Neutral Citation Number: [2020] EWHC 3204 (Admin)

Case No: CO/1290/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

Flaxby Park Limited	**Claimant**
- and -	
Harrogate Borough Council	**Defendant**
-and-	
(1) Secretary of State for Communities and Local Government **(2) Oakgate Yorkshire Limited** **(3) CEG Land Promotions III (UK) Limited**	**Interested Parties**

- -
- -

Christopher Katkowski QC & Richard Moules (instructed by **Town Legal LLP**) for the **Claimant**
Paul Brown QC (instructed by **Harrogate Borough Council**) for the Defendant
Christopher Young QC & James Corbet Burcher (instructed by **Walker Morris LLP**) for the 2nd Interested Party
James Strachan QC (instructed by **Walton & Co**) for the 3rd Interested Party
The 1st Interested Party did not appear and was not represented

Hearing dates: 27-29 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII.
The date and time for hand-down is deemed to be 10:00am on 25.11.2020

Mr Justice Holgate

Introduction

1. Policy DM4 of the Harrogate District Local Plan ("the Local Plan") provides for a new settlement within a "broad location for growth" in the Green Hammerton/Cattal area, lying to the east of the A1(M). The claimant, Flaxby Park Ltd ("FPL") brings this challenge under s. 113 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") to quash that policy and other references in the Local Plan to that location for the new settlement. The local planning authority for the district is the defendant, Harrogate Borough Council ("HBC"), which adopted the Local Plan on 4 March 2020.

2. The Local Plan covers the period 2014 to 2035. Policy GS1 makes provision for a minimum of 13,377 new homes over the Plan period. To help meet this requirement, Policy GS2 states that growth will be focused in the district's main settlements, settlements on the key public transport corridors and "a new settlement within the Green Hammerton/Cattal area". Policy GS2 adds:-

> "A broad location for growth is identified in the Green Hammerton/Cattal area, as shown on the key diagram. Within this area a site for a new settlement will be allocated through the adoption of a separate Development Plan Document (DPD). The DPD will be brought forward in accordance with the development principles outlined in policy DM4."

3. Policy DM4 states *inter alia*:-

> "Land in the Green Hammerton/Cattal area has been identified as a broad location for growth during the plan period and beyond. The boundary, nature and form of a new settlement within this broad location will be established in a separate New Settlement Development Plan Document (DPD)."

Policy DM4 also requires the DPD to address a number of principles for the design, development and delivery of the new settlement, including the provision of at least 3,000 dwellings of an appropriate mix to provide a balanced community (A), about 5 hectares of employment land (B), and appropriate public transport services and infrastructure to serve the new settlement including the improvement of two existing rail stations (F).

4. FPL is the owner and promoter of land focused on the former Flaxby Golf Course, Harrogate, which broadly lies along the western side of the A1(M). FPL has promoted the development of a new settlement on this site since 2016, through the Local Plan process and an outline planning application, submitted in November 2017 and refused by HBC on 14 October 2020.

5. Oakgate Yorkshire Limited, the second Interested Party ("IP2"), is a property development company that is promoting land in the vicinity of Cattal which forms part of the Policy DM4 location. It has been promoting a new settlement here since 2016.

6. CEG Land Promotions III (UK) Limited, the third Interested Party ("IP3"), is a property development company that is promoting land in the vicinity of Green Hammerton which forms part of the Policy DM4 location. It has been promoting a new settlement here since 2013.

7. FPL, IP2 and IP3 have all participated actively in the preparation and examination of the Local Plan by making written and oral representations throughout the process. It is important to record at this point that the issues raised in these proceedings do not involve any challenge to HBC's decision that the Local Plan should contain a policy promoting a new settlement with at least 3,000 houses. The issues are solely concerned with the lawfulness of the decision to include policies identifying Green Hammerton/Cattal as a broad location for that new settlement.

8. FPL's claim mainly relates to the requirements of Directive 2001/42/EC ("the Directive"), as transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633) ("the 2004 Regulations"), for what is often referred to as strategic environmental assessment ("SEA"). The three grounds of challenge may be summarised as follows:-

   (1) The Council's Members failed to consider the reasonable alternative of allocating a new settlement in the broad location of Flaxby in breach of the Directive as implemented by the 2004 Regulations. The Inspector had required assessment of that alternative, but the fruits of that additional sustainability work were never put before Members. Instead Council officers decided whether the further sustainability work justified any change to the "finely balanced" decision regarding the location of the proposed new settlement;

   (2) The Council failed to assess the reasonable alternative of a new settlement in the broad location of Flaxby on an equal basis as it was required to do by the 2004 Regulations as interpreted by the English courts; and

   (3) The Council and the Inspector had insufficient evidence about, and made insufficient enquiry into, the viability and deliverability of the Green Hammerton/Cattal broad location despite FPL expressly putting those matters in issue and providing evidence calling the viability and deliverability of this proposed broad location into question.

9. Grounds 2 and 3 are concerned with whether there was a failure to address particular considerations in the SEA process and the examination of the draft Local Plan. On the other hand, ground 1 is concerned with identifying which body or person was required to consider the comparison of broad locations in the SEA, irrespective of the outcome of grounds 2 and 3. In the circumstances it is convenient to deal with grounds 2 and 3 before going on to consider ground 1.

10. I would like to express my gratitude for the way in which this case was presented by all parties, both in their skeleton arguments and at the hearing. There was good co-operation in the production of an agreed statement of facts, the refining of the issues needing to be decided and the production of electronic bundles complying with the protocols and guidance on remote hearings. Such good practice greatly assists the work of the Planning Court for the benefit of its users.

11. The remainder of this judgment is set out under the following headings:

Witness statements

12. FPL relied upon a lengthy witness statement by Mr. Neil Morton of Savills, who acted as their planning consultant in the Local Plan process. This document set out the history of that process and FPL's involvement in it. However, for the most part, it simply duplicated material which was already contained in the claimant's Statement of Facts and Grounds. There were a few short sections in the witness's evidence which added to that Statement, but there appears to be no reason why that additional material could not have been set out in the latter document. A Statement of Facts and Grounds is required to set out the facts relied upon and be verified by a statement of truth (CPR 8.2, 22, 54.6, and PD54A paragraph 5.6). Ultimately, FPL's case at the hearing did not depend upon Mr Morton's witness statement except for a small section relevant to ground 3.

13. Similar criticisms apply to much of the material contained in the witness statements of Mr Procter and Mr McBurney on behalf of IP2 and IP3 respectively. Fortunately, HBC did not find it necessary to submit a witness statement.

14. It is necessary to add a few observations about witness statements in proceedings in this court.

15. First, I should re-emphasise the principle that witness statements should not provide a commentary on documents exhibited or make points which are essentially a matter for legal submission or argument (*JD Wetherspoon plc v Harris* [2013] 1 WLR 3296; *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government* [2020] PTSR 993 at [66]-[70]).

16. Second, "evidence" of this kind is also objectionable because firstly, costs are incurred unnecessarily, not only by a claimant but also by opposing parties in having to consider whether to respond to that material and secondly, court time is taken up in considering that material needlessly. It is also a waste of time to have to compare such a witness statement with the statement of facts and grounds to identify the extent to which, if at all, the statement adds anything of substance.

17. Third, a defendant and interested party may feel under pressure to file a witness statement responding to the claimant's "evidence" in order to avoid a forensic point, as was made in this case, that the material has gone unchallenged. So the unnecessary proliferation of material continues. The simple point is that in so far as the claimant's evidence offends the principle in *Wetherspoon*, it should not call for an answer in the form of an opposing witness statement. In general, the defendant and interested parties should respond to legal argument and submissions advanced by a claimant in the

Summary Grounds of Defence and in the Detailed Grounds of Defence, supplemented by any additional documentary evidence upon which they rely, together with any witness statement to cover points which could not be addressed in, or are not apparent from, those documents. Factual matters may be dealt with in an Acknowledgment of Service but must be verified by a statement of truth (CPR 22.1(1)(d) and 54.1(2)(e)).

18. Fourth, lengthy witness statements are normally unnecessary because of the general principles governing the admissibility of fresh evidence in judicial or statutory review. Except for certain cases of procedural error or unfairness or perhaps irrationality, judicial or statutory review generally proceeds on the basis of the material which was before the decision-maker together with the decision itself (*R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584; *Newsmith Stainless Limited v Secretary of State for the Environment* [2017] PTSR 1126 at [9]; *R (Network Rail Infrastructure Limited) v Secretary of State for the Environment, Food and Rural Affairs* [2017] PTSR 1662 at [10]).

19. In *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [37]-[41] the Divisional Court discussed the limited circumstances in which expert evidence may be admissible in a public law challenge based upon irrationality to explain technical matters which the court *would not otherwise be able to understand*. But the court sounded a warning that if that material "is contradicted by a rational opinion expressed by another qualified expert, the justification for admitting *any* expert evidence will fall away" ([41] emphasis added). The resolution of disputed factual or expert evidence generally falls outside the proper scope of proceedings for judicial or statutory review.

20. Fifth, it must be borne in mind that a party is not entitled to rely upon expert evidence without the court's permission (CPR 35.4) and that that rule cannot be circumvented by presenting evidence of expert opinion in a witness statement as to fact.

Statutory Framework

Planning and Compulsory Purchase Act 2004

21. Section 13(1) of PCPA 2004 requires the authority to keep under review matters which may be expected to affect the development of their area or the planning of its development. Those matters include the principal physical, economic, social and environmental characteristics and the size, composition and distribution of the population of the area (s.13(2)).

22. Section 17(3) of PCPA 2004 requires a local planning authority to set out its policies relating to the development and use of land in their area in local development documents, such as the Local Plan in this case. The authority must keep under review their local development documents having regard to the results of any reviews under s.13 (s.17(6)). In general, a local development document must be adopted by resolution of the local planning authority (s. 17(8)).

23. Section 19(1A) to (1C) provide as follows:-

> "(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use

> of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.
>
> (1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.
>
> (1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole)."

24. Section 19(2)(a) requires that in the preparation of a local development document the local planning authority must have regard to "national policies and advice contained in guidance issued by the Secretary of State".

25. Section 19(5) provides that:-

> "The local planning authority must also-
>
> (a) carry out an appraisal of the sustainability of the proposals in each development plan document;
>
> (b) prepare a report of the findings of the appraisal."

In this case the Local Plan is a "development plan document" (s.37(3) and s.38(3)).

26. PCPA 2004 does not say any more about what a sustainability appraisal and report ("SA") is required to address. The Act received Royal Assent on 13 May 2004. The 2004 Regulations were made on 28 June 2004 and came into force on 20 July 2004. I agree with Ouseley J in *Heard v Broadland District Council* [2012] Env.L.R. 23 at [11] that s. 19(5) integrates the requirements of the Directive and the 2004 Regulations with the statutory process for the preparation and examination of development plan documents. This solution is authorised by Article 4(2) of the Directive. In practice the sustainability appraisal produced for s 19(5) must satisfy the requirements in the 2004 Regulations for an "environmental report".

27. The local planning authority must submit a draft development plan document to the Secretary of State for independent examination (s.20(1)) before adoption may be considered under s.23. Before submitting a draft plan, the authority must comply with a number of requirements in The Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012 No. 767) ("the 2012 Regulations"), including consultation on proposals for a draft plan, publicity for the plan submitted for examination, and the procedure allowing representations to be made on that submitted version. Any such representations must be forwarded to the Secretary of State with the submitted plan and must be taken into account by the Inspector who carries out the examination under section 20(4) (regulations 18 to 23 of the 2012 Regulations).

28. The authority must not submit a draft development plan document to the Secretary of State unless "they think the document is ready for independent examination" (s.20(2)(b)).

29. The purpose of the examination is *inter alia* to determine whether the submitted plan satisfies the requirements of s.19 and the 2012 Regulations (s.20(5)(a)) and "whether [the plan] is sound" (s.20(5)(b)).

30. The legislation does not define what is meant by "soundness". However, paragraph 182 of the National Planning Policy Framework ("NPPF") 2012 (which applied to this Local Plan pursuant to the transitional arrangements in paragraph 214 of the NPPF 2019) set out a number of criteria which included a requirement for a plan to be:-

> "Justified – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on *proportionate* evidence" (emphasis added)

31. If the examining Inspector considers that the authority has complied with the duty under s.33A of PCPA 2004 to co-operate with other planning authorities and the requirements referred to in s.20(5)(a) and that the plan is "sound", he must recommend that the document be adopted by the authority (s.20(7)). Where he considers that one or more of those requirements is not satisfied, he must recommend to the authority that the plan is not adopted (s.20(7A)). However, subject to being satisfied that the authority has complied with the duty to co-operate under s.33A, the Inspector must recommend "main modifications" to the draft plan so as to make it "sound" or otherwise compliant, if requested to do so by the plan-making authority (s.20(7B) and (7C)).

32. The Inspector must give reasons for his or her recommendations (s.20(7) and (7A)). The authority must publish the Inspector's "recommendations and the reasons" (s.20(8)).

33. By virtue of s. 23(2) to (4) the local planning authority may adopt a local plan only if the Inspector has recommended that outcome, whether in relation to the plan as submitted for examination or with any main modifications to make that plan sound and/or satisfy the requirements referred to in s.20(5)(a). If the authority wishes to adopt the plan, it can only do so in accordance with the terms of the recommendations made by the Inspector, along with any other modifications that do not "materially affect" the policies in the plan (sometimes referred to as "minor modifications"). However, if the Inspector has recommended against the adoption of the plan (s.20(7A)) the authority cannot adopt that plan.

34. If the Inspector recommends adoption, the authority has only a binary choice as to whether to adopt the local plan in accordance with the terms of that recommendation, or to withdraw the plan. After the examination of a local plan has been concluded by the production of the Inspector's final report, the local planning authority cannot seek to adopt the plan with any modifications which the Inspector has not recommended (other than ones which do not materially affect those policies already set out in the plan together with any main modifications). I therefore accept the submission of Mr Katkowski QC that the motion put forward by one councillor at the meeting of the full Council on 4 March 2020 that the Local Plan be *adopted* with the new settlement policy but without endorsing the broad location at Green Hammerton/Cattal was not something which HBC could lawfully agree to.

35. Section 23(5) provides that a development plan document can only be adopted by "resolution of the authority", which Mr Brown QC accepted refers to the full Council.

36. It follows from this analysis of the 2004 Act, that if the Inspector decides that it would not be reasonable to conclude that the requirements of s.19(5) have been satisfied, which in effect refers to the SEA requirements in the 2004 Regulations, he must recommend that the local plan is not adopted, unless he is asked by the authority to recommend main modifications which would satisfy the relevant requirements. This procedure reflects the general principle in the case law that SEA is an iterative process, which may allow a defect at one stage to be cured by steps taken subsequently (see e.g. *Cogent Land LLP v Rochford District Council* [2003] 1 P & CR 11; *No Adastral New Town Limited v Suffolk Coastal District Council* [2015] 1 Env LR 551; *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [144]).

37. It also follows that it is a pre-requisite for the adoption of a plan that the Inspector should judge it to be sound. In *Barratt Development Limited v City of Wakefield Metropolitan District Council* [2011] J.P.L 48 at [11] Carnwath LJ (as he then was) said that although local authorities and Inspectors must have regard to NPPF policy on "soundness", that is only advisory and not prescriptive. Ultimately it is they who are the judges of "soundness". At [33] he said:-

> "soundness was a matter to be judged by the Inspector and the Council, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law." (emphasis added).

38. Section 113(3) enables an "aggrieved person" to apply to the High Court for statutory review of *inter alia* a development plan document on the grounds that (a) it is not within the powers conferred by Part 2 of PCPA 2004 or (b) a "procedural requirement" has not been complied with. The High Court may only intervene if either (a) the document "is to any extent outside the appropriate power" or (b) "the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement" (s.113(6)). It is common ground that non-compliance with the 2004 Regulations is a ground upon which the court may intervene under s. 113.

