Neutral Citation Number: [2016] EWHC 2512 (Admin)

Case No: CO/2515/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2016

Before:

THE HON. MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN (on the application of (1) STONEGATE HOMES LIMITED (2) LITTLEWORTH PROPERTIES LIMITED)	**Claimants**
- and -	
HORSHAM DISTRICT COUNCIL	**Defendant**
- and -	
HENFIELD PARISH COUNCIL	**Interested Party**

- -
- -

Mark Lowe QC and Robert Williams (instructed by **Russell-Cooke**) for the **Claimants**
David Lintott (instructed by **Sharpe Pritchard**) for the **Defendant**

Hearing date: 4 October 2016

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Approved Judgment

Mrs Justice Patterson:

Introduction

1. This is a claim under section 61N of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) which seeks to challenge the decision of the defendant on 27 April 2016 to make the Henfield Neighbourhood Plan (HNP). That decision was made following a referendum held on 12 April 2016 when the HNP was passed with a vote of 94.3% of the voters.

2. The claimants are developers who have been promoting a site known as Sandgate Nursery, on the western side of Henfield, as a site for the development of 72 dwellings. A planning application was refused by the defendant on 25 November 2014. That refusal was appealed by the claimants. The decision remains with the Secretary of State for determination.

3. The claim is brought on three grounds:

    i) That the defendant had failed to lawfully assess reasonable alternatives to the spatial strategy as established by the HNP and, in particular, the alternative of permitting development on the western edge of Henfield;

    ii) That the defendant had failed to consider any alternatives to the Built-Up Area Boundary (BUAB) as established in the HNP and had failed to act rationally in the selection of the BUAB;

    iii) That the defendant and/or the examining inspector failed to give any or adequate reasons as to why the HNP met EU obligations.

4. The defendant submits:

    i) That the challenge is limited in scope by section 38A(4) and section 38A(6) of the 2004 Act to a consideration of whether the making of the neighbourhood development order would breach or would otherwise be incompatible with any EU obligation or any of the Convention rights;

    ii) Even if the scope of challenge is not so limited the option of developing land to the west of Henfield and that of including the "Barratt site" within the BUAB of Henfield had been adequately dealt with by the examiner and the defendant in a proportionate way and the reasons that had been advanced were adequate.

5. An acknowledgement of service and summary grounds of resistance were filed by the interested party, Henfield Parish Council, on 3 June 2016, which submit:

    i) That it lawfully assessed development sites put forward during the call for sites including those on the western edge of Henfield;

    ii) It did consider alternatives to the BUAB and it acted rationally in the selection of the BUAB.

Apart from submission of those grounds the Parish Council has played no active role in the proceedings before me.

6. On 27 June 2016 Gilbart J ordered a "rolled-up hearing".

Legal framework

Development plans

7. The development plan has a particular significance in the operation of the planning system in England. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) provides:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Neighbourhood development plans

8. Amendments to the 2004 Act were made by the Localism Act 2011. Those amendments provide for a process whereby parish councils or bodies designated as neighbourhood forums can initiate the making of a neighbourhood development plan. The provisions provide for an independent examination of a neighbourhood development plan. The examiner may recommend that the plan, with or without modification, is submitted to a referendum. If more than half of those voting at a referendum vote in favour of the plan, the local planning authority must make the neighbourhood development plan.

9. The material provisions of section 38A of the 2004 Act provide:

> "(1) Any qualifying body is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development plan.
>
> (2) A 'neighbourhood development plan' is a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan.
>
> (3) Schedule 4B to the principal Act, which makes provision about the process for the making of neighbourhood development orders, including—
>
> (a) provision for independent examination of orders proposed by qualifying bodies, and
>
> (b) provision for the holding of referendums on orders proposed by those bodies,

> is to apply in relation to neighbourhood development plans (subject to the modifications set out in section 38C(5) of this Act).
>
> (4) A local planning authority to whom a proposal for the making of a neighbourhood development plan has been made—
>
> (a) must make a neighbourhood development plan to which the proposal relates if in each applicable referendum under that Schedule (as so applied) more than half of those voting have voted in favour of the plan, and
>
> (b) if paragraph (a) applies, must make the plan as soon as reasonably practicable after the referendum is held."

10. A qualified body is a parish council or an organisation or body designated as a neighbourhood forum authorised to act for a neighbourhood area for the purposes of a neighbourhood development plan: see section 38A(12) of the 2004 Act. Section 38B(1) of the 2004 Act prescribes that neighbourhood development plans must specify the period for which they are to have effect, may not include provision about excluded developments as defined and may not relate to more than one neighbourhood area.

11. Schedule 4B to the 1990 Act, with modifications, is applied to the process of preparing and making a neighbourhood plan: see sections 38A(5) and 38C(5) to the 2004 Act. Paragraph 7 of Schedule 4B requires the local authority to submit a draft neighbourhood plan for independent examination. Paragraph 8, as modified by section 38C(5)(d) of the 2004 Act, provides, so far as material:

> "8(1) The examiner must consider the following—
>
> (a) whether the draft neighbourhood development order meets the basic conditions (see sub-paragraph (2)),
>
> (b) whether the draft order complies with the provision made by or under sections 61E(2), 61J and 61L,
>
> …
>
> (2) A draft order meets the basic conditions if—
>
> (a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,
>
> …
>
> (d) the making of the order contributes to the achievement of sustainable development,

> (e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),
>
> (f) the making of the order does not breach, and is otherwise compatible with, EU obligations, and
>
> (g) prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order."

