promote land owned by the Council in a plan-making process. In my view it lies well beyond the ambit of section 113. It is, however, plainly susceptible to proceedings for judicial review. "

86. Nor do I accept that the decision taken by the Council's Cabinet on 23 January 2012 lies within the reach of the preclusive provision. That decision had the effect of approving a pre-submission draft of the Core Strategy for consultation, the results of which would later inform the preparation of the submission draft. Such a decision does not, in my judgment, constitute a local development document being adopted as such by resolution of the Local Planning Authority. These proceedings were begun before even the pre-submission Core Strategy had crystallized in a document published for consultation. And they do not seek to question any development plan document as such, either adopted or in draft.

87. Therefore, I do not think it is necessary to decide in this case whether a pre-submission draft of a core strategy qualifies as a "relevant document" within section 113. But I would hold that it does not. The relevant statutory provisions must be read together. Admittedly, the requirement in section 20(1) of the 2004 Act that the Local Planning Authority must submit a development plan document to the Secretary of State for independent examination implies that, according to the particular statutory context, the concept of a development plan document can include the submission draft of such a document. This is also effectively acknowledged in the 2004 regulations. However, I do not believe one can infer from any of the relevant statutory provisions that a pre-submission draft, published – or about to be published – for consultation, qualifies as a development plan document within section 113(1).

88. The conclusion that these proceedings are not ousted by section 113(2) seems both legally right and pragmatic. In a case such as this an early and prompt claim for judicial review makes it possible to test the lawfulness of decisions taken in the run-up to a statutory process, saving much time and expense – including the expense of public money – that might otherwise be wasted. In principle, it cannot be wrong to tackle errors that are properly amenable to judicial review, when otherwise they would have to await the adoption of the plan before the court can put them right. Improper challenges – including those caught by the ouster provision in section 113(2) – can always be filtered out at the permission stage."

69. The factual situation in *Manydown* was entirely different to that in Lichfield. What was of concern there were the contents of a pre submission draft of a core strategy. That was not a local development document. The decisions under attack were, therefore, of proceedings which preceded, but were not properly part of, the statutory process that would end in the adoption of the core strategy. As a result they came within the class described by Simon Brown LJ in *Ex Parte Huntington* as some antecedent step quite separate and distinct from any eventual decision reviewable under statute.

70. Here, the decision relates to main modifications which have been endorsed by the defendant within a local plan process approaching its end. One is not dealing, therefore, with an early claim for judicial review testing the lawfulness of decision taking in the run up to a statutory process but with a claim for judicial review taken during the statutory process which, far from saving time and expense could add time and expense to the process which is currently underway. Although Mr Crean QC submits that the present claim does not seek to question a relevant document of the kind to which Section 113 refers, in my judgment, it is not that simple. What the claimant is seeking is a quashing order of main modifications. If successful such a claim would abort the current plan making process when it is at an advanced stage. That would lead to considerable delay and expense not only to those parties before the court but to others who have made representations on the modifications which will be considered in due course by the Inspector at the resumed examination. The effect of a successful challenge would be to start that process again: a re-making of main modifications, further consultation, further representations which would then be considered at a deferred examination. It is precisely because of the potential chaos that could be caused by a successful challenge at this stage in the plan making process that, in my judgement, Parliament inserted the ouster in the statutory provision.

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

72. It is quite clear, in my judgment and not inconsistent with the *Manydown* judgment, that once a document has been submitted for examination it is a Development Plan document. The main modifications which have been proposed and which will be the subject of examination are potentially part of that relevant document. To permit any other interpretation would be to give a licence to satellite litigation at an advanced stage of the Development Plan process. I do not accept that at such a stage the Venn diagram analogy used by Mr Crean to illustrate that there was a stage in the process where a claimant had a choice whether to challenge by way of judicial review or to await the adoption and then challenge under Section 113 is valid.

73. Further, it should be recalled that the Inspector had found the preferred option for development relied upon by the defendant, namely, town focussed development, to be sound. The new village option was considered by the Inspector and rejected by him.

Yet, that is what the claimant wishes to resuscitate and seeks to do so by these proceedings. To permit that approach to plan making is, in my judgment, inimical to the statutory scheme.

74. For those reasons I find that this claim is not one that can be lawfully brought by reason of the operation of Section 113(2).

75. For the sake of completeness I deal with the other grounds below.

Issue Two: Pre-determination

76. The claimant submits that Councillor Pritchard's email was a dogmatic instruction to councillors as to how to vote. He contends that their discretion as to how to vote was removed. Although there was a vigorous debate at the council meeting the email had foreclosed any discretion about how members could vote.