The SEA Directive

39. Directive 2001/42/EC deals with 'the assessment of the effects of certain plans and programmes on the environment'. Recital (4) states:

> "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."

40. Recital (9) states that the Directive "is of a procedural nature".

41. Article 1 provides: -

> "The objective of this Directive is 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 and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment"

42. Article 2b, defines "environmental assessment":-

> "'environmental assessment' 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 consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9."

43. Article 3(1) provides:-

> "An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects."

44. Article 4(1) provides:

> "The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure"

45. Article 5(1) addresses the content of an environmental report:-

> "Where an environmental assessment 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 the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

The information required under Annex 1 includes in paragraph (h) "an outline of the reasons for selecting the alternatives dealt with".

46. Article 5(2) provides-

> "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 certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

47. Thus, the information to be included is that which may "reasonably be required", taking into account *inter alia* "the contents and level or detail in the plan" and "its stage in the decision-making process" and "the extent to which certain matters are more appropriately assessed at different levels in that process". In the present case, the new settlement policies in the Publication Draft and Submission Draft of the Local Plan were of a strategic rather than detailed nature, based upon high-level analysis, even at the stage when HBC was proposing to identify a "site" rather than a "broad location" in the plan.

48. Articles 6 and 7 deal with the consultations required to be carried out. Article 8 deals with decision-making:-

> "The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure"

49. Article 9 requires the publication of information when a plan is adopted including:-

> "(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, ……"

The 2004 Regulations

50. It is common ground that the Local Plan was a plan for which SEA was required under the 2004 Regulations (see regulation 8(1)).

51. Regulations 8(2) and (3) provide:-

> "(2) A plan or programme for which an environmental assessment is required by any provision of this Part shall not be adopted or submitted to the legislative procedure for the purpose of its adoption before–
>
> (a) ……;
>
> (b) in any other case, the requirements of paragraph (3) below, and such requirements of Part 3 as apply in relation to the plan or programme, have been met.

> (3) The requirements of this paragraph are that account shall be taken of–
>
> (a) the environmental report for the plan or programme;
>
> (b) opinions expressed in response to the invitation referred to in regulation 13(2)(d);
>
> (c) opinions expressed in response to action taken by the responsible authority in accordance with regulation 13(4); and
>
> (d) the outcome of any consultations under regulation 14(4)."

Regulation 8(3)(b) and (c) refers to the responses to the consultations required with specified agencies and with the public.

52. Regulation 12 deals with the preparation of an "environmental report". Sub-paragraphs (1) to (3) provide:-

> "(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and
>
> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

53. For most purposes, the term "responsible authority" is defined as "the authority by which or on whose behalf [a plan or programme] is prepared" (regulation 2(1)).

Delegation of functions for the preparation of plans

54. Section 101(1) of the Local Government Act 1972 ("LGA 1972") contains a general power for a local authority to delegate any of its functions to one of its committees or officers, subject to any express provision in that Act or any statute passed subsequently. It is under this provision that authorities have delegated many planning functions.

55. Part 1A of the Local Government Act 2000 ("LGA 2000"), which was inserted by the Localism Act 2011, introduced revised arrangements for the governance of English local authorities. In broad terms, s.9B requires such authorities to operate under either "executive arrangements" or "a committee system". The latter expression applies where the authority does not operate executive arrangements. Those "arrangements" provide for the creation and operation of the authority's executive and for certain of the authority's functions to be the responsibility of the executive (s.9B(4)). By s.9C an executive comprises the elected mayor of the authority or a councillor elected as leader of the executive, plus two or more councillors. In effect, the executive forms what is generally referred to as a cabinet. HBC operates an executive or cabinet system with an elected leader, and not a "committee system".

56. Sections 9D and 9DA, together with the regulations made thereunder, are central to defining the extent to which the functions of a local authority are made the responsibility of its executive or remain with that authority (see ss. 9D(1) and 9DA(1)).

57. Section 9D(3) authorises the Secretary of State to make regulations to define any function of a local authority which:-

> (a) is *not* to be the responsibility of its executive; or
> (b) *may* be the responsibility of its executive under the arrangements made by the authority (and which must therefore be addressed by the authority's "executive arrangements" - see s.9D(4)); or
> (c) *to the extent* specified by the regulations, either is or is not the responsibility of its executive.

There is a fourth category. Section 9D(2) provides that any function of a local authority which is *not* specified in such regulations is to be the responsibility of the authority's executive in accordance with the "executive arrangements" it makes.

58. Section 9DA(2) provides that any function which is the responsibility of an executive of a local authority is to be regarded as exercisable on behalf of that authority. Section 9DA(3) prevents any such executive function from being exercisable by the authority itself and disapplies s.101 of LGA 1972 so that that function may not be delegated by the authority to a committee or to an officer. Instead, the functions which are the responsibility of the executive may be delegated (e.g. to a committee or an officer) by the executive, or by the leader or a member of the executive, in accordance with s. 9E.

59. The effect of section 9DA(4) is that any function which is not made the responsibility of an authority's executive is to be discharged in any way which would otherwise be permissible or required. So those functions may be exercised by the authority or delegated under s.101 of LGA 1972 to a committee or officer, subject to any regulations made under s.9DA(5).

60. The relevant regulations are the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (SI 2000 No. 2853) ("the 2000 Regulations"). These regulations were made under s.13 of the LGA 2000, before that part of the statute was replaced in England by the relevant provisions of the Localism Act 2011. However, the 2000 Regulations continue to have effect as if made under ss.9D and 9DA (see s.17(2)(b) of the Interpretation Act 1978).

61. Regulation 2 and schedule 1 of the 2000 Regulations set out functions which are *not* to be the responsibility of an authority's executive. Part A of schedule 1 lists a wide range of planning functions, including the determination of planning applications. Such functions are therefore to be discharged by the authority itself, unless delegated under s. 101 of LGA 1972 to a committee or to an officer.

62. Regulation 3 and schedule 2 of the 2000 Regulations deal with the functions which *may be*, but need not be, the responsibility of an authority's executive, and therefore are to be addressed under the authority's executive arrangements. Although schedule 2 identifies some planning and environmental functions, none relate to any aspect of the local plan process.

63. Regulation 4 and schedule 3 deal with functions which are *not* to be the sole responsibility of an authority's executive.

64. By regulation 4(1), the formulation or preparation of a development plan document is not to be the responsibility of the executive as regards any of the "actions" described in regulation 4(3). Those actions are therefore matters to be dealt with by the local authority, subject to any permissible delegation under s.101 of LGA 1972. They include the approval of a draft local plan for submission to the Secretary of State for examination under s.20 of PCPA 2004 and the adoption of the plan, with or without modifications. As we have seen, s.23(5) of PCPA 2004 precludes delegation by an authority of the decision to adopt. By virtue of regulation 4(8)(a), the decision on whether or not to approve the draft of the local plan for submission to examination cannot be delegated under s.101 of LGA 1972.

65. However, by regulation 4(2) the function of formulating or preparing a development plan in all respects other than the approval of a draft plan for submission to examination and the adoption of the plan is made the responsibility of the authority's executive.

66. The effect of regulation 4(4) (so far as is material) is that an authority's executive is expressly made responsible for the specified functions of amending, modifying, revising, varying, withdrawing or revoking a local plan, in so far as the taking of such action is recommended by the Inspector in his or her report on the examination. The executive's responsibility would therefore include a decision on whether to accept a recommendation that "main modifications" be made to a local plan (see s. 23(2A) of PCPA 2004). But the responsibility for those specified functions in all other respects lies with the authority, not the executive (regulation 4(4)(b)). In the present case, it was the responsibility of HBC's Cabinet's to decide whether to modify the local plan in accordance with the Inspector's report before the full Council could decide whether to adopt it as so modified.

67. Regulation 4(8)(b) has the effect of disapplying s.101 of LGA 1972 in relation to any function described in regulation 4(4) to the extent that it is *not* made the responsibility

of the executive. So, the functions described in that provision of amending, modifying, revising, varying, withdrawing or revoking a local plan, in so far as they are the responsibility of the authority, may only be exercised by the full Council and cannot be delegated.

68. The position may be summarised as follows:-

(i) The effect of regulation 4(1) to (3) of the 2000 Regulations is that any function in connection with the formulation and preparation of a development plan document, including a local plan, is the responsibility of the executive, save for the approval of a draft plan for submission for examination and the adoption of the plan following that examination, both of which are the responsibility of the local planning authority;

(ii) The functions in (i) above of the *authority* cannot be delegated (regulation 4(8)(a)), but those functions of the *executive* may be (s.9E);

(iii) The functions of amending, modifying, revising, varying, withdrawing, or revoking any development plan document is the responsibility of the executive in so far as that action is recommended by the Inspector carrying out the examination under s.20, but are otherwise the responsibility of the local planning authority (regulation 4(4) and see also s.9D(4)). The executive, but *not* the authority, may delegate the functions referred to in this paragraph for which it is responsible (s. 9E of the 2000 Act and regulation 4(8)(b));

(iv) Any other function involved in the statutory process leading to the adoption of a local plan which is not expressly specified in the 2000 Regulations is the responsibility of the executive (s.9D(2)) and may be delegated under s.9E. These functions would include a request to the Inspector under s. 20(7C) of PCPA 2004 to consider recommending "main modifications". That "request" does not itself amount to a variation or modification of the plan. Any such alteration would only come about if firstly, the Inspector were to recommend in his report on the examination that it be made and secondly, the executive were then to accept that recommendation when considering the report.

Factual background

69. It is necessary to set out the evolution of the Local Plan policy for a new settlement in some detail.

70. HBC began its plan-making process in 2014. It issued a scoping report and made an initial call for interested parties to notify sites with potential to be allocated for development.

The Issues and Options consultation document - 2015

71. In July 2015 HBC published the Local Plan: Issues and Options consultation document. The accompanying Draft Sustainability Appraisal: Interim Report assessed 11 growth strategies, from which HBC selected 5 for consultation. Option 5 was for "creating a new settlement within the A1(M) corridor to accommodate up to 3,000 new homes", with the remaining housing requirement being met in the main urban areas of Harrogate,

Knaresborough, Ripon, market towns and villages. The SA referred at p. 206 to an area of search running broadly north/south for about 3 miles either side of the A1(M).

72. The SA included a comparative assessment based upon 16 objectives, which was subsequently carried forward in later SA work during the local plan process. Under the heading "10. A transport system which maximises access while minimising detrimental impacts", HBC identified proximity to the motorway encouraging commuting by car as a disadvantage, while seeing the scope for improvements to public transport as an advantage, depending on the location of the site within the A1(M) corridor. It was also recognised from the outset that a new settlement would be a long-term option going beyond the plan period, given the need to secure land assembly.

Consultation draft Local Plan - October 2016

73. HBC published a Draft Local Plan in October 2016 for consultation between 11 November and 23 December 2016. Policy GS2 set out a growth strategy to 2035. The opening words of the policy stated:-

> "The need for new homes and jobs will be met as far as possible in those settlements that are well related to the key public transport corridors."

74. Paragraph 3.12 stated:-

> "Those settlements within, or located in close proximity to, the key public transport corridors have the best access to public transport and therefore also a wide range of jobs, services and facilities within the district but also further afield."

75. Because there were insufficient sites within existing settlements to meet housing needs in full, the plan proposed a "major new strategic allocation for housing with associated employment and supporting services and facilities" which would "take the form of a new settlement". This was intended to help meet housing needs during the plan period and beyond (paragraph 3.15).

76. Two potential locations were identified:-

- land at Flaxby, adjacent to the A59/A1(M), known as Site FX3; and
- land in the Hammerton area, Green Hammerton/Kirk Hammerton/Cattal, known as Site GH11.

FX3 had an area of 196.6 ha and GH11 an area of 168.1 ha. Paragraph 10.10 stated that the final version of the plan would include only one new settlement.

77. Paragraph 5.6 of the accompanying draft SA stated:-

> "An initial sustainability assessment of these two new settlement options is included in Appendix 8a. Further work will now be undertaken to inform which option for a new settlement is taken

> forward and included at the Formal Publication Stage consultation in July 2017."

78. The SA assessed 6 potential locations. One site at Cattal, referred to as CA4, was discounted at this point because, taken in isolation, it could provide only 1,000 homes and so was below what was considered to be the threshold for a new settlement. The SA noted that there are two rail stations near GH11 offering the potential for non-car journeys, whereas in the case of FX3 there were "significant transport/accessibility problems …", an "aspiration to deliver a rail station … no detailed work undertaken" and "limited scope for non-car travel from site". The relative proximity of FX3 to Knaresborough was also identified as a disadvantage. But at that stage the appraisal said that FX3 was an "option for further consideration".

79. During the consultation on the 2016 draft Local Pan two additional sites were put forward, one of which was also at Cattal, CA5. This site included part of CA4 and was larger than that site.

Additional Sites Plan - 2017

80. Between 14 July and 25 August 2017, HBC undertook consultation on an Additional Sites Plan dated July 2017. At this stage GH11 became HBC's preferred location for a new settlement. Paragraph 7.1 stated:-

> "….. a new settlement is being proposed which will help to meet the need within the plan period and beyond. Last year HBC consulted on two options, one at Flaxby and one in the Hammerton area. It was made clear in the consultation document that HBC would only identify one of the options for inclusion in the draft plan. Following a review of both of these options, together with options at Malt Kiln village (Cattal) and an option at Deighton Grange (Kirk Deighton) HBC has concluded that land at Green Hammerton is the preferred location for a new settlement. HBC has prepared a separate New Settlement Report that sets out the reasons for this choice".

Paragraph 7.2 identified HBC's objectives for the new settlement, including that it should "be designed to integrate into and enhance the local public transport network, maximising public transport use", "be designed to have its own identity and sense of place and create a new focus for growth" and "have the propensity to grow in the future".

81. The New Settlement Report was published in July 2017. Its purpose was explained at paragraph 1.5:-

> "to provide detail on HBC's rationale for including a new settlement as part of the Local Plan growth strategy and to make an assessment of a preferred new settlement location to be taken forward and included in the Publication Local Plan".

HBC's objectives for the new settlement remained as previously stated (paragraph 3.13).

82. The Report contained a like for like comparison of four sites, CA5, FX3, GH11 and OC5. In Chapter 5 "Constraints and Opportunities" FX3 was assessed for accessibility by rail as follows:-

> "there is currently no direct access to the Leeds-Harrogate-York line. As the rail line runs to the south west of the site there may be the potential to develop a new station stop, preferably to the north of the A59 so as to be within walking/cycling distance of the majority of the site. The former Goldsborough station site lies to the southwest of the site although outside of the site boundary shown in the draft Local Plan. The development promoter has undertaken initial investigations on the feasibility of reopening a station in this location to serve the new settlement. This could be a potentially complex solution and without certainty: as it currently stands, a station and rail service are not in place. Knaresborough and Cattal rail stations, the nearest existing stations, are outside of walking distances but potentially accessible by improved bus services."

By contrast the report's appraisal of GH11 on this subject was:-

> "the site benefits from two operational stations within walking distance of the whole site offering choice."

83. The "comparative analysis" was brought together in chapter 6. Under accessibility it was stated that "CA5 and GH11 have additional benefit of access to rail stations within or immediately adjoining the sites".