12. The reference in paragraph 8(2)(e) to the development plan excludes the neighbourhood development plan (see paragraph 17 of Schedule 4B to the 1990 Act). The basic condition in paragraph 8(2)(e) therefore means, "in general conformity with the strategic policies contained in the development plan (documents) for the area (or any part of that area)."

13. Paragraph 9 sets out the general rule that the examination of the issues by the examiner is to take the form of the consideration of written representations.

14. Paragraph 10 sets out what the examiner must do after the independent examination. That reads, where relevant:

> "10(1) The examiner must make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations).
>
> (2) The report must recommend either—
>
> (a) that the draft order is submitted to a referendum, or
>
> (b) that modifications specified in the report are made to the draft order and that the draft order as modified is submitted to a referendum, or
>
> (c) that the proposal for the order is refused.
>
> (3) The only modifications that may be recommended are—
>
> (a) modifications that the examiner considers need to be made to secure that the draft order meets the basic conditions mentioned in paragraph 8(2),
>
> (b) modifications that the examiner considers need to be made to secure that the draft order is compatible with the Convention rights,
>
> (c) modifications that the examiner considers need to be made to secure that the draft order complies with the provision made by or under sections 61E(2), 61J and 61L,

> (d) modifications specifying a period under section 61L(2)(b) or (5), and
>
> (e) modifications for the purpose of correcting errors.
>
> …
>
> (5) If the report recommends that an order (with or without modifications) is submitted to a referendum, the report must also make—
>
> (a) a recommendation as to whether the area for the referendum should extend beyond the neighbourhood area to which the order relates, and
>
> (b) if a recommendation is made for an extended area, a recommendation as to what the extended area should be.
>
> (6) The report must—
>
> (a) give reasons for each of its recommendations, and
>
> (b) contain a summary of its main findings.
>
> (7) The examiner must send a copy of the report to the qualifying body and the local planning authority.
>
> (8) The local planning authority must then arrange for the publication of the report in such manner as may be prescribed."

15. Paragraph 12 applies to the duty on the local planning authority after receipt of the independent examiner's report. That reads:

> "12(1) This paragraph applies if an examiner has made a report under paragraph 10.
>
> (2) The local planning authority must—
>
> (a) consider each of the recommendations made by the report (and the reasons for them), and
>
> (b) decide what action to take in response to each recommendation.
>
> (3) The authority must also consider such other matters as may be prescribed.
>
> (4) If the authority are satisfied—
>
> (a) that the draft order meets the basic conditions mentioned in paragraph 8(2), is compatible with the Convention rights

and complies with the provision made by or under sections 61E(2), 61J and 61L, or

(b) that the draft order would meet those conditions, be compatible with those rights and comply with that provision if modifications were made to the draft order (whether or not recommended by the examiner),

a referendum in accordance with paragraph 14, and (if applicable) an additional referendum in accordance with paragraph 15, must be held on the making by the authority of a neighbourhood development order.

(5) The order on which the referendum is (or referendums are) to be held is the draft order subject to such modifications (if any) as the authority consider appropriate.

(6) The only modifications that the authority may make are—

(a) modifications that the authority consider need to be made to secure that the draft order meets the basic conditions mentioned in paragraph 8(2),

(b) modifications that the authority consider need to be made to secure that the draft order is compatible with the Convention rights,

(c) modifications that the authority consider need to be made to secure that the draft order complies with the provision made by or under sections 61E(2), 61J and 61L,

(d) modifications specifying a period under section 61L(2)(b) or (5), and

(e) modifications for the purpose of correcting errors.

(7) The area in which the referendum is (or referendums are) to take place must, as a minimum, be the neighbourhood area to which the proposed order relates.

(8) If the authority consider it appropriate to do so, they may extend the area in which the referendum is (or referendums are) to take place to include other areas (whether or not those areas fall wholly or partly outside the authority's area).

(9) If the authority decide to extend the area in which the referendum is (or referendums are) to take place, they must publish a map of that area.

(10) In any case where the authority are not satisfied as mentioned in sub-paragraph (4), they must refuse the proposal.

> (11) The authority must publish in such manner as may be prescribed—
>
> (a) the decisions they make under this paragraph,
>
> (b) their reasons for making those decisions, and
>
> (c) such other matters relating to those decisions as may be prescribed.
>
> (12) The authority must send a copy of the matters required to be published to—
>
> (a) the qualifying body, and
>
> (b) such other persons as may be prescribed."

16. Under the Neighbourhood Planning (General) Regulation 2012, regulation 19 provides for the decision on a plan proposal. That reads:

> "19. As soon as possible after deciding to make a neighbourhood development plan under section 38A(4) of the 2004 Act or refusing to make a plan under section 38A(6) of the 2004 Act, a local planning authority must—
>
> (a) publish on their website and in such other manner as they consider is likely to bring the decision to the attention of people who live, work or carry on business in the neighbourhood area—
>
> (i) a statement setting out the decision and their reasons for making that decision ("the decision statement");
>
> (ii) details of where and when the decision statement may be inspected; and
>
> (b) send a copy of the decision statement to—
>
> (i) the qualifying body; and
>
> (ii) any person who asked to be notified of the decision."

17. Section 61E of the 1990 Act reads:

> "(4) A local planning authority to whom a proposal for the making of a neighbourhood development order has been made—
>
> (a) must make a neighbourhood development order to which the proposal relates if in each applicable referendum under

> that Schedule more than half of those voting have voted in favour of the order, and
>
> (b) if paragraph (a) applies, must make the order as soon as reasonably practicable after the referendum is held."