77. The claimant submits that Section 25 of the Localism Act 2011 is not of any great assistance as it is directed at a situation where a politician has made a public statement about a project: the expression of a view is about the merits of the decision to be taken. That is wholly distinguishable from the current situation where the email that was sent was to fellow councillors and about how they should vote.

78. As a result a fair minded and objective observer would conclude that the decision on the 28th January 2014 carried with it all the appearance of pre-determination.

79. The defendant and interested parties contend that Section 25 of the Localism Act is of considerable assistance and closes down the claim. The email is evidence of something said and done prior to the decision making meeting. As a result the action is caught by section 25.

80. The email was a strongly worded pre-disposition. It is a political group whip and no more. There is no evidential basis to say that all or any of the recipients of the email were unable to weigh the whip with the material that they had been provided with and reach a different conclusion if they considered that was merited.

81. The case of *R v Waltham Forest London Borough Council Ex Parte Baxter [1987] 1 QB 419* established that when a councillor voted in support of a majority or that he faced the sanction of the withdrawal of the party whip should he vote contrary to the group policy his decision was not necessarily evidence that his discretion had been fettered.

82. The claimant's case cannot be made out unless it is shown that the debates which took place were a sham. There is no evidence from the claimant that that is the case here. Witness statements from other councillors present at the meeting indicate that the voting was far from being a sham.

Discussion and conclusions

83. Section 25 of the Localism Act 2011 provides,

> "**25. Prior indications of view of a matter not to amount to predetermination etc**

> (1) Subsection (2) applies if—
>
> (a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and
>
> (b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.
>
> (2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because—
>
> (a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and
>
> (b) the matter was relevant to the decision.

84. The statutory wording makes it clear that just because a decision maker has done anything directly or indirectly which indicated a view that he took or might take on a matter it was not to be taken as an appearance of a closed mind.

85. Mr Crean submits that the section is only applicable when a councillor makes a public statement. The statutory wording does not support that submission. It is broadly phrased. It refers to a decision maker having previously done "anything" in relation to a matter that was relevant to the decision. That would, in my judgment, cover the sending of the email. It was something done prior to the meeting which was relevant to the decision in that it was exhorting the recipients to vote in a particular manner. It comes within the description of doing "anything" which is the statutory wording. In my judgment the indication of the view expressed in the email would not be something that would amount to pre-determination.

86. In any event, despite Mr Crean's submissions, I do not find that the tenor of the email was so strident as to remove the discretion on the part of the recipient as to how he or she would vote. Neither the language used nor the absence of any sanction support that contention. The debate shows a far reaching discussion between members and displays no evidence of closed minds in relation to the decisions that had to be taken. A fair minded and reasonable observer in possession of all of the facts would not be able to conclude on the basis of the evidence that there was any real possibility of predetermination as a result of the email from Councillor Pritchard. This ground fails.

Issue Three: The Approach to Green Belt Boundaries

87. The claimant contends that the defendant has persistently misunderstood the approach to the revisions of the green belt. He relies on the case of *Copas v Royal Borough of Windsor and Maidenhead [2001] EWCA Civ 180* which dealt with previous guidance on green belt in PPG2. There, Simon Brown LJ made it clear that, the terms of the guidance were clear, so that unless there were exceptional circumstances which necessitated a revision of the green belt boundary a single composite test would not be

satisfied. Further, from paragraph 40 of the judgment the claimant derives a proposition which he describes as the falsification doctrine. Paragraph 40 reads,

> "I would hold that the requisite necessity in a PPG 2 paragraph 2.7 case like the present - where the revision proposed is to increase the Green Belt - cannot be adjudged to arise unless some fundamental assumption which caused the land initially to be excluded from the Green Belt is thereafter clearly and permanently falsified by a later event. Only then could the continuing exclusion of the land from the Green Belt properly be characterised as "an incongruous anomaly". The Secretary of State's 1991 objection to development was neither sufficiently long-term nor sufficiently clearly applicable to all possible development on all parts of the site to be capable of constituting such an event, still less when it seemed of itself to demonstrate the sufficiency of existing planning controls to safeguard the various amenity interests identified."

88. From that it is said that a revision proposed to increase a green belt cannot arise unless the fundamental basis upon which the land was originally excluded from the green belt was subsequently falsified. The converse must also apply when the green belt is to be rolled back.

89. The defendant and interested parties assert that the falsification doctrine does not exist. It is a misreading of the case of *Copas* on the part of the claimant. In any event it is not the relevant test. That is whether a necessity has been established as a result of the exceptional circumstances to bring about a boundary alteration.