84. The conclusions of the Report were set out in chapter 7. Site OC5 was rejected because it lay outside all of the key transport corridors identified in the draft Local Plan (paragraph 7.2). the document then turned to address the three other sites:-

> "7.3 Of the remaining three sites, they all share similar constraints in terms of landscape, ecological and heritage impacts and the need to upgrade physical infrastructure (Junction 47, A1M) and utilities). However, the comparative assessment has not identified these to be showstoppers and the assessment indicates that these should be capable of site specific mitigation, although this may be more challenging for some sites.
>
> 7.4 *Maximising public transport use* is one of HBC's objectives for the new settlement and sites *CA5 and GH11 are best placed to achieve this with direct access to train stations. Whilst the promoters of site FX3 have indicated that provision of a new station is possible there is no evidence that this could be delivered during the plan period, if at all.* Sites CA5 and GH11 also offer a greater opportunity to grow in the longer term, beyond the current plan period and, therefore, have more potential to support a wider range of services and jobs whereas site FX3 is more restricted by virtue of its proximity to the A1(M) and Knaresborough to the west.

> 7.5 Sites CA5 and GH11 share many similarities. This is due largely to their close proximity to one another: indeed an area of land to the east of Station Road between the A59 and the rail line is included within the boundaries of both sites. However, the larger part of site GH11 is within reasonable walking distance (800m) of the services and facilities available in Green Hammerton (school, shop, GP) than is the case with site CA5, where only the very eastern edge of the site is within reasonable walking distance of the services and facilities in Kirk Hammerton (school). Accessibility to services that can meet the day to day needs of residents, and by sustainable modes, in the early stages of the development is considered to be a distinct advantage of site GH11.
>
> 7.6 On balance, it is concluded that site GH11 should be the preferred option for a new settlement location for inclusion in the Publication version of the Harrogate District Local Plan." (emphasis added)

85. Paragraph 7.3 indicates that in relation to general planning considerations there was not much to choose between the three sites. Nonetheless, HBC reached a clear conclusion about which site they preferred so that they could advance their Plan. At this stage they selected GH11. Paragraph 7.4 is of crucial importance to that judgment. Some two years after the Issues and Options consultation there was still no evidence that a new station to serve FX3 could be delivered within the plan period running to 2035, if at all. CA5 and GH11 were best placed to maximise public transport use because of their direct access to existing railway stations.

86. HBC also identified the "greater opportunity" offered by CA5 and GH11 to provide for growth in the longer term beyond the plan period. HBC's judgment was that FX 3 was more restricted because of proximity to the A1(M) (which according to the SA involved issues about the effect of noise from traffic) and proximity to Knaresborough to the west (which had raised issues about the need for separation and how far the settlement could expand in that direction).

87. Mr Katkowski QC rightly accepted that HBC's judgment was that GH11 was preferable to CA5, but both were preferable to FX3, for the reasons summarised in paragraph 7.5.

New Settlement Background Paper and Publication Draft Local Plan - January 2018

88. In January 2018 HBC issued its Publication Draft Local Plan for consultation under regulation 19 of the 2012 Regulations. In order to explain its "final preferred approach" in the draft plan on a new settlement, in November 2017 HBC had already published its New Settlement Background Paper (see paragraph 1.2).

89. On the subject of connections to the railway system, the Background Paper said this with regard to FX3:-

> "A new station at Green Hammerton could bring opportunities for an interchange and improved parking in a central location within the site. However, adding a new station anywhere is

> problematic and would present logistical issues (updating of signalling system and decommissioning of older stations) and would be costly with a long lead in time. As Flaxby is located on a fast section of the line, a new station in this location would impact on journey times. A case to limit stops elsewhere on the line could not currently be put forward without updating the signalling system (not currently scheduled or funding available) and increasing the number of stations on the line may make it more difficult to secure improvements. Improving existing stations would on balance be preferable to delivering a new station because of uncertainty over delivery."

90. In the summary and conclusions in chapter 8 HBC explained why it continued to prefer the Green Hammerton location over Flaxby, but considered that the local plan should identify a broad location comprising areas CA4/CA5 and GH11/GH12 within which a site would be identified in a subsequent Development Plan Document ("DPD") (see paragraph 8.8), rather than allocate a defined site in the Local Plan:-

> "8.3 The consideration of alternative locations in Section 7 has highlighted that, for the majority of the sites, the consideration between alternative sites is finely balanced and that there are few differences in the opportunities and constraints for each site and the performance of the sites when assessed against sustainability objectives. All of the sites, with the exception of Sites DF7 and OC5 'fit' with the Local Plan growth strategy being located in a key public transport corridor, although sites CA4/CA5, FX3 and GH11/GH12 have the additional advantage over Site OC11 of being located in the rail corridor to the east of Knaresborough.
>
> 8.4 Throughout the evolution of the Local Plan the council has considered the various options put forward. At the Draft Local Plan stage the council considered that, based upon a comparative consideration of the alternatives put forward, the preferred options were either Flaxby or Green Hammerton. At the Additional Sites Consultation stage, a preference was given for the Green Hammerton proposal. The council has now had the opportunity to review all the very latest evidence (including additional material provided by the various site promoters) alongside wider consultation feedback, and considers that the optimum approach to ensure the best possible place making solution for the future would be to continue to focus on the Green Hammerton option, but introduce additional flexibility to enable full consideration of adjoining land which has also been promoted as a new settlement (Maltkiln). The key reasons for the selection of this site over the other options includes:
>
> - The area has direct and convenient access to the Leeds Harrogate York rail corridor providing opportunities for sustainable travel via two operational rail stations. The scale of development would support the improvement and enhancement of existing rail facilities and services,

realising substantial positive environmental, social and economic benefits.

- The area is also located with convenient access onto the A59 for local bus services as well as providing accessibility to the highways network. It is sufficiently far enough away from the A1(M) to not suffer from noise or disturbance from that corridor.
- The area provides greater scope to deliver funding for infrastructure and wider planning obligations to support the creation of a quality place.
- A large area of land has been promoted for development providing scope to define the best possible site boundary and inclusion of necessary infrastructure through future comprehensive master planning.
- The site is located close to existing village settlements which provide some local services. These could assist in the very early phases of development to provide for day to day A362 New Settlement Background Paper 2017 Harrogate Borough Council 69 Summary and Conclusions 8 needs of new residents (albeit over time the new settlement will be expected to address its needs through the provision of a comprehensive range of new services and facilities).

8.5 A new settlement represents an unprecedented scale of development in the district and the council is mindful of the need to ensure the effective and successful planning and delivery of a new settlement including achieving a step change in the quality of place making. In considering the evidence and key issues raised during the Additional Sites consultation, the council considers that to achieve this, a broad location for a new settlement in the Green Hammerton area should be identified in the Local Plan rather than allocation of an individual site or landownership defined boundary that has been promoted to date. This approach offers a number of potential benefits:

- Consideration of the optimum boundary for a new settlement taking account of all key factors including land ownership, infrastructure and masterplanning matters;
- Provides for further consideration of the provision of key infrastructure, for example to ensure the most appropriate long term solution to improvements to the A59 and local rail facilities;
- Provides a further opportunity to consult on the most appropriate spatial and place making approach (such as creation of a new settlement in accordance with Garden City principles), a site specific boundary, disposition of key land uses and relationship with existing neighbouring villages; and

- It does not result in a delay to the adoption of the Local Plan or meeting local housing requirements within the plan period.

8.6 Map 8.1 is the broad area for growth. It generally includes Sites CA4/CA5 and GH11/GH12 previously considered albeit boundaries will be defined through subsequent planning policy development. The exact boundary will seek to best exploit the existing railway line and optimise the delivery of the necessary improvements to the A59 in the longer term. It will also further reflect on the relationship to existing communities."

91. Three points can be seen from chapter 8 of the Background Paper. First, HBC continued to take the view that for most of the planning considerations which had been assessed, there was little to choose between the majority of the sites, including Flaxby and Green Hammerton/Cattal. Second, HBC continued to identify as key reasons for preferring the Green Hammerton/Cattal location, its direct access to the rail corridor through two operational rail stations, the absence of significant noise constraints from the A1(M), and proximity to existing settlements providing local services assisting new residents in the early phases of development. Third, the paper also referred to the broad location as providing scope for selecting an optimum site boundary in the future.

92. At meetings in November and December 2017 HBC's cabinet and the full Council received a report by officers on the process which had been followed and an analysis of issues raised in consultation, as well as the Background Paper and what became published in January 2018 as the latest iteration of the SA. On that basis they considered and approved the Publication Draft Local Plan. Paragraphs 5.15 to 5.18 of the officers' report stated:-

"5.15 Whilst the housing and employment need figure has increased, it is still considered appropriate to identify a single new settlement in order to meet identified needs. At the Additional Sites consultation stage the Council identified the Green Hammerton option as its preferred location. Following submissions to this consultation, officers have reviewed all the very latest evidence (including material provided by the various promoters) alongside wider consultation feedback and consider that the focus should remain on the Green Hammerton option but introduce additional flexibility to enable a full consideration of adjoining land which has also been promoted as a new settlement (known as Maltkiln).

5.16 In order to achieve this it is proposed that a broad location for a new settlement in the Green Hammerton area should be identified in the Local Plan rather than allocation of an individual site or landownership defined boundary that has been promoted to date. This approach offers a number of potential benefits:

- Consideration of the optimum boundary for a new settlement taking account of all key factors including

> land ownership, infrastructure and masterplanning matters
> - Provides for further consideration of the provision of key infrastructure, for example to ensure the most appropriate long-term solution to improvements to the A59 and local rail facilities
> - Provides a further opportunity to consult on the most appropriate spatial and placemaking approach, a site-specific boundary, disposition of key land uses and relationship with existing neighbouring villages and
> - It does not result in a delay to the adoption of the Local Plan or meeting local housing requirements within the plan period.
>
> 5.17 A New Settlement Background Paper is attached at Appendix 3 that draws together relevant information from the Local Plan evidence base, sets out the consideration of the alternative options and proposals, explains the decision making process and rationale behind the choices made including the final preferred approach, which has been included in the Publication Local Plan.
>
> 5.18 Whilst the District Local Plan will provide the strategic policy context for development of a new settlement the detailed site boundaries and detailed planning of the new settlement will be taken forward through the preparation of a separate Development Plan Document (DPD). ….."

93. It follows that the Cabinet and full Council approved the decision to discard alternatives to the Green Hammerton proposal and, having reached that decision decided that that proposal should be taken forward as a "broad location" extending to 604 ha, within which the optimum site boundary would be identified in a future DPD.

94. The Publication Draft Local Plan (dated January 2018) included draft policy DM4: Green Hammerton/Cattal Broad Location for Growth. It is common ground that this policy was in very similar terms to policy DM4 in the draft of the plan submitted by HBC in August 2018 to the Secretary of State for examination and in the version adopted on 4 March 2020. Paragraph 10.15 of the Publication draft relied upon the Background Paper to identify the "broad location" for the new settlement (ie. areas CA4/CA5 and GH11/GH12). The new settlement is to provide at least 3,000 homes, of which at least 1,000 are expected to be built by 2034/35 (paragraph 10.21).

95. The draft SA (January 2018) that accompanied the Publication Draft Local Plan did not assess any other broad location for growth. It compared the policy DM4 broad location with a number of *sites* including FX3. This provided a record for the public and consultees as to how those sites had been assessed as the SA continued to evolve during the local plan process. The SA plainly states that in the local plan documents produced in 2017 and 2018 FX3 was not identified as a new settlement option for further consideration, in contrast to the position in 2016. In other words, FX3 had been "sieved

out". According to HBC, there continued to be significant transport/accessibility problems with FX3 (p. 223 of draft SA).

96. In March 2018 FPL made representations on the Publication Draft of the Local Plan objecting to the fact that the Draft SA had not assessed any other "broad locations" or areas of search for growth apart from the preferred location. All the comparisons made had been between the policy DM4 broad location and other *sites* such as FX3. The consultants said that Flaxby should be assessed in the SA as a broad location, that is as a wider area of search extending beyond the boundaries of FX3.

97. In June 2018, HBC's consultants, AECOM, prepared a Sustainability Appraisal Health Check. It appears that a number of consultees, and not simply FPL, had raised issues to do with "reasonable alternatives". AECOM advised that there were numerous approaches that could be taken. They then summarised four options with varying degrees of risk of legal challenge, acknowledging the delays to the local plan process that could occur and the constraints of the timetable for adoption of the plan. It was in this context that AECOM pointed out that, given the iterative nature of the SEA process and in accordance with case law, any deficiencies found to exist in the SA could be rectified during the examination. Specifically on the objections which had been raised by FPL on HBC's treatment of Flaxby, AECOM advised:-

> "The change in approach is not fundamental to the selection of a new settlement. The choice is still the same with regards to Green Hammerton or Flaxby. However, within Flaxby, there are no 'sub options' to consider. Appraisal of a broad area of search at Green Hammerton versus a broad area of search at Flaxby would reveal very similar findings to the appraisal of site options that have already been undertaken."

Submission of Local Plan for examination - August 2018

98. HBC submitted the Local Plan for examination on 31 August 2018. Policy DM4 retained the broad location for growth at Green Hammerton/Cattal. The SA continued to compare the merits of that broad location with other sites, not broad locations.

99. On 14 November 2018, HBC's Cabinet received a report from officers recommending the grant of delegated powers to deal with issues that were likely to arise in the course of the examination. It was explained that during the examination officers would be expected to provide information in response to requests from the Inspector and views on possible amendments to policies. The delegation would enable the examination to proceed efficiently, but any proposed modifications to the plan resulting from the process would require the agreement of the Council before adoption. The Cabinet approved the following resolution: -

> "That Cabinet delegates authority to the Executive Officer Policy and Place for the duration of the Examination, in consultation with the Cabinet Member for Planning to:
> a. provide formal responses to questions from the Inspector alongside other supporting statements and documentation as requested by the Inspector; AND

> b. to agree to modifications to the plan through the examination period in order to make the plan sound."

Mr Katkowski QC rightly accepted that the reference to "soundness" made it clear that the second part of the delegation related to potential "main modifications" (see ss. 20(7C) and 23(2A) of PCPA 2004). But it is also clear that the delegation was only to last for the duration of the examination and required the Executive Officer to consult with the Cabinet Member for Planning.

100. The examination hearings took place between 15 January and 13 February 2019. A number of documents were submitted by FPL and by HBC dealing with the SEA issues regarding the proposals for a new settlement. FPL submitted that the SA was flawed because HBC had not assessed any alternative "broad location" for the settlement, including Flaxby. FPL also claimed that such a defect could not subsequently be cured through the SEA/local plan process and that a fresh environmental report would have to be prepared before the examination commenced. FPL did not pursue that argument in the hearing before me.

101. In an undated document (but apparently supplied on 14 January 2019) HBC responded to FPL's submissions, stating that no further SEA was required comparing alternative broad locations. The Council's reasoning included the following extracts from Table 1 and paragraph 3.4:-

> "The change in approach is not considered to be fundamental to the decision making process with regards to the selection of a new settlement. All reasonable alternatives for a new settlement have been tested in the SA (as discussed at section 7 of the SA Report). Following this process, the Council identified that the new settlement option sites in the Green Hammerton / Cattal area were emerging as a preferred location for growth. However, it was considered that a broad area of search should be identified to allow for detailed issues and opportunities in this area to be explored in more detail (to help determine an appropriate boundary for a new settlement).
>
> *At this stage, other new settlement options had been discounted in favour of the options in the Green Hammerton/Cattal area. It was therefore considered unnecessary to identify additional 'broad areas of search' to compare to the Green Hammerton / Cattal location. The choice of location had been made but the exact boundary was to be determined.*" (emphasis added)
>
> "The legal opinion goes on to suggest at para 21 that the failure to do this meant that the Flaxby site was not treated equally. It is accepted that appraisal of a broad area of search is not exactly on a like-for-like basis with an assessment of individual site options (i.e. it allows for greater flexibility to address impacts). However, there had already been an assessment of new settlement options across the district which was carried out on a like-for-like basis and which provided an understanding of the issues and opportunities in key locations such as Flaxby, Green

> Hammerton/Cattal. *Flaxby was not taken forward as the preferred location based on that assessment and not as a result of a comparison with the assessment of the broad location. This process helped to inform the identification of a broad area of search, which is only necessary in order to determine the optimum boundary of the new settlement.*" (italics added)

FPL did not raise any issue about the factual accuracy of that italicised summary of the basis upon which HBC had reached its decision.