18. That is subject to subsection 8 which reads:

> "(8) The authority are not to be subject to the duty under subsection (4)(a) if they consider that the making of the order would breach, or would otherwise be incompatible with, any EU obligation or any of the Convention rights (within the meaning of the Human Rights Act 1998)."

19. Section 61N provides, where relevant:

> "(1) A court may entertain proceedings for questioning a decision to act under section 61E(4) or (8) only if—
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of 6 weeks beginning with the day on which the decision is published."

The remainder of section 61N deals with challenges to the independent examiner's report and the holding of a referendum. Those provisions are not relevant here.

Environmental assessment

20. Directive 2001/42/EC provides for the environmental assessment of certain plans and programmes. Article 1 sets out its objective. That reads:

> "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."

21. Article 2 provides that plans and programmes include those prepared at a local level for adoption.

22. Article 3 deals with the scope of the environmental assessment.

23. Article 5 provides for the preparation of an environmental report 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 is set out in Annex I to the Directive. It includes at:

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

24. Article 8 provides that the report shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

25. Article 9 provides for what information is to be given on the decision and includes at Article 9(1)(b): "…the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with."

Policy guidance

26. Planning practice guidance on neighbourhood planning provides that:

> "Proportionate, robust evidence should support the choices made and the approach taken. The evidence should be drawn upon to explain succinctly the intention and rationale of the policies in the draft neighbourhood plan or the proposals in an order."

27. On strategic environmental assessments the advice is that:

> "The strategic environmental assessment should identify, describe and evaluate the likely significant effects on environmental factors using the evidence base … reasonable alternatives must be considered and assessed in the same level of detail as the preferred approach intended to be taken forward in the neighbourhood plan (the preferred approach). Reasonable alternatives are the different realistic options considered while developing the policies in the draft plan … the strategic environmental assessment should outline the reasons the alternatives were selected, the reasons the rejected options were not taken forward and the reasons for selecting the preferred approach in light of the alternatives … the development and appraisal of proposals in the neighbourhood plan should be an iterative process with the proposals being revised to take account of the appraisal findings. This should inform the selection refinement and publication of the preferred approach for consultation."

28. In a practical guide to the Strategic Environmental Assessment Directive (SEA) published by the Office of the Deputy Prime Minister (ODPM) there is advice at B3 on predicting the effects of the plan or programme including alternatives. Paragraph 5.B.9 says that authorities should predict effects by identifying the changes to the

environmental baseline which are predicted to arise from the plan or programme, including alternatives, which can be compared with each other and with no "plan or programme" and/or "business as usual" scenarios, where these exist, and against the SEA objectives. It continues at paragraph 5.B.10 that predictions do not have to be expressed in quantitative terms. Qualitative predictions can be equally valid and appropriate but qualitative does not mean "guessed" (see 5.B.11). Section B4 on evaluating the effect of the draft plan or programme including alternatives advises that evaluation involves forming a judgment on whether or not a predicted effect will be environmentally significant.

29. EU policy advice is contained in 'Implementation of Directive 2001/42 on the assessment of certain plans and programmes on the environment'. Under the heading 'Alternatives' it reads, where relevant:

> "On alternatives it indicates that the obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption." (see 5(11)).

It continues:

> "…it is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen." (see 5.12)

30. The National Planning Policy Framework (NPPF) sets out the Government's planning policies for England. Its policies are a material consideration. Paragraph 14 explains that at the heart of the NPPF is a presumption in favour of sustainable development which should be seen as a golden thread running through both plan-making and individual decision-taking. Paragraphs 183 to 185 deal specifically with neighbourhood development plans. They provide:

> "183. Neighbourhood planning gives communities direct power to develop a shared vision for their neighbourhood and deliver the sustainable development they need. Parishes and neighbourhood forums can use neighbourhood planning to:
>
> ● set planning policies through neighbourhood plans to determine decisions on planning applications; and
>
> ● grant planning permission through Neighbourhood Development Orders and Community Right to Build Orders for specific development which complies with the order.

> 184. Neighbourhood planning provides a powerful set of tools for local people to ensure that they get the right types of development for their community. The ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area. Neighbourhood plans must be in general conformity with the strategic policies of the Local Plan. To facilitate this, local planning authorities should set out clearly their strategic policies for the area and ensure that an up-to-date Local Plan is in place as quickly as possible. Neighbourhood plans should reflect these policies and neighbourhoods should plan positively to support them. Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies.
>
> 185. Outside these strategic elements, neighbourhood plans will be able to shape and direct sustainable development in their area. Once a neighbourhood plan has demonstrated its general conformity with the strategic policies of the Local Plan and is brought into force, the policies it contains take precedence over existing non-strategic policies in the Local Plan for that neighbourhood, where they are in conflict. Local planning authorities should avoid duplicating planning processes for non-strategic policies where a neighbourhood plan is in preparation."

Factual background

31. Henfield is a settlement recognised as appropriate to accommodate further housing development. It was classified as a category 1 settlement in the settlement hierarchy established in the Horsham Core Strategy (2007). A category 1 settlement means that it has a good range of services and facilities as well as some access to public transport and is capable of sustaining some expansion. There is some variation in public transport services within the category 1 settlements. Several regular bus services connect Henfield with Horsham and the coastal conurbation.

32. The whole of Henfield Parish was designated a neighbourhood area for the purpose of preparing the HNP. The designation was approved by the defendant on 4 February 2014 and by the South Downs National Park on 13 December 2013.