90. The case of *Gallagher Homes v Solihull Metropolitan Borough Council [2014] EWHC 1283* deals with the test for redefining a green belt boundary since the publication of the NPPF. Paragraphs 124 and 125 of *Gallagher* read:

> "124. There is a considerable amount of case law on the meaning of "exceptional circumstances" in this context. I was particularly referred to Carpets of Worth Limited v Wyre Forest District Council (1991) 62 P & CR 334 ("Carpets of Worth"), Laing Homes Limited v Avon County Council (1993) 67 P & CR 34 ("Laing Homes"), COPAS v Royal Borough of Windsor and Maidenhead [2001] EWCA Civ 180; [2002] P & CR 16 ("COPAS"), and R (Hague) v Warwick District Council [2008] EWHC 3252 (Admin) ("Hague"). "
>
> 125. From these authorities, a number of propositions are clear and uncontroversial.
>
> i) Planning guidance is a material consideration for planning plan-making and decision-taking. However, it does not have statutory force: the only statutory obligation is to have regard to relevant policies.

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

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

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

However, it is not arguable that the mere process of preparing a new local plan could itself be regarded as an exceptional circumstance justifying an alteration to a Green Belt boundary. National guidance has always dealt with revisions of the Green Belt in the context of reviews of local plans (e.g. paragraph 2.7 of PPG2: paragraph 83 above), and has always required "exceptional circumstances" to justify a revision. The NPPF makes no change to this.

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

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

91. From that review it can be seen that there is no test that green belt land is to be released as a last resort. It is an exercise of planning judgment as to whether exceptional circumstances necessitating revision have been demonstrated.

92. The interested parties emphasise the importance of section 39 of the Planning and Compulsory Purchase Act 2004 which imposes a duty upon the defendant and the inspector when exercising their functions under part 2 of the Act in relation to local development documents. The section demonstrates that the achievement of sustainable development is an ongoing duty upon any body exercising its function under part 2 of the Act. Sustainable development is a concept which is an archetypal example of planning judgment.

93. The duty to contribute to sustainable development imports a concept which embraces strategic consideration about how best to shape development in a district to ensure that proper provision is made for the needs of the 21st century in terms of housing and economic growth and for mitigating the effects of climate change. Inevitably, travel patterns are important. Both the SEA and the sustainability appraisal are important components in forming a judgment to be made under Section 39(2).

94. As a result it is submitted that the green belt designation is a servant of sustainable development.

Discussion and conclusions

95. In my judgement to refer to a falsification doctrine is to take the words of Simon Brown LJ out of context. To elevate the words that he used into a doctrine is to overstate their significance.

96. What is clear from the principles distilled in the case of *Gallagher* is that for revisions to the green belt to be made exceptional circumstances have to be demonstrated. Whether they have been is a matter of planning judgment in a local plan exercise ultimately for the inspector. It is of note that in setting out the principles in *Gallagher* there is no reference to a falsification doctrine or that any release of green belt land has to be seen as a last resort.

97. The only statutory duty is that in Section 39 (2) (supra). In that regard the contents of paragraph 84 of the NPPF are relevant. That says,

> "84. When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development. They should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt or towards locations beyond the outer Green Belt boundary."

98. That is clear advice to decision makers to take into account the consequences for sustainable development of any review of green belt boundaries. As part of that patterns of development and additional travel are clearly relevant.

99. Here, the release from the green belt is proposed in Lichfield which is seen by the defendant as consistent with the town focused spatial strategy. The further releases have been the subject of a revised sustainability appraisal by the defendant. That found that no more suitable alternatives existed for development.

100. The principal main modifications endorsed by the defendant expressly referred to the green belt review and to the supplementary green belt review as informing the release of green belt sites. They contained advice as to the relevant tests that members needed to apply. Both documents were available to the decision making committees and were public documents. Ultimately, the matter was one of planning judgment where the members had to consider whether release of green belt land was necessary and, in so determining, had to be guided by their statutory duty to achieve sustainable development.

101. The members were aware that they had originally been presented with the Deans Slade and Cricket Lane sites as directions of growth at a much earlier stage of the local plan development. As the sites were to the south of Lichfield members were advised that development there would have little impact on the setting of the city overall and there were few limitations beyond the policy constraint of green belt. However, the extent of concern about loss of green belt at that time meant that the plan was revised to reduce the amount of growth in that direction. The inspector had found that the defendant had failed to produce a sound plan with that approach. An alternative strategy of a new village had been considered by the inspector as a first stage of the examination process and he had found that that failed to outperform the council's preferred strategy. The members were entitled to take all of those factors into account in concluding whether there was a necessity to propose to release sites from the green belt.