Sustainability Appraisal Addendum 2 - 2019

102. On 11 March 2019, the Inspector issued a letter to HBC stating:-

> "Having considered the submissions from Flaxby Park and Keep the Hammertons Green, along with HBC's additional submission in relation to Matters 1 and 12, it seems to me that the issue of whether additional SA work in relation to broad locations for growth for a new settlement is needed is finely balanced. This being so, I consider that it would be sensible for HBC to undertake additional work in this regard. In short, for it to assess broad locations around each of the proposed potential sites. I may comment further on the matter of the proposed new settlement in due course, if I deem it necessary in light of the additional work."

103. On 14 March 2019, HBC's Executive Officer Policy and Place wrote to the claimant's planning consultant referring to the Inspector's letter:-

> "As you will see he is asking the Council to undertake additional Sustainability Appraisal (SA) work, to assess broad locations around each of the new settlement options that had been promoted and considered by the Council.
> The broad location for growth around Green Hammerton/Cattal was identified on the basis of known available land. The Council will look to identify a broad location around the other new settlement options on the same basis, i.e. based on known available land. Where there is no additional land available the sustainability appraisal will be limited to the extent of the land that you have previously promoted as a new settlement. The reason for this is on the grounds of deliverability.
> You submitted the attached land for consideration (FX3). I would be grateful, if you could confirm the extent of land that you consider to be available. If you propose new land over and above that previously promoted then I would need you to provide confirmation from the landowners that they are willing to have their land considered and/or details of any option agreements that secure control of the land. *The Council is aware of other land promoted around FX3 (shown on the attached plan) and will be writing to those promoters separately to confirm availability.*

> In order that the Council can progress this work in a timely manner I would appreciate a response by Friday 22 March. Should I not hear from you by that date I shall proceed on the basis that the extent of land available is as you have previously promoted.
> If you have any questions then please get back to me." (emphasis added)

104. On 22 March 2019 the claimant's planning consultant responded as follows:-

> "…… I can confirm on behalf of Flaxby Park Ltd that all of the land identified as FX3 on your plan is available (it is all owned and controlled by FPL).
> In addition, your plan excludes land at the former Goldsborough Station which is owned by FPL (title plan attached) and forms part of their outline planning application. As you know, the outline planning application proposes to re-open the station alongside a park and ride and this should be added to the FX3 site.
> Please could you keep me informed on the progress of this work."

On the same date, HBC responded:-

> "Thank you for getting back to me. We will amend the area accordingly."

105. In May 2019 HBC produced a draft "Sustainability Appraisal 2: Broad Locations of Growth" dated May 2019 ("SAA2") which included an assessment of a broad location at Flaxby (site OC16), two other broad locations, Dishforth (OC18) and Kirk Deighton (OC19), and the DM4 broad location (OC12). The OC16 location significantly expanded FX3 by including additional land identified through the exercise in March 2019, ie. land extending northwards along the A1(M), westwards towards Knaresborough, to the south of the A 59 and to the east of the A1(M).

106. Paragraph 1.6 of draft SAA2 stated:-

> "Sites CA5, FX3 and GH11 lie within the public transport corridor to the east of Knaresborough. However, maximising public transport is one of the council's objectives for the new settlement and sites CA5 and GH11 were best placed to achieve this with direct access to train stations. Whilst the promoters of site FX3 indicated that provision of a new station was possible there was no evidence that this could be delivered during the plan period, if at all. Sites CA5 and GH11 also offered a greater opportunity to grow in the longer term, beyond the current plan period and, therefore, had more potential to support a wider range of services and jobs whereas site FX3 was more restricted by virtue of its proximity to the A1(M) and Knaresborough to the west. For these reasons FX3 was discounted in 2017."

This confirms that FX3 had been rejected not only on the grounds of accessibility to public transport, but also because it offered a lesser opportunity for growth in the long term, as had previously been explained in the New Settlement Report in November 2017.

107. Draft SAA2 was subject to a "targeted consultation" between 8 and 30 May 2019. HBC consulted 12 parties interested in the location of a new settlement, including FPL, landowners within the Green Hammerton/Cattal broad location, and an environmental amenity group (Keep the Hammertons Green) which was opposed to a new settlement at the DM4 broad location. FPL submitted representations in response to this consultation on 30 May 2019. They contended *inter alia* that there had not been a proper opportunity for landowners in the vicinity of the FX3 site to put forward additional land as part of a broad location or area of search. HBC resisted that contention in their response.

108. In July 2019 HBC published a revised version of the draft SAA2, taking into account comments received in the targeted consultation exercise. The scoring analysis was updated to correct errors which had been identified and accepted.

109. The overall conclusions were set out in paragraphs 4.2 and 4.3:-

> "4.2 Whilst the broad locations all produced a red score against one or more sustainability appraisal criteria, it should be acknowledged that any new settlement would have negative impacts mainly through development scale and the impact that scale has on, for example, the surrounding landscape or existing settlement. From the above assessments it is clear that all the broad locations achieve similar ratings but there are key points of difference between them which are as follows:
>
> - A key part of the Local Plan growth strategy is locating development in areas that have good public transport links. Maximising public transport is one of the council's objectives for the new settlement. Significant long term positive effects in relation to sustainability objectives transport (10), climate change (11) and local needs met locally (9) will be met in those locations where there is good access to public transport, especially where there are existing bus and rail services which can be enhanced. OC18 and OC19 do not sit in the defined public transport corridor, albeit that there may be scope to expand a bus service into OC19; this would be less likely in relation to OC18. OC12 includes within it two operational rail stations that allows direct and convenient access to the Leeds-Harrogate-York rail line, providing sustainable transport options from the earliest phases of development. Whilst OC16 includes the former Goldsborough Station, there is no substantive evidence to suggest that this can be delivered in the medium to long term, and certainly would not be available from the earliest phases of development. This leaves the provision of an operational rail station as uncertain and certainly as a less favourable position than a location that has within it

operational stations that can be used by residents from day one.

- With the exception of OC19, all of the remaining options are of sufficient scale to deliver a minimum of 3,000 dwellings as required by Local Plan policy DM4. The propensity to grow in the future is limited in respect of OC18. In terms of known available land there is sufficient land within either OC12 and OC16, to enable future expansion. In respect of OC16, any expansion would limit effective place making by virtue of either linear expansion alongside the A1(M) and/or development crossing the A1(M). The extent to which any new settlement at this location could expand in a westerly direction is limited by the fact that Knaresborough lies only a short distance from the area

.

4.3 In conclusion it is considered that:

- OC12 should be selected as the preferred Broad Location for growth. It sits within the key public transport corridor and offers the added advantage of having two operational rail stations. The area of land promoted offers significant scope to define the optimum boundary and deliver effective place making, alongside delivery of necessary infrastructure
- OC16 should not be selected as it does not offer the same locational advantages as OC12. It is currently not served by a key bus service (albeit it is considered that there is scope to extend existing services), it does not have an operational rail station nor any surety that one can be provided and the extent of available land makes effective place making more difficult.
- OC18 should not be selected as it does not fit with the identified public transport corridor, and would deliver a limited amount of development within the Plan period.
- OC19 should not be selected as it is not of sufficient scale to deliver the minimum number of homes needed to meet policy DM4 and is not a best fit with the identified public transport corridor."

110. Thus, according to the authors of SAA2, the comparison of broad locations at the high level of analysis involved in this environmental assessment process, which (apart from the limited points raised under grounds 2 and 3) is not the subject of legal challenge, showed very much the same outcome as HBC's earlier comparison of *sites* using the same assessment criteria (which was considered by the full Council). The broad locations achieved similar overall ratings against HBC's 16 objectives subdivided into 58 headings. The authors then went on to distinguish the *broad locations* by relying on the same factors which had caused both the Cabinet and the full Council to decide to select GH11 and discard FX3, comparing the *sites* in the suite of documents in 2017 leading up to the Publication Draft Local Plan. Those factors continued to be regarded as decisive.

111. Between 26 July and 20 September 2019 HBC consulted on SAA2 and a schedule of Main Modifications to the Local Plan. It is common ground that the Main Modifications do not affect the issues raised by this challenge.

112. FPL made written representations on 20 September 2019. FPL advanced a number of detailed criticisms of some of the evaluations and scoring in SAA2, both in relation to OC12 and OC16. They also criticised what they considered to be the illogical boundary which HBC had selected for OC16, which had resulted in it being rejected as a broad location because effective place-making would be limited by linear expansion alongside the A1(M) and/or crossing that road. FPL referred to other landowners in the area who wished to promote their land as part of a new settlement, but who had not been aware of the additional assessment work being undertaken by HBC before the publication of SAA2. In response to the consultation on that document those parties had identified additional land at Flaxby in the order of 630 ha, which would result in a much more logical broad location. FPL also criticised SAA2 for failing to compare the relative deliverability and viability of the broad locations. They suggested that the infrastructure costs for OC12 had been grossly under-estimated and if corrected would make the scheme non-viable. FPL submitted that this should be addressed in an evidence-based, public examination along with the other issues raised. They also expressed "disappointment" that the conclusions of SAA2 and criticisms of that work had not been considered by elected members of the Council. I should record that although there were suggestions in the representations on behalf of FPL that the assessment by officers in SAA2 had been carried out in a predetermined, biased or unfair manner, those allegations were rejected by the Inspector in his report (see below) and were not pursued in this challenge.

113. In October 2019 HBC provided a summary response explaining that it had not been able to include land in the broad locations which it had not known to be available. HBC said that there had been no unfairness because landowners in the vicinity of OC16 had been able to put forward additional land throughout the local plan process. They added:-

> "FPL has known throughout the process that the potential for expansion was one of the reasons why the Council had preferred OC12. If FPL considered there was additional land which should be considered as part of their proposal, it was at all times open to them to gather information from adjoining landowners as to their willingness to make land available."

114. With regard to the additional area of land at Flaxby of 630 ha HBC said this:-

> "The Council has assessed a broad location around Flaxby, thereby carrying out a like for like assessment with the broad location at Hammerton/Cattal. The additional land that has been submitted to the Council is largely agricultural land; in many ways very similar to the land already considered. The land in question may provide the opportunity to overcome some of the issues around place making and expansion, however it does not provide a better locational advantage to the Hammerton/Cattal option with respect to access to operational rail stations to the extent that this option would be chosen. Given the similarity of the land to that already considered it will perform in a similar

> way, the one area where it might perform differently is in respect of ecology where conceivably this new land may score red due to proximity to Hay-a-park SSSI in light of Natural England's recent request to discuss cumulative impact on the SSSI from development. In light of this a full and detailed assessment has not been undertaken."

115. HBC's representations concluded by saying that the preference in SAA2 for OC12 was in line with the decision taken by the full Council on 13 December 2017.

116. On 14 October 2019 the Inspector wrote to FPL refusing to re-open the hearing sessions.

Inspector's report on the examination - January 2020

117. On 30 January 2020 the Inspector issued his report.

118. In his assessment of the "soundness" of the Local Plan, the Inspector said at IR 16:-

> "I deal only, and proportionately, with the main matters of legal compliance and soundness. I do not respond to every point raised by the Council or by representors, nor do I refer to every policy, policy criterion or allocation."

119. The Inspector considered the proposal for a new settlement under Issue 1 at IR 24 to 28:-

> "24 The Council has made a balanced planning judgement (informed by both the SA and a, careful and considered, comparative assessment of potential new settlement locations) that a new settlement is an appropriate response to accommodating the borough's longer-term housing needs. The conclusion in relation to the most suitable (broad) location for that new settlement necessarily involves matters of planning judgement, including consideration of 'fit' with the overall Growth Strategy. The process is not just a box ticking exercise. I consider it to be sound.
>
> 25. This is not to say that there are no potential constraints to development in the broad location identified. These are recognised by policy DM4 and its supporting text (although in the interests of efficacy, MM161 is necessary to clarify that the nursery within the broad location may not need relocating).
>
> 26. Based on all that I have read, heard and seen, these constraints are not necessarily (individually or cumulatively) incompatible with new development. They may, however, restrict the number of dwellings which can appropriately be accommodated, particularly given the Council's fully justified expectations in terms of exemplary design and layout. Nonetheless, I conclude that there is a reasonable prospect that a

> new settlement in this broad location could make a significant contribution towards the delivery of homes by the end of the plan period and in the longer term. Should the case prove otherwise, the matter can be addressed during a plan review (notably as delivery from the new settlement is not needed to support the Council's five-year housing land supply).
>
> 27. Policy DM4 will provide an appropriate framework for the production of a New Settlement Development Plan Document (NSDPD), which itself will provide more detailed policy guidance in relation to the precise location, design and delivery of the new settlement. It will also need to address very carefully the implications of the new settlement for nearby villages, having regard to the degree to which the new settlement is just that, rather than being merely an extension of an extant settlement.
>
> 28. I do not consider that there is sufficient evidence at this stage for the plan formally to allocate specific pieces of land effectively. Indeed, such an approach could fetter the NSDPD's ability to ensure high-quality, comprehensive development, having regard to the key issues (as set out in DM4) that it will need to address."

120. Under issue 10 the Inspector considered "Whether or not the plan is soundly based in terms of economic viability issues and its delivery and monitoring arrangements":-

> "188. A whole plan viability assessment was carried out by the Council in line with the advice in national planning policy and guidance. It was scrutinised as part of this examination in relation to other policy matters, noted above. I am satisfied that a robust assessment of viability has been undertaken such that scale of obligations and policy burdens will not prevent development being delivered in a timely manner.
>
> 190. I find that the plan is soundly based in terms of economic viability issues and its delivery, monitoring and contingency arrangements."

121. The Inspector dealt with the lawfulness of the SEA process at some length in IR 191 – 206:-

> "191. An extensive body of Sustainability Appraisal (SA) work was undertaken in connection with the preparation of the plan and the formulation of the main modifications to it. A consistent framework of objectives has been used to assess the emerging plan throughout all of these documents. These are relevant and appropriate to the scope of the plan, local context and national policy.

192. The SA process was reviewed by independent and experienced assessors (EXOTH009a), who made a number of recommendations. These were addressed by the Council as deemed necessary. I am satisfied that this overall approach is adequate.

193. Some specific criticisms with regard to the legality of the SA were made by representors at various stages of the examination. The Council responded in turn, in detail, to such criticisms. Having considered the body of representations and responses, I address the substantive points arising below.

194. There is a legal duty set out in Article 2(b) of the SEA Directive, which requires (in this case) the Council to take into account in its decision making the results of the consultations. It may be that a summary of representations or an explanation of how they have been taken into account would be helpful, but neither is a requirement of law. Nor is there is any requirement that a summary or explanation is set out within the SA itself. Indeed, the only duty upon the Council is to summarise the main issues arising from the representations, not to deal with every point raised by every representor.

195. I am satisfied that the Council's Key Issues report (CD08) addresses this duty and that, in any case, there is sufficient evidence (EXOTH009b and EXOTH002 (Table 1)) that the Council took relevant representations into account.

196. It is suggested that the SA overall contains material errors of fact in relation to the Flaxby Park site, such that it is legally flawed, specifically in relation to ecology/biodiversity, noise, agricultural land classification, potential for expansion and provision of a railway station. I do not consider, however, that this argument withstands much scrutiny:

- The information relied upon by Flaxby Park in relation to ecology/biodiversity and railway station provision was supplied to the Council after the initial SA process was complete, in the context of a planning application. In any case, it did not (and still does not) appear to provide any greater certainty about future station provision (which contrasts with the presence of extant stations proximate to the Green Hammerton/Cattal broad area. There remains dispute between the Council and Flaxby Park on these matters but this is, ultimately, a difference of opinion and judgement, rather than any error of fact that would undermine the integrity of the SA process;
- Whether the site has potential for expansion, in an appropriate and logical direction, and to an appropriate and logical extent, is a matter of planning judgement;

- Flaxby Park is next to a major road and, as such, was scored appropriately in line with the approach taken to sites GH11 and CA5;
- The minor error in relation to the amount of the Flaxby Park site that is best and most versatile agricultural land is, in the grand scheme of things, neither here nor there (notwithstanding that it can be corrected, in any case). The Council's overall conclusion that Green Hammerton/Cattal would be a better location for a new settlement does not turn on this point. It is derived from consideration of a wide range of factors.