33. The process up to submission of the HNP included a state of parish report which summarised the evidence provided by focus groups and others on which the HNP is based.

34. In July 2014 a Land and Site Assessment Schedule was prepared by the housing and development focus group. That included, at site 6, land at Sandgate Nursery in which the claimants have an interest. The site was noted to have an area of 3.76 hectares and had been identified in the 2014 Strategic Housing Land Availability Assessment (SHLAA) as developable with 30 units. Site 7 was land north of West End Lane which had a site area of 7.34 hectares which had been identified in the 2014 SHLAA as not developable. The site was on the west of Henfield, in a similar location to site

6 which was on the other side of West End Lane. At the time an application for 160 residential units had been refused and was the subject of a planning appeal by Barratt Homes. That appeal was allowed on 2 June 2014. I shall return to that later. Site 24, on the east of Henfield, known as land at east of Manor Close, had a site area of 4.12 hectares and again, had been subject to appeal where development of 102 units had been allowed.

35. The Pre-Submission Plan was dated September 2014. The Submission Plan was produced in March 2015. An independent examination was held. The examiner reported on 10 July 2015 and recommended that a referendum be held. That was scheduled for 22 September 2015 but was cancelled due to concerns raised by the community due to the reclassification of a site from housing use to mixed use. A further independent examination was held in February 2016 into a revised HNP. The examiner reported on 25 February 2016.

36. The HNP 2015 to 2035 was published on 25 February 2016. The relevant policies are:

> "Policy 1: A Spatial Plan for the Parish.
>
> The Neighbourhood Plan defines the Built Up Area Boundary of Henfield and Small Dole, as shown on pages 22 and 23. Development proposals located inside these boundaries will be supported, provided they accord with the other provisions of the Neighbourhood Plan and the Horsham development plan.
>
> Development proposals outside of these boundaries will be required to conform to development plan policies in respect of development in the countryside. Proposals will be resisted if they adversely affect the setting of the South Downs National Park or if they result in the loss of Grade 1/2/3a agricultural land. Only proposals for minor development of an appropriate scale will be supported on land west of the Downs Link, or on the southern escarpment of Henfield village. "

Policy 1 draws a clear distinction between sites within the BUAB where development proposals will be supported and development proposals outside the boundary which will be required to conform to development plan policies in respect to developments in the countryside.

37. The supporting paragraphs make clear that the policy establishes the key spatial priority for the HNP. Paragraph 4.13 reads:

> "The key criteria for determining the right spatial strategy of the plan focused on sites within the Henfield boundary first, then identifying only sites that immediately adjoin the eastern boundary of the village, which is considerably closer to the majority of village services located on and around High Street. All other sites in the Horsham Strategic Housing Land Availability Assessment (SHLAA) and/or that responded to the Parish Council's call for sites have been excluded from further assessment if they did not meet these criteria (see the separate Site Assessments Report in the evidence base)."

38. Paragraph 4.16 refers to the fact that to accommodate some of the proposals the policy modifies the BUAB of Henfield.

39. Paragraph 4.18 refers to the Sustainability Appraisal/Strategic Environmental Assessment (SA/SEA) report and its assessment that the policy had positive and neutral likely effects in achieving sustainable development in the parish.

40. Paragraph 4.19 reads:

> "One alternative was to confine development within the existing settlement boundaries and allocate no new sites on the edge of the village, which resulted in too few new homes being allocated, though scoring well on a range of environmental measures. Another was to confine allocations to all the edges of the village and to allow for greater development at Small Dole but not to allocate land inside the boundary at Henfield. In this option, the scale of negative impact on environmental measures outweighed the benefits of delivering housing and, in any event, would very likely put at risk the chance of securing a majority vote at referendum. The remaining alternative was to favour sites on the western boundary of the village that consolidate the recent consent at West End Lane. This too scored badly overall as any further significant development in that area, which lies furthest from the village centre, would place unsustainable pressure on the local road system."

41. Policy 2 provides housing site allocations. Those are predominantly on the east of Henfield and include land to the east of Manor Close where the development was allowed on appeal. They do not include the Barratt site, north of West End Lane or the Sandgate Nursery site.

42. The rest of the policies are not relevant for current purposes.

43. The SA/SEA provides an assessment of the options which were considered to policy 1. The site selection strategy is recorded as sites within the BUAB followed by sites on the eastern edge of Henfield as these are closer to the services and facilities in the village centre (see paragraph 7.9). Alternative option A confined development within the existing settlement boundaries and was dismissed as it resulted in too few new homes being allocated. Alternative option B confined allocations to all the edges of the village and allowed for greater development at Small Dole. That was dismissed due to the scale of negative impact on environmental measures. Alternative option C favoured sites on the western boundary of the village that consolidated the recent consent at West End Lane. That, too, scored badly overall as any further significant development in that area, which lies furthest from the village centre, would place unsustainable pressure on the local road system and infrastructure: see paragraph 7.11.

44. The wording in the final SEA on option C is identical to that contained in the Sustainability Appraisal in December 2014, that published in March 2015 and that published in August 2015.

45. In a note produced of a planning workshop on 7 July 2014 into the HNP on housing and development it was noted that the recent planning appeals/consents in Henfield had had an impact on local public opinion and, significantly:

> "Sites in Henfield closer to the village services on its eastern edge would have less of an impact in terms of traffic movements generated by new residents (but marginal in terms of commuting, shopping, leisure trips)."

Submissions

46. To a great extent the claimants' grounds of challenge overlap. For ease I have retained their original numbering but as will become apparent much of the reasoning applies to all and the rest of this judgment should be read with that in mind.