102. In my judgment, the members were aware of the test which they had to apply through the content of the documents before them together with their experience and knowledge as members of a council where a significant amount of its land was within the green belt. They were entitled to take into account the genesis of the plan and the inspector's findings in concluding that in their view there were exceptional circumstances for a green belt revision. The main modifications endorsed show, in my judgment, that the defendant grappled with matters set out in the NPPF, their duty under Section 39 and the request by the Inspector to remedy shortcomings in their Development Plan.

103. Further, the letter from Deloitte of the 6th January 2014 which was sent to members of the Environment and Development (Overview and Scrutiny) Committee, albeit on the part of the claimants, was absolutely clear as to the correct approach to adopt. It rightly said that exceptional circumstances had to be demonstrated. It is odd, in those circumstances, for the claimant to make the submission that the defendant throughout misunderstood, misinterpreted and/or was misled as to the relevant test to apply. This ground fails.

Issue Four - Fairness of the process adopted by the defendant

104. The claimant submits that deliverability of a development site is a central concern. The process that the defendant has embarked upon is geared up to the resolution of a housing shortfall identified by the inspector in the order of 900 units. It is clearly material for the local authority, in those circumstances, to have regard to land outside the green belt. That is especially the case when such land as is suggested is supported by experienced developers.

105. It was unfair, therefore, in the circumstances, to tell the members of the defendant that the information on the claimant's proposal was too vague. That is especially the case as a planning permission was submitted accompanied by an EIA. That members were not informed was as a result of the guillotine on receipt of information after the 10th July 2013. It is contended that that is an unfair approach especially as that date has been applied selectively. It is apparent from the supplementary sustainability appraisal and the habitats regulations assessment that information has been provided after the 10th of July which is favourable for other sites, in particular, to Deans Slade Farm and Cricket Lane.

106. Further, the Parliamentary Statement of the 17th January 2014 should have been brought to members attention. That is a further example of unlawfulness. There was no attempt to bring it to the notice of the relevant decision making committee. The statement made it clear that unmet housing need could not amount to an exceptional circumstance.

107. The defendant submits that the guillotine was applied ruthlessly in relation to all prospective development sites. There was no unfairness as it applied to all of those who were promoting a site. It was the logical place to apply a guillotine as the defendant had thought that was the end of the evidence process. It did not know when the date was set about the contents of the interim report on the part of the inspector.

108. The progress of the claimant's planning application was entirely a matter for the claimant. The claimant wanted to rely on later information from December 2013 and January 2014. It would not be fair to take that into account for the claimant's site but not for others.

109. The Ministerial Statement was directed towards decision taking as opposed to plan making. The defendant was engaged in the process of plan making. The statement was, in any event, primarily directed towards traveller sites.

Discussion and conclusions

110. The defendant had invited the inspector to consider main modifications which would remedy any lack of soundness that he found. Once the inspector had found that the plan was potentially unsound because of the housing shortfall the defendant was under a duty to carry out work to remedy that identified flaw. In carrying out that work the defendant updated its sustainability appraisal as it was obliged to do. To make its case for additional land release the defendant had to embark upon a supplementary report dealing with the green belt and consider what principles may be applicable should any land have to be released.

111. Both the exercise of a sustainability appraisal and a strategic environmental assessment are integral to the Development Plan process. They are iterative documents. There can be no unfairness on the part of the defendant in carrying out the necessary updating work on those documents. The defendant would have failed in its legal duties had it not done so.

112. There is a distinction between applying a guillotine in relation to developer submissions on individual sites and applying that rigorously across the board which is clearly fair and the more strategic task which the defendant had to carry out to repair its local plan. To have permitted further evidence to be adduced on the claimant's planning application before members in January 2014 would be to place the claimants at an unfair advantage compared to other sites promoted by other developers. That would clearly be an inappropriate approach on behalf of the defendant and it was right not to adopt it.

113. The Ministerial Statement is primarily directed at individual decision taking rather than the plan making process. In those circumstances, I do not find that the failure to bring it to the attention of the members was the omission of a material consideration. If that is wrong, that defect can be remedied so far as the inspector is concerned when he considers the main modifications at the resumed examination.

114. The fact of the pending further examination is the answer to the claimant's complaints. The claimant will have ample opportunity at that hearing to raise all of these issues, if it thinks it is appropriate to do so, and to have the inspector's findings upon them. I do not find that there has been any lack of fairness in the process thus far which seems to me to have been carried out in a thorough manner on the part of the defendant. However, the claimant is not deprived of any opportunity to make representations on the main modifications as the examination process is ongoing. In truth, the claimant has an alternative remedy for its complaints.

115. Accordingly this ground fails also.

Conclusions

116. In the circumstances if it was necessary to do so I would have dismissed the claim on all the other grounds. However, as is clear, in my judgement this claim fails at the first hurdle as there is no jurisdiction for the court to entertain it.

117. I invite submissions as to the form of final order and costs.