197. The argument that the SA did not assess broad areas of search as reasonable alternatives to that at Green Hammerton/Cattal was not without merit. To this end, although it maintains that it was not legally required to do so, the Council undertook, at my request, additional SA work. I am satisfied that this addresses any shortcomings in relation to broad areas of search, which may be perceived to have existed in the original SA.

198. Others disagree, suggesting that the outcome of the additional work, which still supports Green Hammerton/Cattal as the broad location, was predetermined. It is difficult to see, however, how the Council could ever overcome such an assertion without going out of its way to reach a different decision about where the broad location for growth should be. I am also mindful that the broader locations in question are not so different from the more specific sites originally considered that one would necessarily expect a different conclusion to be reached.

199. Case law would also appear to support the Council's view that SA is an iterative process, such that any defect can be remedied, and that the ability to cure a defect is not limited to situations where that defect is simply the failure to explain, or to provide reasons for, a decision that has already been taken.

200. It was further suggested that in deciding to allocate sites, which it had initially rejected, in a second wave around extant settlements, the Council should have reviewed its decision that a new settlement was part of the most appropriate strategy for the area.

201. It does not seem to me, however, that the latter is a necessary corollary of the former. The Council took the view early on that a new settlement was an appropriate response to delivering the borough's housing needs over the long term. There is no compelling reason why that judgement should have been revisited when it became apparent that the borough's OAN

> had increased, and that additional sites were required. The only decision that needed taking was how best to accommodate the additional dwelling numbers within the spatial framework that had already been established.
>
> 202. There are sites around extant settlements, which were rejected as allocations, which the SA scores the same or less than the new settlement. I do not consider that they should have been allocated instead of the new settlement. This point fails to address the likely cumulative impacts of allocating such sites or to consider the implications of seeking constantly to grow existing settlements beyond the point at which it is feasible or desirable to do so, for a range of reasons.
>
> 203. In addition, it is reasonable for the Council to conclude that sites which are likely to have many positive impacts, but one significant adverse effect, should not be allocated in the plan, while one that has a number of adverse effects but one significant beneficial effect should be allocated. Furthermore, it is not unusual that some reasonable alternatives are found to have very similar effects as the chosen site allocations.
>
> 204. SA is intended to inform plan preparation, not to direct it or to provide definitive answers. In practise, there is an almost limitless number of combinations of comparative assessments that could be undertaken across the full breadth of options for a plan's overall spatial strategy, for broad locations for growth and for site allocations. That such appraisal work could, in theory, be undertaken does not mean that it is necessary in order for the SA to be legally compliant.
>
> 205. That people disagree with the assessment of specific effects, and decisions about specific sites (or, indeed, broad locations), is completely unsurprising. I would go so far as to suggest that it is inevitable given that, although supported by relevant technical or expert evidence, many of the SA conclusions involve a significant element of planning judgement. I am satisfied that the conclusions reached are reasonable ones and that any omissions, errors or inconsistencies that may exist do not result in the SA being fundamentally, or even substantially, flawed.
>
> 206. Overall, I conclude that the SA proportionately and adequately assesses reasonable alternatives to the policies and allocations included in the plan. The SA work undertaken in connection with the plan is adequate."

122. Thus, the Inspector concluded that the SEA carried out by HBC complied with the 2004 Regulations and therefore with s. 19(5) of PCPA 2004.

Adoption of the Local Plan – March 2020

123. HBC's Cabinet considered the adoption of the Local Plan on 3 March 2020. HBC formally adopted the Local Plan on 4 March 2020.

Legal Principles

General principles for legal challenges to a local plan

124. The Court's jurisdiction under s.113 is confined to conventional public law principles for judicial review and statutory review (*Solihull Metropolitan Borough Council v Gallagher Homes Limited* [2014] EWCA Civ 1610 at [2]; *Blyth Valley Borough Council v Persimmon Homes Limited* [2009] J.P.L 335 at [8]). The parties acknowledge that s. 113 does not provide an opportunity to re-run the planning merits on any issue before HBC or the Inspector.

125. In relation to an allegation that a decision-maker has failed to take a material consideration into account, the following principles are now well-established:-

> "In *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 the Supreme Court endorsed the legal tests in *Derbyshire Dales District Council* [2010] 1 P & CR 19 and *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so . Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account."

See *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 at [8] and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 at [30]-[32].

126. Where the judgment is that of an expert tribunal such as a Planning Inspector, the threshold for irrationality is a difficult one for a claimant to surmount; it is "a particularly daunting task" (*Newsmith Stainless Limited v Secretary of State for Environment, Transport and the Regions* [2017] PTSR 1126). Furthermore, there is an enhanced margin of appreciation afforded to the judgments of such decision-makers on technical and predictive assessments (*R (Mott) v Environment Agency* [2016] 1 WLR

4338 ; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240; *R (Plan B Earth v Secretary of State for Transport* [2020] PTSR 1446 at [68], [71] and [176-7]).

127. The tests for the adequacy of the reasons given in an Inspector's report on the examination of a plan is that laid down in *South Bucks v Porter (No.2)* [2004] 1 WLR 1953. The crucial question is whether the Inspector's reasons give rise to a substantial doubt as to whether he has committed an error of public law. But such an inference will not readily be drawn. In a planning appeal the reasons need only refer to the main issues in dispute and not to every material consideration ([36]). Reasons are addressed to a "knowledgeable audience" familiar with the material before the examination and they may be briefly stated (*CPRE Surrey v Waverley Borough Council* [2019] EWCA Civ 1896 at [71]-[76]. In the CPRE case Lindblom LJ added at [75]:-

> "Generally at least, the reasons provided in an inspector's report on the examination of a local plan may well satisfy the required standard if they are more succinctly expressed than the reasons in the report or decision letter of an inspector in a section 78 appeal against the refusal of planning permission. As Mr Beglan submitted, it is not likely that an inspector conducting a local plan examination will have to set out the evidence given by every participant if he is to convey to the "knowledgeable audience" for his report a clear enough understanding of how he has decided the main issues before him."

Public law challenges to SEA and the handling of "reasonable alternatives"

128. In *Plan B Earth* the Court of Appeal held that the court's role in ensuring that an authority has complied with the requirement of Article 5 and Annex 1 when preparing an environmental report must reflect the breadth of the discretion given to it to decide what information "may reasonably be required", taking into account current knowledge and methods of assessment, the contents and level of detail in the plan, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at other levels in that process in order to avoid duplication of assessment. The authority is left with a wide range of autonomous judgment on the adequacy of the information provided ([136]) :-

> "The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review – as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court." (referring to *R (Blewett) v Derbyshire County Council* [2004] Env. L.R. 29)

129. In *Spurrier* the Divisional Court drew a distinction between the failure by an authority to give any consideration at all to a matter which it is expressly required by the 2004 Regulations to address, namely whether there are reasonable alternatives to a proposed policy, which may amount to a breach of those regulations, as opposed to issues about

the non-inclusion of information on a particular topic, or the nature or level of detail of the information provided to or sought by the authority, or the nature or extent of the analysis carried out. All those latter matters go to the quality of the SEA undertaken and are for the judgment of the authority, which may only be challenged on grounds of irrationality (see *Plan B Earth* at [130] and [141]-[144]; *R (Khatun v Newham London Borough Council* [2005] QB 37 [35] and *Flintshire County Council v Jayes* [2018] EWCA Civ 1089; [2018] E.L.R. 416).

130. The consideration of alternatives under the SEA Directive is to be contrasted with the way in which that subject is treated under the Habitats Directive (92/43/EEC). In the latter case the tests in the legislation operate to determine the outcome of a proposal. There, the rules regarding alternatives are substantive in nature. But as the Divisional Court pointed out in *Spurrier* at [332] :-

> "……the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature. Thus, the requirement to address "reasonable alternatives" in the environmental report (or AoS under section 5(3) of the PA 2008) is intended to facilitate the consultation process under article 6 (and section 7 of the PA 2008). The operator of Gatwick and other parties preferring expansion at that location would be expected to advance representations as to why the hub objective should have less weight than that attributed to it by the Secretary of State or that, contrary to his provisional view, the Gatwick 2R Scheme could satisfy that objective. The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process"

(see also the Court of Appeal in *Plan B Earth* at [109]-[113] and Hickinbottom J (as he then was) in *R (Friends of the Earth England, Wales and Northern Ireland Limited) v The Welsh Ministers* [2016] Env. LR 1 at [88(i)]). Furthermore, the process of SEA is iterative. It is not confined to a single environmental report. There may well be several iterations as work on the plan progresses *(Cogent Land LLP v Rochford District Council* [2013] 1 P & CR 11)

131. The identification and treatment of reasonable alternatives is a matter of "evaluative assessment" for the authority *(Friends of the Earth* at [87]-[89] and *Ashdown Forest Economic Development LLP v Wealden District Council* [2016] PTSR 78 at [42] subject to review only on public law grounds. An enhanced margin of appreciation should be given to decisions which involve, for example, the expert evaluation of a wide variety of complex technical matters or scientific, technical, or predictive assessments (see [126] above).

132. Accordingly, the identification of reasonable alternatives and the nature of the assessment to be carried out are matters of judgment for the local planning authority, and in due course for the Inspector who conducts the examination of the draft local plan. It is in this context that the principle of equal or comparable treatment as between alternative options needs to be considered. As Ouseley J recognised in *Heard* at [71] the principle is not explicitly stated in the Directive, or in the Regulations. He said that

although there may be a case for the examination of a preferred option in greater detail, the aim of the directive would more obviously be met by, and best interpreted as requiring, "an equal examination of the alternatives which it is reasonable to select for examination". But it should be noted that the lack of equivalence in that case was fundamental. It related to the absence of any reasons for the authority's selection of its preferred option and rejection of alternatives (see [68]-[71] and *Spurrier* at [426])

133. Although in his summary of legal principles in *Friends of the Earth* at [88(viii)], Hickinbottom J stated that reasonable alternatives have to be assessed in a "comparable way", that appears to have been derived from the decision in *Heard* (see [87]) and did not form the basis for the court's resolution of the issues in that case. The main part of the court's reasoning in *Friends of the Earth* was concerned with a complaint that the authority had failed to identify certain alternatives to the proposal, a challenge which was unsuccessful.

134. In *Ashdown Forest* the Court of Appeal referred at [10] to the proposition stated by Ouseley J in *Heard* at [71]. However, it was unnecessary for the Court to apply that principle. Instead, the case simply turned on the fact that the local authority had not applied its mind at all to the question of "reasonable alternatives" ([42]).

135. From a review of the authorities I do not consider that the equal or comparable treatment of alternatives is a hard-edged question for the court to determine for itself. It goes to the quality of an SEA. In so far as this subject is a matter for judicial review, the test is whether the approach taken by the plan-making authority is irrational or can be impugned on public law grounds. That is the approach which the courts take to a challenge to an authority's decision on which options to treat as "reasonable alternatives" (see e.g. *Friends of the Earth* at [88(iv)] and there is no logical justification for taking any different approach to an issue about comparable treatment of such alternatives.

136. In *Heard* Ouseley J qualified the notion of comparable treatment in an important way. At [67] he stated:-

> "I accept that the plan-making process permits the broad options at stage one to be reduced or closed at the next stage, so that a preferred option or group of options emerges; there may then be a variety of narrower options about how they are progressed, and that that too may lead to a chosen course which may have itself further optional forms of implementation. It is not necessary to keep open all options for the same level of detailed examination at all stages. But if what I have adumbrated is the process adopted, an outline of the reasons for the selection of the options to be taken forward for assessment at each of those stages is required, even if that is left to the final SA, which for present purposes is the September 2009 SA."

137. In his summary of legal principles in *Friends of the Earth* Hickinbottom J made the same point at [88(vii)], but he also suggested that in some circumstances a plan-making authority might need to reassess alternatives which it had previously discarded:-

> "However, as a result of the consultation which forms part of that process, new information may be forthcoming that might transform an option that was previously judged as meeting the objectives into one that is judged not to do so, and vice versa. In respect of a complex plan, after SEA consultation, it is likely that the authority will need to reassess, not only whether the preferred option is still preferred as best meeting the objectives, but whether any options that were reasonable alternatives have ceased to be such and (more importantly in practice) whether any option previously regarded as not meeting the objectives might be regarded as doing so now. That may be especially important where the process is iterative, i.e. a process whereby options are reduced in number following repeated appraisals of increased rigour. As time passes, a review of the objectives might also be necessary, which also might result in a reassessment of the "reasonable alternatives". But, once an option is discarded as not being a reasonable alternative, the authority does not have to consider it further, unless there is a material change in circumstances such as those I have described."

It is necessary to emphasise, however, that such considerations are matters of judgment for the authority or their executive or delegatee (as appropriate).

138. Mr Katkowski QC placed some emphasis upon [88(v)] of *Friends of the Earth* which should be read together with [88(vi)]:-

> "(v) Article 5(1) refers to "reasonable alternatives *taking into account the objectives… of the plan or programme…* " (emphasis added). "Reasonableness" in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an "alternative" to the preferred plan, is not a "reasonable alternative". An option which will, or sensibly may, achieve the objectives is a "reasonable alternative". The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no "reasonable alternatives" to it.
>
> (vi) The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process."

139. So although Mr Katkowski QC is right to point out that at one stage HBC had certainly regarded FX3 as a "reasonable alternative", in the sense that it might sensibly achieve the authority's objectives, it does not follow that the authority remained obliged to carry on treating Flaxby in that way. Where an authority considers that only one proposal may go forward, it is entitled to assess how well each alternative performs against its

objectives and to discard any that do not meet those objectives or perform sufficiently well. Even if circumstances subsequently change, the authority may judge that its earlier decision, and the reasons upon which it was based, make it unnecessary for a discarded option to be reassessed or to be included in any different SEA work.

Ground 2 – failure to include an additional 630ha of land in the assessment of Flaxby as a broad location

140. At the hearing Mr Katkowski QC confirmed that FPL is pursuing only one point under this ground, namely that HBC failed to compare the broad locations of Flaxby and Green Hammerton/Cattal on an equal basis because it did not include in the SA the additional 630 ha of land which had been identified by the consultees in response to SAA2 issued in July 2019. This area of land was not assessed in SAA2. The claimant submits that HBC should have issued an additional call for land which went beyond the exercise carried out between 14 and 22 March 2019 and then included in the SA the additional 630ha of land that would have been revealed.

Discussion

141. There is no merit in this complaint.

142. As far back as July 2017 HBC made it clear publicly that it had rejected site FX3 because its potential for growth was more restricted than in the case of GH11 and CA5, given its proximity to Knaresborough to the west and the A1(M) to the east (see also p.29 of the New Settlement Report). Thereafter, HBC adhered to that view. From November 2017 it was also known publicly that HBC was promoting a broad location for the new settlement within which the boundaries would be determined through a DPD. That location comprised CA4/CA5 and GH12 in addition to GH11. HBC's position was carried forward in the Publication Draft Local Plan (January 2018) and the Submission Draft Local Plan (August 2018), together with the accompanying SAs.

143. FPL was well aware of these matters. In March 2018 its consultants made representations to HBC complaining about a lack of comparison between the Council's preferred locations and other broad location, in particular Flaxby. They sought to argue that HBC had not given adequate reasons for preferring Green Hammerton or its "broad location" approach. But in my judgment the Council's reasons were clear enough. In reality, there was simply a clash of opinions.