Ground 1(a): Assessment of alternatives to the spatial strategy within the HNP

47. The claimants contend that there were three basic errors, namely:

i) That there was an unlawful departure from/failure to grapple with previous findings on a materially similar issue;

ii) That there was a lack of any evidential foundation for the conclusions that were drawn;

iii) There was a premature fixing of the spatial strategy.

48. The claimants rely upon the principle that where an issue has previously been the subject of a finding of fact or judgment by an expert independent tribunal in a related context the decision-maker must take into account and give appropriate respect to the conclusions of that tribunal. The weight to be given to the conclusions of the other tribunal and the ease with which the decision-maker can depart from previous conclusions of the tribunal depends upon the context. However, in all cases it is incumbent on the decision-maker to grapple with the conclusions of the tribunal and, if departing from them, to give reasons for so doing.

49. In support of that proposition the claimants rely upon the well known cases of **R v Warwickshire County Council ex parte Powergen Plc** (1998) 75 P&CR 89, **R (Bradley) v Work and Pensions Secretary** [2008] EWCA Civ 36, **R (Mayor of London) v Enfield London Borough Council** [2008] EWCA Civ 202 and **R (Bachelor Enterprises Limited) v North Dorset District Council** [2003] EWHC 3006 (Admin) and **R (Evans) v Attorney General** [2015] UKSC 21.

50. From those cases the claimants make the following five submissions:

i) Both the local planning authority and the parish council were dealing, in the HNP, with the same proposition made by the parish council in the Barratt appeal. The only distinction was of size of development.

ii) The proposition was the same as that which was put to the inspector on the sustainability of the Barratt site and rejected by him after he had heard evidence.

iii) The Barratt appeal inspector had heard evidence over several days.

iv) Neither the defendant nor the parish council began to grapple with the significance of the Barratt decision or to consider whether that appeal decision constituted a change of circumstances that might have warranted a different decision on spatial strategy in the HNP.

v) The decision made in the HNP was of an absolute nature, namely, that development on the west would "lead to unsustainable pressure on the local road network".

51. The second strand of cases on which the claimants rely are those which highlight the principle of consistency in decision-making. The claimants rely on **North Wiltshire District Council v Secretary of State for the Environment** (1992) 65 P&CR 137 and **R (Fox Strategic Land & Property Limited) v Secretary of State for Communities and Local Government** [2012] EWCA Civ 1198. The claimants submit that although the decisions relate to individual planning applications there is no logical reason why the principle of consistency should not apply equally to the context of plan-making.

52. The defendant contends that a plan-making exercise is different to what was being considered in the cases of **Powergen**, **Evans**, **Bachelor** and **North Wiltshire**. The plan-making authority and independent inspector were looking at comparative sustainability. What was before them was an evaluative judgment as to where development should go within the neighbourhood. A court can only intervene if the decisions made were irrational.

53. The timing of the challenge is important to the overall context. The independent examiner's report has not been challenged by the claimants at any stage. The February 2016 decision on the part of the defendant accepted the recommendation and modifications of the examiner that the HNP met the basic conditions in paragraph 8(2) of Schedule 4B of the 1990 Act which included a determination as to the compatibility with EU obligations. After the referendum on 12 April 2016 with 94.3% of the votes cast agreeing that the HNP be used in the determination of planning applications the defendant was under a duty to make the plan subject only to section 38A(6) which provides that local planning authorities are not subject to the duty if they consider that the making of the plan would breach or otherwise be incompatible with any EU obligation. Unless the claimants can establish that the defendant could not lawfully consider that the plan was incompatible with any EU obligation the claim must fail.

Discussion and conclusions

54. Alternative option C which related to sites on the western boundary of Henfield was dismissed in the SA/SEA report and in the HNP because "any further significant development in that area which lies furthest from the village centre would place unsustainable pressure on the local road system." There was, therefore, a live issue as to whether development on the western side would place unsustainable pressure on the local road system. As a matter of fact the western area lay further from the village centre but that was not the rationale for rejecting the area in the SA/SEA or in the HNP.

55. The Barratt application on land north of West End Lane was made on 29 April 2014. The appeal into the refusal of planning permission by the defendant was heard over four days at the end of March and the beginning of April 2014. A decision letter was issued on 2 June 2014. One of the reasons for refusal was a highways reason. That was withdrawn by the council at appeal as a result of an agreement between Barratt and the Highways Authority on highway works and contributions. The issue of transportation though remained live at the appeal as the parish council and other interested parties maintained their objections. As a result, one of the main issues in the appeal recorded by the appeal inspector was what effect the development would have on the safety and free-flow of traffic in Henfield and on sustainable travel objectives. The inspector allowed the appeal.

56. In dealing with transportation objections he concluded that most Henfield facilities were within reasonable and level walking distance of the appeal site and the roads were also suitable for cycling. Improvements to the footways would make walking easier and safer and a more attractive option. He noted that much attention at the appeal before him focused on the junction of Church Street and High Street. The appeal development would generate additional movements so that there was some potential for additional congestion at peak hours but the transport assessment did not support the high traffic estimates claimed by some objectors which were typically based on car ownership and parking provision rather than car use. Not all cars would be used every day or at the same time of day. Moreover, should excessive queuing occur then alternative routes were available which had wider and higher capacity junctions with the main road. Some drivers were likely to divert to those routes if congestion increased. Those features would themselves serve to keep traffic speeds to safe levels. He rejected the suggestion that the diversion routes were not suitable to carry extra traffic. Accordingly, there was before him a lack of evidence to demonstrate that the Church Street junction would become unsafe or that the congestion or other effects of extra traffic would be severe in terms of the NPPF. He clearly dismissed the arguments of the parish council and individual objectors on highways and sustainability grounds. Neither the district council nor the county highway authority objected to the development on highway grounds (paragraphs 55 and 56 of the decision letter). He concluded that the Barratt development would be a sustainable development and the presumption in favour of such development should be applied.

57. The Sandgate Nursery site was the subject of an application for planning permission in March 2014 for 72 dwellings. Officers recommended approval. Members rejected that recommendation and refused planning permission on 25 November 2015 including highways grounds. As set out that refusal has been the subject of an appeal.

58. During the course of the appeal a highways statement of common ground was agreed between the appellants and West Sussex County Council, the relevant highways authority. That included agreement that the Sandgate Nursery site was accessible by foot to many of Henfield's facilities and services located about 1.2 kilometres east of the site within a maximum "acceptable" walking distance for pedestrians without mobility impairment of 2 kilometres. The parties agreed that the proposal should not be refused on traffic or transport grounds with the consequence that the highways reason for refusal was withdrawn.

59. The claimants contend that the primary basis for rejecting alternative option C in the HNP was unsustainable pressure on the local road system which was clearly inconsistent with the inspector's decision in the Barratt appeal. No reference in the plan making process was made to the Barratt appeal decision letter nor to the position of the highways authority in that appeal or in the Sandgate appeals where the highway authority withdrew the highways reason for refusal. The outcome of the Barratt appeal was clearly known both to the parish council and to the defendant. It had been brought to the attention of the independent examiner who was obliged to deal with it.

60. In her first report dated 10 July 2015 the independent examiner in dealing with matters under the hearing 'European Convention on Human Rights and European Union Obligations' expressed "satisfaction that the neighbourhood plan did not breach nor is it in anyway incompatible with the ECHR". She continued "I am satisfied that a fair and transparent process has been undertaken in the seeking of and the selection of development sites within the neighbourhood plan area. There is a clear rationale to the allocations where presumption is in favour of development within the allocated settlement boundaries close to facilities both to the benefit of future occupants and to continue sustaining those facilities." She continued that it had been determined that an SA/SEA would be required as policies may have significant environmental effects, in particular site allocations. She said:

> "The SA/SEA demonstrates its policies will have no significant social, economic or environmental effects. I am satisfied that the proposals have been significantly assessed and raise no negative impact in either summary (as per Table 3: Summary Assessment of Objectives) nor in the detail of the assessment."

61. In her second report dated 25 February 2016 under the heading 'Subsequent changes to policy context since an examination July 2015' the examining inspector said:

> "There had been no subsequent alterations to the European Convention on Human Rights under European Union obligations to impact upon this NDP … I am satisfied that the neighbourhood plan does not breach nor is in anyway incompatible with the ECHR. …the SA/SEA demonstrates the revised NDPs policies will have no significant social, economic or environmental effect … I am therefore satisfied that the neighbourhood plan is compatible with EU obligations and, as modified, will meet the basic conditions in this respect."

62. Section 5 of her report dealt with representations received. In that she said:

> "Concern is raised about failing to assess housing needs for local and wider community and providing a sufficient allocation of land for housing and unfair exclusion of land on the western side of the village, no objective assessment to support the evidence of 137 unit allocation is correct in terms of numbers, need to provide an opportunity to revisit the other candidate sites to make up the shortfalls. Most of these points were raised on the previous plan. …the rationale for not supporting development on the western boundary is clearly

> stated in NDP para 4.19. The rationale for supporting or otherwise is clearly stated in the site allocation paper and there is no reason to reopen these issues with no conflicts arising with meeting the basic conditions."

63. The issue then is whether the inspector was under an obligation to grapple with the implications of the finding of the Barratt appeal inspector on the parish council's assessment of reasonable alternatives and the subsequent development of highways issues in the Sandgate Nursery appeal. Her failure to do so is contended to be in breach of the legal principles established in the **Powergen** and **North Wiltshire** line of cases.

64. I have no hesitation in rejecting the application of the **North Wiltshire** line of cases to the circumstances before the independent examiner and the defendant, namely, that the decision made in the HNP needed to be consistent with the decision on the individual planning decision on the Barratt appeal. **North Wiltshire** was dealing with an entirely different context to a plan-making exercise in which comparative judgments have to be made within the plan boundary. That exercise is distinct from determining, on an individual basis, whether a planning application is acceptable on a particular site. An individual case is entirely distinguishable from reaching a decision on the spatial dispersal of prospective development in a broader geographical area. That is the case also in **Fox Strategic Land & Property** which, again, was dealing with two planning appeals after the refusal of planning permission. There, the issue was whether the decisions of the Secretary of State were inconsistent with the established spatial vision for the area. In the current context the issue was the establishment of the spatial vision for the HNP and how it is to be realised through objectives in the NDP. It is, in my judgment, a materially different exercise. That does not mean, however, that the Barratt decision may not be a material consideration for the plan making process but there was no obligation on the part of the plan making authority to follow it.