144. Despite HBC having clearly stated its view that FX3 lacked potential for expansion, neither FPL nor any of the landowners sought to put forward the 630 ha in response to HBC's documents published in November 2017. That remained the case even when the draft Local Plan was submitted for examination in August 2018. The Court was told that this substantial area was only put forward for consideration in the consultation between 26 July and 20 September 2019. This was some 2 years after HBC had identified its reasons for rejecting Flaxby as the location for the new settlement. No explanation has been given for this delay, which is all the more surprising given the obvious importance of the local plan process being handled in an efficient and timely manner, not only for the local planning authority, but also for developers and all others interested in progressing that plan through to adoption.

145. Not surprisingly therefore, HBC pointed out that landowners had been able to bring forward land throughout the local plan process, so that it could not be said that any unfairness had occurred ([113] above). Officers had already given their views on the broad location at Flaxby identified by the Council. Essentially, this location was rejected for the same reasons as had been identified in 2017 (see [109]-[110] above). In October 2019 they went on to give their opinions on the additional 630 ha (see [114] above). They accepted that it might provide the opportunity to overcome *some* of the issues relating to place-making and expansion, but it did not provide a better locational advantage compared to Green Hammerton/Cattal as regards access to public transport. In addition, it was thought that the additional land might score red (according to the Council's "traffic light" system of assessment) as regards effects on ecological interests. They therefore concluded that a full and detailed assessment of the additional area of 630ha was not justified.

146. On 14 October 2019 the Inspector refused FPL's request to reopen the examination ([116] above). That was a procedural issue for his determination. His decision is hardly surprising given the late stage in the examination at which this substantial area of land was put forward and the lack of any justification from FPL, or any of the other landowners involved, for the delay which had occurred. Certainly, none was put before the Court at the hearing.

147. The Inspector concluded that the additional work which had been undertaken on the SA to compare broad locations addressed any "perceived shortcomings" in the earlier SA (IR 197-199).

148. Having examined all the material before the court, I have reached the firm conclusion that neither the response of HBC nor that of the Inspector to the suggested addition of the 630 ha of land at Flaxby could be criticised as irrational (see *Khatun* and *Plan B Earth*) or in any way unlawful. I also note that the officers were acting well within the scope of their delegated authority (see [99] above). FPL's argument does not begin to get off the ground.

149. It also follows that FPL's complaint under ground 2 cannot lend any support to ground 1, in particular the failure of the full Council to consider SAA2 and consultation responses before adopting the Local Plan.

150. For all these reasons, ground 2 must be rejected.

Ground 3 – insufficiency of information or enquiry about the viability and deliverability of Green Hammerton/Cattal

151. Mr Katkowski QC referred to paragraph 173 of the NPPF (2012) which required development plans to be "deliverable" and careful attention given to viability and costs in plan-making so that development sites identified do not become subject to obligations and policy burdens which threaten the ability to develop them viably. But it should be noted that the focus of ground 3 is not on whether the requirements of the Local Plan were excessive so as to render any site non-viable. Rather the claimant, as the promoter of a rival scheme at Flaxby, was arguing before the Inspector that a new settlement at the Green Hammerton/Cattal location would not be commercially viable and therefore would not be deliverable.

152. As noted in [30] above, paragraph 182 of the NPPF (2012) stated that local plans should be "justified" on the basis of evidence which is "proportionate".

153. More detailed assistance was given in paragraph 004 of the National Planning Practice Guidance on "viability and plan-making"; in particular:-

> "Evidence should be proportionate to ensure plans are underpinned by a broad understanding of viability. Greater detail may be necessary in areas of known marginal viability or where the evidence suggests that viability might be an issue – for example in relation to policies for strategic sites which require high infrastructure investment."

154. The issue of whether viability should be addressed in terms of a "broad understanding" or in "greater detail" is a matter of judgment initially for the local planning authority. But the inspector conducting the examination of the draft plan may also address the adequacy of the information provided, in so far as he or she judges that to be necessary or appropriate to assess the soundness of the plan. But judgments made by a local planning authority and the Inspector on, for example, the range of matters covered by a viability assessment, or the depth of the analysis, or whether further information should be sought, are not open to challenge in this Court unless shown to be irrational (see e.g. *Khatun* and [129] above). That is a difficult hurdle to surmount (see [126] above). Furthermore, viability appraisal is a technical matter for assessment by planning authorities and Inspectors, which attracts an enhanced margin of appreciation.

155. The Inspector reached his overall conclusions on viability in IR 188 and 190 (see [120]) above. He specifically addressed the deliverability of the new settlement in policy DM4 in IR 25 and 26 (see [119] above).

156. The focus of the challenge under ground 3 is on the Inspector's conclusions. Mr Katkowski QC submits that either:

i) It was perverse for the Inspector to reach his conclusions on viability on the basis of the material before the examination; or

ii) It was perverse for the Inspector not to call for the confidential information on viability which IP2 and IP3 had provided to HBC.

Acknowledging the high hurdle which must be overcome, Mr Katkowski QC did not put ground 3 in the forefront of the claimant's case.

157. In his witness statement Mr Morton referred to an expert viability appraisal submitted on behalf of FPL in March 2018 as part of its representations on the Publication Draft Local Plan. He said that this had suggested that infrastructure costs for GH11 would be £125m as compared with £46m for FX3 and that the outcome would be negative viability of £73m for the GH11 site and a positive viability of £33m for the FX3 site. He also refers to the rival interests and schemes of the main developers involved in promoting Green Hammerton/Cattal, IP2 and IP3, which, he says, called into question the deliverability of a new settlement at that location. The claimant submitted representations in the examination process in May and September 2019 which briefly

stated that there had been a lack of comparative assessment of viability as between different locations. It was said that this work ought to have been included in the SA.

158. It is necessary to bear in mind that policy DM4 of the Local Plan only identified a *broad* location for a new settlement. The New Settlement DPD (which has subsequently been prepared and is the subject of consultation until 22 January 2021), will address matters such as the site boundary, the quantum and mix of uses, a concept plan, highway and access arrangements, public transport, and housing types and tenures including affordable housing. There is no legal challenge to that approach. Accordingly, any viability appraisal prior to the adoption of the Local Plan was bound to have been of a high-level, strategic nature, looking into the future over a long time span. The Local Plan does not expect all 3,000 of the dwellings at the new settlement to be provided during the plan period. It goes no further than to say "at least 1,000 dwellings" are expected to be provided by 2034/35 (paragraph 10.17). Each of the alternatives which have been considered would require very substantial investment in various kinds of infrastructure, the detail of which is still to be addressed. Accordingly, it is self-evident that any viability assessment for broad locations for a new settlement would be highly sensitive to *assumptions* about what infrastructure would be required for each alternative, the future costs of such infrastructure and other development works, future land values and sale values, and finance costs. These assumptions are likely to fluctuate over time and be subject to substantial uncertainty, irrespective of the authorship of any assessment.

159. The New Settlement Background Paper (November 2017) summarised HBC's assessment of viability and deliverability (see e.g. paragraph 5.62 *et seq*). This was based upon material which each of the developers, including FPL, had submitted about their own schemes and HBC's Whole Plan Viability Study (2016) and Infrastructure Capacity Study. Paragraphs 5.106, 5.108 and 5.109 of the Background Paper confirmed that the developers of CA4/CA5 and FX3 had provided confidential viability assessments for their own sites and the developers of GH11/GH12 had provided a deliverability statement which included the costs of providing key infrastructure. On the basis of the viability assessment undertaken in the Infrastructure Capacity Study, paragraphs 7.3, 7.18 and 7.25 stated that CA4/CA5, FX3 and GH11 could all generate sufficient "headroom", or value, to meet critical infrastructure costs. HBC stated that because of the large infrastructure costs and the challenges faced, the viability for *each* site was in the "marginal" category, meaning that the residual land value exceeded "existing" or "alternative" use value, but *might* not generate any *further* uplift for the landowners involved. But the Council expected that to be the case for a project of this scale and type. It estimated that on a "net developable basis" residual values would be "well over £400,000/ha in all cases" (paragraph 5.66).

160. The Background Paper also summarised why HBC was satisfied that the promoters of CA4/CA5, GH11/GH12 and FX3 had sufficient control over land needed for the delivery of a new settlement.

161. In the examination of the draft plan, HBC relied upon the appraisal work which had been undertaken and said that it was satisfied that a viable scheme could be delivered at the policy DM4 location. The issue had been examined at the hearing session on "matter 12" and IP2 and IP3 had confirmed that viable schemes were deliverable there.

162. Mr Brown QC also referred to the "Whole Plan Viability Assessment" (September 2016) and the "Infrastructure Capacity Study". The information covered *inter alia* infrastructure costs and residual land values. The analysis showed the sensitivity of both Green Hammerton and Flaxby to assumptions about the scale of affordable housing and other developer contributions, such as the Community Infrastructure Levy, which may be required. The work carried out in 2016 was updated in May 2018. These documents recognised that the delivery of *any* large site would be challenging, not least because of the infrastructure and mitigation measures required. Having said that, significant land values would be generated.

163. Officers explained during the examination that the position on land ownership and availability within the Green Hammerton/Cattal broad location would not compromise the delivery of a new settlement there. Mr Procter and Mr McBurney reiterate points made at the examination that it is in the interests of both IP2 and IP3 to collaborate on the delivery of the new settlement in the DM4 location. Each has already invested many millions of pounds in the promotion of the new settlement, initially on GH 11, but since late 2017 on the "broad location", in the firm belief that the project is viable and deliverable.

164. From this brief review of the material before the Inspector, I conclude that there was evidence which was legally sufficient to support his conclusions on viability and deliverability. It cannot be said that those conclusions were irrational, or that it was perverse for him not to call for more information, such as the confidential material submitted to HBC by developers. Bearing in mind that the Inspector's function was to examine the soundness of policy DM4 by considering whether it was justified by a proportionate evidence base, and not to resolve every contested issue raised by participants in the examination, it is plain that he considered the material before him to be adequate for that purpose.

165. For all these reasons ground 3 must be rejected.

Ground 1 – failure by the Council to consider environmental assessment of alternative "broad locations"

A summary of the submissions

166. Mr Katkowski QC submits that in order for SEA to be conducted lawfully, the plan-making authority must carry out an appraisal which compares its preferred policy proposal with reasonable alternatives in an equivalent manner. In the present case, FPL makes no legal complaint about the way in which alternative *sites* for a new settlement were compared up to and including the Additional Sites Plan and the New Settlement Report published in July 2017. The sites were compared on a like for like basis.

167. When in November 2017 HBC decided that the Local Plan should identify a "broad location" rather than a "site" for the new settlement, FPL complained that the Council had ceased to make a like for like comparison. Green Hammerton was assessed as a "broad location" comprising about 604ha, whereas Flaxby continued to be assessed as a "site" of 196ha, up to and including the submission of the Local Plan for examination. Mr Katkowski said that the inclusion of Flaxby in this exercise meant that it was judged by HBC to be capable of meeting the Council's objectives for a new settlement and that had not ceased to be the position when in 2017 Green Hammerton/Cattal was chosen

as HBC's preferred option. Accordingly, it still remained a "reasonable alternative" for the purposes of the 2004 Regulations.

168. He then submitted that the Inspector had accepted that the sustainability appraisal for the new settlement policy should include a comparison between HBC's preferred option and alternatives, all as broad locations. Alternatively, he said, that exercise was carried out and consulted upon and it informed the Inspector's conclusion that the requirements of the 2004 Regulations had been satisfied, specifically in relation to the new settlement policy. SAA2 had become part of the environmental report for the purposes of Regulation 8(3). It was not therefore open to HBC to say now that this further work had been unnecessary in order to satisfy the 2004 Regulations.

169. Mr Katkowski QC submitted that there had been a failure to comply with regulation 8(3) because the full Council was required to take into account the further sustainability appraisal work, SAA2, together with the consultation responses and had not done so. This obligation could not be discharged by officers acting under the delegated power granted on 14 November 2018 or by the Inspector's examination of the material and his conclusion that the requirements of the 2004 regulations had been satisfied. The judgment reached by the Inspector was not that of the full Council. The members were required to apply their own minds to the SEA material referred to in regulation 8(3).

170. FPL claimed that this was an important point because HBC's documents had said that the choice between the alternative sites was "finely balanced" (see e.g. paragraph 8.3 of the New Settlement Background Paper, November 2017). It was only proximity to existing rail stations and the greater potential for expansion which had led HBC to prefer the Green Hammerton site (GH 11). FPL contend that the decision to adopt a "broad location" approach in DM4 meant that it was necessary to revisit the "reasonable alternatives", including Flaxby, to re-assess (a) their potential for expansion, and (b) the scoring under the 16 sustainability objectives. The weight to be given to those factors was a matter of planning judgment, but it was ultimately for the members of the Council to decide how to weigh those aspects and the relative weight to give to proximity to existing rail stations. That would involve balancing a number of considerations and there was at least a real possibility that members, presented with the SAA2 exercise, might draw different conclusions to those reached by the officers (working with the Cabinet member) and the Inspector.

171. Mr Katkowski QC also submitted that the obligation on the members of the Council to consider a comparison of broad locations for a new settlement had applied not only when they decided to adopt the Local Plan, but also when they resolved that the draft plan should be submitted to the Secretary of State for examination. There is no evidence to show that that was done. He submitted that a Local Plan is supposed to contain the policies of the authority, that is its members rather than the officers. The requirement that only the members may take the decisions at these key stages of a plan carries with it an obligation that they consider the SEA work, which is to inform the preparation as well as the adoption of a plan. At the point of adoption, the members have only a binary choice, to adopt the plan with any main modifications, or to decide not to adopt the plan, in which case the whole plan falls away. The Council cannot make any fresh modifications at that point.

172. Mr Brown QC, supported by Mr Young QC and Mr Strachan QC for IP2 and IP3 respectively, pointed to the absence of any legal challenge to the SEA carried out up to

and including July 2017. The decisions taken then were endorsed by the full Council. At that stage HBC had decided to discard FX3 as a reasonable alternative. It is permissible for a local planning authority to sieve sites or options at one stage in the process and thereafter not to carry out any further SEA work on sites which had been discarded. That is what happened in the present case. HBC's decision in November 2017 to base the settlement policy on a "broad location" did not oblige the Council to revisit sites which had been rejected, including FX3, or to include them in a comparison of broad locations. FX3 had been rejected for reasons which did not require Flaxby to be considered any further because of that particular change of approach.

173. In any event, at the Inspector's request, HBC did carry out a comparison of the broad locations. The outcome was only "finely balanced" in relation to general planning considerations, but not the two factors which HBC regarded as decisive.

174. Ultimately, the content or quality of the SEA is only criticised under grounds 2 and 3. Ground 1 raises a separate issue as to *who* was required to consider the environmental information (including the comparison of broad locations) in order to satisfy the 2004 Regulations. The delegation to officers dated 14 November 2018 is not challenged. That resolution allowed officers to agree main modifications to the draft plan as part of its examination by the Inspector, as well as to provide information requested by the Inspector. Mr Brown QC submitted that this delegation must have carried with it the carrying out of supplemental work on the SEA, consulting on that material and taking the product of that consultation into account. The delegation therefore allowed officers to deal with SAA2 and the consultation responses received, so as to satisfy the requirements of the 2004 Regulations. He submitted that this delegation was therefore a complete answer to ground 1. There was no legal requirement for the comparison of the Green Hammerton/Cattal broad location with other broad locations to have been considered by the full Council, whether in March 2020 at the adoption stage or, indeed, in August 2018 at the submission stage.