65. Again, none of the **Powergen** line of cases are dealing with plan-making decisions and the comparative exercise which is part of that process. In **Evans** Lord Neuberger reviewed the cases of **Powergen** and **Bradley** amongst others and continued at paragraph 66 and 67:

> "66. Such comparisons with other cases can, however, only be of limited assistance: what is of more importance is to seek to identify the relevant principles. In Bradley at para 70, Sir John Chadwick did just that and suggested that there were five applicable propositions. At least for present purposes, I would reformulate and encapsulate those propositions in the following two sentences. In order to decide the extent to which a decision-maker is bound by a conclusion reached by an adjudicative tribunal in a related context, regard must be had to the circumstances in which, and the statutory scheme within which, (i) the adjudicative tribunal reached its conclusion, and (ii) the decision-maker is carrying out his function. In

> particular, the court will have regard to the nature of the conclusion, the status of the tribunal and the decision-maker, the procedure by which the tribunal and decision-maker each reach their respective conclusions (eg, at the extremes, (i) adversarial, in public, with oral argument and testimony and cross-examination, or (ii) investigatory, in private and purely on the documents, with no submissions), and the role of the tribunal and the decision-maker within the statutory scheme.
>
> 67. Although Sir John expressed his propositions so as to apply to "findings of fact", it seems to me that they must apply just as much to opinions or balancing exercises. The issue is much the same on an appeal or review, namely whether the tribunal was entitled to find a particular fact or to make a particular assessment. Anyway, it is clear from Powergen that an assessment as to whether an access onto a highway would be safe fell within the scope of his propositions. Indeed, the ombudsman's decision in Bradley itself seems to me to have involved issues as to which she had to make assessments or judgements, such as whether the department concerned should have done more and whether some failures amounted to maladministration – see at para 27 of Sir John's judgment."

66. That makes it clear that a decision-maker can have regard to a balancing exercise carried out by another in a related context but the extent to which he is bound by it requires a consideration of the circumstances and the statutory scheme within which the decision-maker is reaching its conclusion and carrying out its function. Given the different nature of the exercises which an inspector on an appeal under section 78 is concerned and those with which an independent examiner or a plan-making authority is concerned it would be difficult to conclude that the latter were bound by the decision of an inspector on an individual site such as that at West End Lane. But that is not to say that the Barratt decision and the current state of knowledge on the highways network should have been disregarded in the plan making system. The Barratt decision letter was issued on 2 June 2014. The parish council were clearly aware of it, as Mr Osgood, who has filed a witness statement in the current proceedings, attended the Barratt inquiry as a local resident and as a member of the Henfield Parish Council, as also did a Mr P Hill. They were aware also of the comments at the planning workshop on the 7 July 2014.

67. The basis for the claim in the HNP that sites on the western boundary consolidating the recent consent at West End Lane would place unsustainable pressure on the local road system is thus, in my judgment, entirely obscure. Mr Osgood, in his witness statement of 29 July 2016, refers to the planning workshop on 7 July whose purpose was to determine the preferred spatial plan for the parish and, specifically, the approach to be taken to distributing new houses to be allocated by the plan. He says, in paragraph 8 of his witness statement:

> "It was open to the parish council and the examiner to determine where development should go and to rule out development to the west on the basis that the community felt 'it would place unsustainable pressure on the local road system and infrastructure' based upon the following:
>
> 1. The western side of the village is further from the High Street as a matter of facts;
>
> 2. Although some facilities are to the west of the High Street, these are all on the eastern side of the village bar one;
>
> 3. Those travelling from the west would therefore be less likely to travel on foot and more likely to come by car; and
>
> 4. Travel by car from the western side of the village is more likely to cause pressure because of pinch points in the road system.
>
> This was discussed at length at the planning workshop in 7 July 2014 and at the site visits thereafter and the essence of this reasoning appeared in many residents' representations."

68. His following paragraph refers to the statement of common ground submitted at the West End Lane inquiry where agreement was reached that, in highways terms, the roads and junctions local to the site were adequate in terms of safety and capacity to cope with site traffic during the construction period but he goes on to say that local residents were still of the opinion that the increase in traffic would have an adverse effect on highways safety. That was revealed in various consultation responses.

69. The difficulty with the basis upon which Mr Osgood says that the decision was reached that sites on the west would place unsustainable pressure on the local road system and infrastructure is that, firstly, the record of the planning workshop of 7 July says nothing of the sort. Its full terms are set out above. Sites to the east are said to have less of an impact in terms of traffic movement but the difference between east and west was marginal in terms of commuting, shopping and leisure trips. That does not amount to an evidence base for concluding unsustainable pressure on the local road system and infrastructure. Secondly, the other points that Mr Osgood makes in paragraph 8 of his witness statement, as set out above, and that he attributes to other consultation responses do not provide a basis for the conclusion in the HNP either. They are unsupported by any technical or expert evidence which, in so far as it exists, goes the other way. Mr Osgood's views are based on opinion and an opinion that had been rejected in the Barratt appeal. As the claimants submit, the reason given for the rejection of sites on the western boundary was because they would place unsustainable pressure on the local road system. That conclusion and the evidence base for it, was therefore, fundamental to the choice of strategy for the HNP.

70. The question then is whether such evidence as there was, based upon local opinion and, as Mr Osgood says, "what the community felt", was sufficient to meet the

standard required under the SEA Directive? As **Ashdown Forest Economic Development Llp v Secretary of State for Communities and Local Government & Others** [2015] EWCA Civ 681 confirmed, "…the identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles [42]."

71. Article 5(2) of Directive 2001/42/EC says:

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

72. Guidance on the implementation of the Directive by the EU advises that:

> "The essential thing is that likely significant effects of the plan or programme when the alternatives are identified, described and evaluated in a comparable way. …it is essential that the authority … responsible for the plan as well as the authorities and public consulted are presented with an accurate picture of what reasonable alternatives there are and why they are not considered the best option."