175. Mr Brown QC submitted that, in any event, on a proper reading of the 2004 Regulations, regulation 8(3) was not required to be satisfied at the adoption stage. That regulation should not be conflated with s.23(5) of PCPA 2004. It could be satisfied prior to adoption and therefore be addressed by officers acting under delegated powers. He sought to reinforce this submission by pointing out that once a draft Local Plan is submitted for examination, the outcome of the process is entirely dependent on the conclusions reached by the Inspector in his final report, including any main modifications to the plan which he or she decides should be made in order to render the plan sound and compliant with relevant legal requirements. These requirements include s.19(5) and the satisfaction of the 2004 Regulations. Accordingly, it was legally sufficient that by the time the Inspector's report and the plan came before the full Council, the Inspector had concluded that the requirements of the 2004 Regulations had been satisfied.

176. Mr Young QC and Mr Strachan QC also emphasised the procedural nature of the SEA Directive. The consideration of alternatives does not dictate any result but is to do with the obtaining of information to improve the quality of decision-making. That is part of the legal context for the interpretation of the delegation to officers and supports the submission that they were empowered to address the consultation responses on SAA2.

177. The parties' submissions give rise to the following main questions for the court to determine:-

(i) Whether a comparison of broad locations was required by the 2004 Regulations;

(ii) Who was required to comply with Regulation 8(3) and when;

(iii) The legal consequences if HBC ought to have considered alternative broad locations before submitting the Local Plan for examination.

Whether a comparison of broad locations was required by the 2004 Regulations

178. In July 2017 HBC published the Additional Sites Plan and the New Settlement Report. In my judgment it is plain that at that stage the Council concluded that GH11 should be taken forward as the preferred location and that FX3 should cease to be considered. There were two key reasons for that decision (paragraph 7.4 of the Report).

179. First, the sites GH11 and CA5 were best placed to maximise the use of public transport because of direct access to two rail stations. By contrast there was no evidence that there would be a new rail station to serve FX3 during the plan period to 2035, if at all.

180. Second, GH11 and CA5 offered a greater opportunity for growth in the longer term beyond 2035, whereas FX3 was more restricted in this respect because of its proximity to the A1(M) to the east and Knaresborough to the west. The claimant does not suggest that HBC was not entitled to take into account this potential for further growth in the future, or that its conclusions on that subject at that stage were unlawful. This second reason reflected HBC's previously stated objectives for a new settlement, namely that it should "have the propensity to grow in the future" as well as "be designed to have its own identity and sense of place and create a new focus for growth" (see paragraph 7.2 of the Additional Sites Plan – July 2017). The officers' report in November 2017 makes it plain that these matters and the SA were considered by the full Council on this basis.

181. If in policy DM4 of the Submission Draft Local Plan HBC had continued to identify a *site* for the new settlement and had chosen GH11 as that site, it would not have been obliged to make any further comparison with FX3. It would unquestionably have been entitled to treat that site as discarded. FX3 ceased to be a "reasonable alternative" for the purposes of the 2004 Regulations.

182. But in the New Settlement Background Paper (November 2017) and the Publication Draft Local Plan (January 2018), HBC decided to promote a "broad location" for a new settlement at Green Hammerton/Cattal (sites GH11, GH12, CA4 and CA5), rather than the GH11 site. Paragraphs 8.3 and 8.4 of the Paper summarised why HBC had preferred the Green Hammerton option to any other. It is incontrovertible that the Council's thinking remained unchanged as to why FX3 (and other sites) had been discarded and Green Hammerton selected.

183. Paragraph 8.5 then explained why HBC had decided to identify a broad location rather than a site at Green Hammerton. In particular, this was to enable the Council to consider the optimum boundary of the new settlement, and to give an opportunity to address "the most appropriate spatial and place making approach" at the location which had been chosen *after having discarded other alternatives.* A decision on the exact boundary of

the site would seek to exploit the existing railway line and optimise the delivery of the necessary improvements to the A59 in the longer term. HBC's thinking was influenced by the important consideration that "a new settlement represents an unprecedented scale of development in the district".

184. It is important to note that HBC's rationale for the "broad location" approach did not involve any departure from, or questioning of, or implications for what it regarded as the key reasons for having decided to prefer GH11 and discard FX3, namely direct access to rail stations and the potential for future growth. That second reason had distinguished Green Hammerton and Flaxby at a strategic or high-level of analysis, noise from the A1(M) and proximity to Knaresborough. The selection of those factors as a critical step in the plan-making process, and the weight given to them, were entirely matters for the judgment of the authority or its executive (as appropriate) and are not open to challenge.

185. In *City and District of St Albans v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin) Mitting J accepted that SEA envisages a process of decision-making in which options can be progressively removed and clarified. They can be "considered and discarded so that they do not need thereafter to be revisited or re-appraised or taken into account again as alternatives to more detailed proposals within a selected option" ([14]).

186. It is apparent that HBC decided to promote a larger area of land as a broad location within which detailed site boundaries could be drawn, but not in order to promote a different type of settlement. The concept for this development, included the key residential and employment components, remained the same. The broader area was simply chosen so that through more detailed work in a DPD the characteristics of the new settlement already selected for Green Hammerton/Cattal could be optimised. But none of the rationale for adopting this "broad location" approach impinged upon the reasons why the Council had rejected FX3 as the location for a new settlement.

187. The full Council considered and approved this change of approach in 2017. There is nothing in the papers before the Court to suggest that the Council changed its view on these matters before they agreed to submit the Local Plan for examination.

188. During the examination the claimant repeated to the Inspector representations it had previously made to HBC as to why it considered a fresh comparison needed to be carried out between different broad locations. The SA accompanying the Submission Draft Local Plan assessed the proposed broad location in policy DM4 against HBC's sustainability objectives for the new settlement, but only addressed other locations as the *sites* already assessed. HBC responded that it had been decided not to take Flaxby forward as the preferred location for the new settlement on the basis of the like for like analysis carried out up until July 2017 "and not as a result of a comparison with the assessment of the broad location" (see [101] above). Although the submissions made for FPL made wide-ranging criticisms of HBC's response, there was no challenge to this summary of the documentation on how the decision to prefer GH11 had been taken.

189. The decision to discard other options, the reasons for that conclusion, and the decision that there was no need for the preferred broad location to be compared with other broad locations based on sites that had already been rejected, were all matters for evaluative assessment by HBC. It cannot be said that HBC failed to take into account FPL's

objections about the way in which it handled this issue or that any of its judgments on these matters was irrational. I find it impossible to conclude that the approach taken by HBC up until the beginning of March 2019 was in any way unlawful.

190. But matters did not stop there. In his letter dated 11 March 2019 the Inspector said that he found the issue to be "finely balanced" and so it would be "sensible" for broad locations around each of the proposed potential sites to be assessed and compared. Despite the issue which had arisen between FPL and HBC, the Inspector was not prepared to express a firm judgment about this matter either way. That reinforces the conclusion I have already reached that HBC's view on the matter could not be criticised as irrational. It lay within the range of different evaluative assessments which different decision-makers could lawfully make. It also follows that if the Inspector had gone further in his letter and ruled that HBC had to carry out the additional comparative assessment, I very much doubt whether that judgment could have been criticised as irrational. At the end of the day, this was a matter of judgment for the Inspector about how the 2004 Regulations should be *applied* in practice to the issues before him, and not about, for example, the objective *meaning* of those Regulations.

191. HBC responded by producing SAA2 which did assess and compare a number of broad locations with HBC's preferred option. Public consultation was undertaken on that work as part of the statutory examination process and the output of that consultation was taken into account by HBC's representatives in the examination and by the Inspector.

192. It is a general principle of public law that even where there is no legal requirement for consultation to be undertaken, nevertheless where a process of consultation is in fact embarked upon, it must be carried out properly, that is, in accordance with established legal principles (*R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at [108]). This means *inter alia* that "the product of consultation must be conscientiously taken into account when the ultimate decision is taken" *(ibid* approved by the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] 1 WLR 3947). This principle aligns with the requirement in Regulation 8(3) of the 2004 Regulations that opinions expressed in response to the environmental report must be taken into account before the adoption of the plan. The legal consequence is much the same as where an environmental impact assessment is produced by a developer voluntarily for a development falling within schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No.571). This engages the procedural requirements of the EIA regime (see regulation 5(1) and (2)).

193. I draw two conclusions from this analysis:-

(i) HBC cannot defeat ground 1 by arguing that a comparison of broad locations *never* fell within the scope of the SEA required by the 2004 Regulations. From the moment when SAA2 was published, that subject did fall within the 2004 Regulations, as well as falling within the scope of the examination of the draft Local Plan;

(ii) But prior to HBC deciding to produce SAA2, the Council was, as a matter of law, entitled to proceed on the basis that their environmental report need not make a comparative assessment of the DM4 location with broad locations for

options which had previously been rejected as reasonable alternatives, including Flaxby.

Who was required to comply with Regulation 8(3) and when?

194. This case is concerned with the obligations of a local planning authority under the 2004 Regulations as they intersect with the statutory provisions leading to the adoption of the plan. But it is also necessary to have well in mind the legal framework which determines where responsibility lies as between the local authority and its executive under the 2000 Act and the 2000 Regulations. This has been summarised in [68] above.

195. Although s.17(3) of PCPA 2004 may give the impression that the local planning authority is entirely responsible for the policy content of a local plan, in the case of an authority with an executive that must give way to the constitutional arrangements put in place under the 2000 Act and the 2000 Regulations. The executive or cabinet is responsible for most of the local plan process from its inception. Even the function of deciding whether to modify or withdraw a plan in accordance with the recommendation of the examining Inspector is vested in the executive, before the plan can be considered by the authority for adoption (if that option remains open).

196. For the most part it is the executive, and not the full Council, which is in the "driving seat" during the local plan process and, to that extent, it is for the executive to decide whether to delegate particular responsibilities to a committee or to officers. Although it is for the full Council to decide whether to approve a draft plan for examination, once that step has been taken the executive is responsible for the authority's participation in the examination process through to the decision on whether to accept the Inspector's recommendations on, for example, adoption, or main modifications, or withdrawal of the plan. That responsibility includes the authority's initiation of and participation in the main modification procedure. These responsibilities also allow for delegation to officers under s.9E. Thus, the delegation authorised on 14 November 2018 lay well within the powers of HBC's Cabinet and HBC's officers were entitled to prepare an addendum to the environmental report (SAA2) and to undertake consultation on that document on behalf of HBC.

197. Regulation 5(1) requires "environmental assessment" to be carried out by the "responsible authority" which, for present purposes, refers to the authority by which or on whose behalf a plan is prepared (regulation 2(1)). The meaning of "responsible authority" is therefore consistent with the legal framework created by the 2000 Act for authorities with "executive arrangements".

198. The objective in Article 1 of the Directive, and hence the 2004 Regulations, is to promote the integration of environmental considerations into the preparation and adoption of plans. That indicates that the "environmental report(s)" and the product of consultation must be taken into account not only during the preparation of the plan but also in the decision whether it should be adopted. Plainly, that material must be taken into account by the person or body responsible at each relevant stage. Accordingly, both when a draft plan is submitted for examination and when it is finally adopted, it is the full Council which must take into account the "environmental assessment" as it then is. The functions of the full Council at these stages are non-delegable. At other stages the general position is that the environmental assessment is to be taken into account by the

executive, or by any committee or officer to whom the executive's functions have lawfully been delegated.

199. I see no merit in HBC's submission that because regulation 8(3) indicates that the environmental assessment is to be taken into account *before* adoption, it does not have to be considered by the full Council. The word "before" does not contain any suggestion that some body (or person) other than the entity responsible for taking the decision to adopt may discharge the requirements of regulation 8(3). Instead, that regulation is only laying down a straightforward requirement that a plan cannot be adopted unless the environmental assessment is taken into account in the decision to adopt, not afterwards. The objective of Article 1 of the Directive is clear, namely to integrate environmental considerations into the preparation and *adoption* of plans. Although the members of the full Council should be asked to consider the final SA, there is no requirement for them to consider all of the consultation responses to the SA one by one. There is often a good deal of overlap or repetition in such material and some of the points raised may not be significant. A proper summary and analysis of consultation responses and how they relate to the SA and the policies in the plan will normally suffice.

200. In any event, Mr Brown's submission does not assist the defendant on this part of ground 1. Adoption cannot be considered before the examination process is concluded by the Inspector sending his report to the authority. It is plainly essential for the environmental assessment to be considered alongside that report. It was the responsibility of HBC's Cabinet to take decisions on whether to accept recommendations in the report, other than the ultimate decision on whether the Local Plan should be adopted. Here it is accepted that the Cabinet did not consider the environmental assessment or any summary of it. Furthermore, the delegated power of officers conferred by the resolution of 14 November 2018, which would have included work on the iterations of the SA as a result of the Inspector's request on 11 March 2019, as well as consideration of the consultation responses, did not extend beyond the examination period.

201. The challenge relates solely to policy DM4 and related provisions dealing with the new settlement. HBC's failure at the adoption stage to comply with regulation 8(3) of the 2004 Regulations, in so far as the SEA was relevant to the new settlement policies, rendered unlawful the adoption in March 2020 of the Local Plan containing those policies. The SEA at that stage included SAA2 and the consultation responses to that document. This unlawfulness affected only the adoption stage of the Local Plan. The reasons I have given above are sufficient to determine ground 1.

The legal consequences if HBC ought to have considered alternative broad locations before submitting the Local Plan for examination?

202. But what if I had reached the conclusion, contrary to [193(ii)] above, that when HBC decided to identify a *broad location* rather than a *site* for the new settlement policy, it became obliged to make a fresh comparative assessment as between broad locations, including Flaxby? In the context of ground 1, it is said that when the full Council resolved to submit the draft Local Plan for examination they ought to have had regard at that stage to an SA which included that comparison, or at least a summary of that work. No such consideration took place.

203. It is a well-established principle that a defect in the SEA process at one stage may be cured by steps taken subsequently (see [36] above). Surprisingly, the claimant disputed that principle during the examination. However, rightly it did not persist in that argument in these proceedings.

204. Instead, Mr Katkowski QC submitted that a defect of this nature at the submission stage could not be cured by the full Council taking into account the comparative assessment of broad locations at the adoption stage. He said that this was because a local planning authority has only a limited choice at the adoption stage, either to adopt the plan with main modifications as recommended by the Inspector, or to withdraw or abandon the plan. As we have seen, the local planning authority cannot adopt the plan with any other modifications, unless they "do not materially affect the policies" in the plan (s.23(2) and (3)). Accordingly, if the members wished to substitute Flaxby for Green Hammerton/Cattal as the DM4 broad location, or to delete any reference in the plan to the location of the new settlement, they could not do so. They would only be able to give effect to that conclusion by deciding to abandon or withdraw the local plan and by restarting the process. Mr Katkowski QC submitted that these limitations on the authority's powers would inhibit proper consideration of that further comparative assessment by members of the full Council at the adoption stage, in contrast to the earlier stage when the Council approved the draft plan to be submitted for examination.

205. I do not accept this submission. It goes too far. It would mean that whenever the content of an SA suffers from a legal defect which is capable of affecting a policy or policies in a plan, and that defect is not corrected before the full Council considers the SA and approves the draft plan for submission for examination, it cannot be corrected thereafter. The curing of any such defect in the SA would always have to precede the submission of the plan for examination.

206. The claimant's submission is inconsistent with authority. For example, in *Cogent Land* the local planning authority published an addendum to its SA to address a legal defect in the environmental assessment accompanying the draft plan submitted for examination. They did so over one year after the submission of those documents to the Secretary of State. Singh J (as he then was) held that that step cured the failure to assess reasonable alternatives properly. His decision has been approved in *Spurrier* and *Plan B Earth* and more specifically in *No Adastral New Town Limited* at [53].

207. Those authorities reflect one of the objectives of the Directive, namely "to contribute to the integration of environmental considerations into the preparation and adoption of plans". The requirements of the Directive, which focus on consultation on the document or sequence of documents comprising the environmental report, are procedural in nature, not substantive. They are not intended to determine the outcome of the process.

208. I put to one side cases in which a substantial legal defect in the content of the environmental report is not addressed until after the examination process is concluded, where different considerations may or may not apply.

209. Here, "the broad locations" point was identified during the examination process, SAA2 was published and consulted upon and the consultation responses were taken into account by officers and by the Inspector. They had the responsibility for considering those matters during the examination stage. During that period, the environmental

considerations arising from a comparison of broad locations were indeed integrated into the preparation of the plan during the process leading up to its adoption.

210. For present purposes, the examination process had essentially two possible alternative outcomes (ignoring in this case the possibility of a recommendation under s.20(7A)). First, an Inspector might have decided that the draft plan would be unsound unless DM4 was amended by a main modification substituting Flaxby for Green Hammerton/Cattal, or alternatively simply retaining the principle of a new settlement without identifying any location. No doubt FPL was aiming to achieve the former. HBC would then have been faced with the choice of deciding whether to adopt the plan subject to that and any other main modifications, or to withdraw the plan. Provided that the full Council took into account the final SA and the consultation responses, or at least a summary or analysis of that material, I do not see how, in the light of the authorities, it could be argued by any party that the earlier defect in the SEA would not have been cured by the publication of and proper consultation upon SAA2. So, if the Council had agreed with a recommendation by the Inspector to modify DM4 by identifying Flaxby as the broad location, I do not see how the promoters of the Green Hammerton/Cattal location, or an objector to Flaxby, could successfully have challenged the plan on the basis that the Council's failure to compare "broad locations" at the submission stage had not been cured because their consideration of the issues at the adoption stage was improperly inhibited by the binary nature of the decision which could then be taken.

211. The other possible outcome is that the Inspector would decide (as he did here) that policy DM4 should not be amended so as to delete the identification of Green Hammerton/Cattal as the broad location. Provided that the full Council had regard to the same SEA material, I do not see why a decision on their part to accept a recommendation by the Inspector that the plan be adopted without that modification would be any more open to legal challenge because the corrected SA had not been considered by the full Council at the submission stage and the legal nature of the adoption stage improperly inhibited a proper consideration of the issues. The legal analysis is no different according to who wins or loses the "merits" argument in the local plan process. Likewise, in either scenario the authority may decide not to accept the Inspector's recommendation on such an important topic with the consequence that the Plan has to be withdrawn.

212. On analysis, the only legal flaw in the procedure followed by HBC was that the full Council did not take into account the final SEA material and consultation responses, or a summary and analysis thereof, when they resolved to adopt the local plan. The claimant's focus on the binary or restricted nature of the decision on whether to accept the Inspector's recommendations on adoption or to withdraw the plan is irrelevant. The argument fails to take into account the local plan process as a whole.

Conclusion on ground 1

213. I uphold ground 1 of this challenge to the new settlement policies of the Local Plan, but only to a limited extent. The challenge relates solely to policy DM4 and related provisions dealing with the new settlement. HBC's failure at the adoption stage to comply with regulation 8(3) of the 2004 Regulations, in so far as the SEA was relevant to the new settlement policies, rendered unlawful the adoption in March 2020 of the Local Plan containing those policies. The SEA at that stage included SAA2 and the

consultation responses to that document. I reiterate that this unlawfulness affected only the adoption stage of the Local Plan.

Conclusions

214. Grounds 2 and 3 of the challenge have been rejected. Ground 1 has been accepted but only to the limited extent identified in [213] above. Neither HBC nor IP2 or IP3 submitted that in the event of any ground succeeding, wholly or in part, relief should be refused by the court in the exercise of its discretion. They were right not to do so. On the material before the Court I could not have been satisfied that, if the full Council had taken into account the SEA material to which I have referred, it is *inevitable* that they would still have resolved to adopt the local plan with policy DM4 (and related policies) as it stands *(Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041*).* It is not for the Court to stray into the forbidden territory of evaluating for itself the substantive merits of the issues. These are matters for the Council to determine *(R (Smith) v North East Derbyshire Primary Care Trust* [2006] 1 WLR 3315*).*

215. The Court has a discretion as to what remedy should be granted under s.113(7) to (7C). Mr Katkowski QC accepted, rightly in my judgment, that it would not be appropriate for the Court to quash the Local Plan, not even if the Court had accepted FPL's three grounds of challenge in their entirety. A quashing order, even in relation to part of the Plan, would result in HBC having to repeat the whole of the local plan process in relation to any part of the Plan which is quashed. That would be wholly unjustifiable.

216. Instead, it is appropriate for the Court to exercise its statutory power to remit the Local Plan with directions as to the action to be taken by HBC in relation to the document. In principle the directions should be limited to rectifying the legal error I have accepted (see *Woodfield v. JJ Gallagher Limited* [2016] 1 WLR 5126). In my judgment there was no error in the local plan process up to and including the conclusion of the examination process.

217. I invite the parties to agree directions for dealing with the flaw I have identified in the decision to adopt the Local Plan (and, as appropriate, the decision by the Cabinet on 3 March 2020) and in default of agreement to exchange and file brief written submissions.

Addendum – Issues relating to the Court's order

218. There are three main issues arising from the parties' submissions on the terms of the Court's order.

The scope of the order to remit

219. In [216] I referred to the power to remit the Local Plan in s.113(7)(b) of PCPA 2004, without indicating at that stage the extent of any remitter.

220. Both limbs (a) and (b) of s.113(7) refer to "the relevant document", but s. 113(7C) provides that the powers to quash or remit are exercisable in relation to the whole or any part of the document. So, for example, in *Woodfield* [2016] 1 WLR 5126 Patterson J remitted only one policy in a local plan ([5]).

221. FPL submits that I should remit the whole of the Local Plan. I agree, but not for the reasons they give.

222. It is necessary to pay careful attention to two different but connected issues. The first issue is what steps need to be taken by HBC in order to remedy the error of law identified by the Court? The second is what needs to be remitted to HBC so that the authority has the necessary power to deal with those steps properly and in accordance with the law?

223. Unless and until the Court makes an order under s. 113 quashing or remitting the local plan, the plan-making authority is *functus officio* in relation to the plan-making process. It is the court's order which revives the authority's powers, but the extent of those powers will depend upon the order made.

224. Here FPL's challenge only related to the new settlement policies in the Local Plan and FPL's ground 1 was only concerned with the failure of HBC to consider SAA2 and the consultation responses thereto. It has never been suggested that this failure is linked to any other part of the Local Plan or that any other part of the plan ought to be reconsidered by HBC.

225. The Local Plan has not been challenged by any other party, whether in relation to the new settlement policies or any other part of the plan. For example, no one has suggested that the whole plan should be quashed or remitted because of the failure of the full Council to consider the SA at the adoption stage. The Local Plan is now immune from any such challenge by virtue of the ouster permissions in s.113(2) and (3) of PCPA 2004.

226. Accordingly, the purpose and wording of the Court's order should be tailored to fit with that analysis and the reasoning in this judgment. The essential requirement is that the Cabinet and the full Council should consider whether or not to accept the Inspector's recommendations with regard to the new settlement policies in the Local Plan and whether or not they wish the plan to be adopted containing those policies. That requires them to consider the SEA material (including consultation responses) in so far as it is relevant to that specific task. I note that no party has suggested that the SA needs to be further updated at this stage, but, in any event, that would be a matter for HBC.

227. It should be recalled that one potential option which the Court must leave open to HBC is the rejection of the Inspector's recommendation in favour of adopting the Local Plan with the new settlement policies. But in the event of the authority deciding that those policies should not be included in the Plan, or should be amended in some material way not addressed by the Inspector's main modifications, it could only give effect to that decision by not adopting (or withdrawing) the Plan (see above [33] to [34] and [204] et seq). Accordingly, I cannot accept the submission by HBC, IP2 and IP3 that the Court should only remit the new settlement policies. Unless the whole of the Local Plan is remitted, HBC's consideration of the relevant questions relating to the new settlement policies would be unlawfully constrained.

228. FPL also submits that a reasonable opportunity should be given to it and "anyone else" to submit written representations to the Cabinet and the full Council before they take their decisions in response to the Court's order, given the time that has elapsed since the decisions taken on the 3 and 4 March 2020 and the possibility that circumstances

may have changed materially since then. However, FPL has not identified any material change of circumstance of which it is aware. HBC, IP2 and IP3 oppose this suggestion on the basis that, applying *Woodfield*, relief should be limited to matters necessary to address the error at the adoption stage identified in the judgment; that is as far back as the matter should be remitted or "rewound".

229. It is not suggested by the FPL that this additional round of consultation stage forms part of the statutory scheme. There is no such requirement, for example, if a local planning authority were to take a year or so to decide on their response to an Inspector's report. HBC points out that the meeting of the full Council will be the subject of a published agenda and report by officers which will be made available to the public in the normal way. It will be open to FPL and any other interested party to send representations to HBC before the meeting, and even before that stage is reached. I do not think it would be appropriate for the Court to impose a consultation requirement in the circumstances of this case. That is a matter which should be left to HBC to consider.

230. FPL has also sought a direction from the Court that consultation on the New Settlement DPD should be paused until the outcome of the decisions by the Cabinet and the full Council on the Local Plan, so that those decisions are not "prejudged". FPL has not explained how s. 113 confers jurisdiction on the Court in a challenge against one plan to make an order directing the procedure to be followed for a different plan which is not (and could not be) the subject of that challenge. Section 113 does not authorise the authorise the making of such an order in order to remedy a legal flaw in the "relevant document" which is before the Court, or in the process which has led up to its adoption. The ouster provisions in s.113(2) and (3) should also be borne in mind as they apply to the DPD.

231. In any event, even if I have the power to make the direction sought, I decline to exercise it. I agree with HBC, IP2 and IP3 that it is necessary for the order to address the legal flaw in the local plan process identified in this judgment. It has not been suggested, let alone demonstrated, that the *legality* of the process *currently* being followed for the DPD is dependent upon the outcome of this challenge or the steps now required to be taken by HBC by the order the court will now make. If HBC were to decide against adoption of the Local Plan, that might have implications for the DPD, but that would be a matter for HBC to address. I do not see why allowing the consultation process to continue until the closing date for the receipt of representations would involve the Cabinet or the full Council prejudging its decisions on the local plan in response to this judgment. Finally, it would be confusing to the public for the consultation on the DPD now to be halted.

Costs of the claim

232. As between FPL and HBC the former submits that it should be paid all its costs by the latter. HBC submits that there should be no order as to costs or that FPL should only recover 10-20% of its costs. HBC submit that additionally two items of FPL's costs should be disallowed in any event.

233. The relevant principles relied upon by the parties are contained in CPR 44. Both sides place emphasis upon the extent to which they have been successful. HBC also raises issues as to the way in which the litigation has been conducted.

234. HBC has been successful in resisting grounds 2 and 3. They were weak grounds. They received no encouragement at all in the order of Sir Wyn Williams dated 12 August 2020 granting permission to apply for statutory review. Had they been successful,l the scope of the relief to which the FDL would have been entitled would have been wider, requiring the local plan process to be "rewound" to an earlier stage. So, it was important for HBC to succeed on those grounds and it had to incur costs in order to do so.

235. FPL has been successful in relation to ground 1, but as is apparent from the judgment, only in relation to a relatively small part of the argument. FPL mounted a much more ambitious, time-consuming and costly attack on the local plan process, which would have required SAA2 to have been produced and considered by the full Council prior to the submission of the Local Plan. They also argued that alleged defect could not be cured by steps taken subsequently. In effect FPL was seeing to have the plan "rewound" at least as far back as the submission stage, so that the examination of the new settlement policies would have to be repeated. They have failed in achieving what was plainly the main object or thrust of the challenge.

236. On the other hand, I do not accept HBC's submissions that there should be no order as to costs. During the process FPL did seek to have matters considered by members of the Council rather than simply by officers, specifically in relation to the "broad location" issue. HBC resisted that suggestion. It was necessary for FPL to bring proceedings, but they ought to have been on a much more limited scale. Taking into account also the unnecessary expenditure to which HBC has been put in order to resist the substantial parts of the claim where FPL was unsuccessful, FPL should be awarded only 15% of its costs, subject to what I say below.

237. Not surprisingly, there has been no real attempt by FPL to defend the size of the original claim bundle of around 11,000 pages. The helpful core bundles agreed between all the parties for the hearing, covering all three grounds and including material from opposing parties, ran to only 663 pages. During the hearing it was only necessary for relatively small additions to be made to those bundles. Plainly, HBC would have incurred costs unnecessarily through having to deal with the superfluity of material contained in the claim bundle.

238. The Court has repeatedly said that it will consider disallowing the costs of bundles and documents filed which are excessive, whether originating from a claimant or another party, in the exercise of its discretion, and also as a necessary sanction, having regard to the obligations of each party under CPR 1.3. Taking into account the costs which HBC would have been forced to incur unnecessarily, I conclude that the whole of the costs of the original claim bundle must be disallowed.

239. I have already explained why it was inappropriate for FPL to rely upon Mr Morton's witness statement, apart from one small section ([12] above). I commend the good judgment of HBC in deciding not to file a witness statement in reply to material of that kind. But they nevertheless incurred costs in having to consider this largely inadmissible material. It is therefore appropriate for the Court to disallow the costs of Mr Morton's witness statement in its entirety.

240. In reaching these conclusions on costs, I have not double-counted any of the arguments advanced by HBC or their effect on the costs recoverable by FPL.

Costs relating to the joinder of IP2 and IP3

241. IP2 and IP3 applied to be joined as interested parties. That was resisted by FPL. The interested parties ask for an order that FPL pays their costs of making the application for joinder and of resisting that application on the grounds that FPL was unsuccessful and acted unreasonably. FPL resist the applications.

242. FPL rightly points out that under paragraph 4.1 of CPR PD 8C they were not required to serve the claim on the interested parties when it was first filed. The rule recognises that although a challenge to a local plan may affect the interests of many individuals, businesses and organisations, it is not practicable or necessary for everyone concerned about that challenge to be served or joined (see e.g. *IM Properties Development Limited v Lichfield District Council* [2015] EWHC 1982 (Admin) at [61] to [(63]). However, the Court has inherent jurisdiction to join an additional party so as to avoid injustice, albeit that that discretion is likely to be exercised rarely (see e.g. *George Wimpey UK Limited v Tewkesbury Borough Council* [2008] 1 WLR 1649 at [11] to [12], *R (Capel Parish Council) v Surrey County Council* [2008] EWHC 2364 (Admin) at [11]).

243. It follows that it was necessary for IP2 and IP3 to make an application to justify to the Court why exceptionally an order should be made joining them as interested parties. IP2 and IP3 were successful in their application and FPL was unsuccessful in its resistance. Mr Neil Cameron QC, sitting as a Deputy High Court Judge, made an order for joinder on 2 July 2020. In effect, FPL's arguments have sought to revisit the merits of that order, which was not appealed. This was inappropriate.

244. FPL's challenge sought to quash policies in the local plan for a new settlement on land in which IP2 and IP3 had substantial interests and for which they had invested large sums of money and effort over many years in order to promote a new settlement. The purpose of FPL's challenge was to advance their own rival site in substitution for that identified in the Local Plan. FPL did not seek any interim relief of the kind discussed in *IM*, but nevertheless, powerful reasons have been set out for the joinder of IP2 and IP3, which do not require to be recited here. It is not difficult to imagine what FPL's reaction would have been if the if "the boot had been on the other foot" and there had been opposition to their wish to participate in a claim challenging the identification by the local plan of Flaxby as the location for the new settlement.

245. Although an application for joinder was necessary, it ought to have been the subject of a straightforward consent order and a relatively inexpensive procedure. It was unreasonable for FPL to resist the application and in so doing it caused IP2 and IP3 to incur costs unnecessarily.