73. Here, anyone reading the HNP would be of the view that significant development on the western side of Henfield would lead to unsustainable pressure on the local road system. Beyond assertion by local residents who had made the same point at the West End Lane appeal when it had been rejected, there was no evidence to support the view expressed for the rejection of option C in the HNP. Although the Office of the Deputy Prime Minister's Practical Guide to Strategic Environmental Assessment Directive advises that predictions do not have to be expressed in quantitative terms as quantification is not always practicable and qualitative predictions can be equally valid and appropriate it goes on to say in paragraph 5.B.11:

> "However, qualitative does not mean 'guessed'. Predictions need to be supported by evidence, such as references to any research, discussions or consultation which helped those carrying out the SEA to reach their conclusions."

74. The problem here is that the absolute nature of the rejection of option C is unsupported by anything other than guesswork. At the very least, having received the Barratt decision letter the plan-making authority, the parish council could have contacted the highways authority to obtain their views on the capacity of the broader local highways network in the western part of Henfield. There is no evidence that that was done. There is no evidence that anything was done when the highways objections to residential development on the Sandgate Nursery site was withdrawn either. Until it is, the outcome of significant development on the western side of Henfield on the local road network is unknown. What is known is that the permitted

site and the appealed site together do not provide any insuperable highways objections. Without further highways evidence though, the reason for rejecting option C as set out in paragraph 4.19 of the HNP is flawed, based as it is upon an inadequate, if that, evidence base. The requirement, under the Directive, that the alternatives are to be assessed in a comparable manner and on an accurate basis was simply not met.

75. The Sandgate Nursery appeal in which the highways reason for refusal was withdrawn would not have been available to the independent examiner in 2015 but it would have been known to the defendant when it received the second report from the independent examiner in February 2016. That combination of factors, namely, the West End Lane appeal decision letter and the highways stance at Sandgate Nursery mean that questions ought to or should have been raised on the part of the defendant on the adequacy of the SEA process for the determination of the spatial strategy in the HNP.

76. Further, the position on Sandgate Nursery was made known to the independent examiner in 2016 through further representations made by the claimants as part of the revised plan process. Given that, and her knowledge of the outcome of the Barratt appeal, her conclusion on compliance of the HNP with EU obligations was wrong. It was insufficient on her part to say that the matter had been raised before and refer back to paragraph 4.19 of the HNP. That paragraph, in so far as it deals with the rejection of Option C, I have found was based on what appears to be an erroneous conclusion and certainly had not been reached based upon an accurate appraisal of alternative C. The obligation under the SEA Directive is to ensure that the consideration of reasonable alternatives is based upon an accurate picture of what reasonable alternatives are. That was not done here. Not only was the conclusion wrong but, in the circumstances, it was irrational, given the absence of an evidence base. Her flawed report then tainted the decision on the part of the defendant.

77. But the defendant knew the position and had the relevant information. It is under an independent duty to set out its decision under regulation 19 of the Neighbourhood Planning (General) Regulations 2012 as to why it made the plan. It was clearly unable to make a lawful decision given, as I have found, that the plan breached and was incompatible with EU obligations.

78. It follows that, in my judgment, the assessment of reasonable alternatives within the SEA process was flawed and that the making of the HNP was incompatible with EU obligations. The decision on the part of the defendant to make the plan was thus irrational.

79. This ground succeeds.

Ground 1(b): Lack of any evidential foundation for conclusions

80. I have largely dealt with this under ground 1(a). I deal with it more shortly as I do also ground 1(c).

81. It is of note that in the representations made on behalf of the claimants on 16 November 2015 on the HNP it was said in terms that there was no objective assessment to support the contention in the draft neighbourhood plan that locations on the western edge of the village were unsustainable in highways terms. In that

representation, not only is there reference to the Barratt inspector's findings but there is also reference to the fact that in the then current ongoing appeal in relation to Sandgate Nursery the council had now withdrawn its highways grounds for refusal.

82. On 24 March 2016 the solicitors acting for the claimants wrote a pre-action protocol letter to the defendant. In that letter the solicitors repeated the contention that there was no objective assessment to support the contention that there was unsustainable pressure on the local road system, that the reason advanced was contrary to the inspector's report on the Barratt appeal and that the defendant had withdrawn its highways reason for refusal in relation to Sandgate Nursery.

83. Both the parish council and the independent examiner had before them in February 2016 a clear dispute as to the adequacy of the reason advanced in the draft HNP at 4.19 for rejection of Option C which they failed to address. But the defendant failed to apply its mind to its own independent duty as to whether the plan complied with EU obligations. At no stage did it seek further evidence or recognise any concern. Its Regulation 19 statement dated 31 May 2016 simply states that the HNP complies with the legal requirements and basic conditions without further explanation or identifying the evidence upon which it relies for such a statement.

84. It follows that this ground succeeds also.

Ground 1(c): Premature fixing of the spatial strategy

85. The claimants contend that, in the circumstances, there was a predetermined view on development to the western edge of Henfield.

86. Reference in the HNP to the sequential test, the claimants contend, is reference to screening out those sites on the western edge of Henfield. That stance remained the position of the parish council and the defendant notwithstanding the Barratt decision in June 2014. The SA in December 2014 and the SA/SEAs published in March, August and October 2015 and February 2016 were after spatial strategy appears to have been decided upon. What the parish council was doing, therefore, was not pursuing an iterative process which informed choices being made in the plan.

87. The defendant submits that, although there is no requirement that a plan and environmental report proceed in parallel, the first iteration of the SA was produced in December 2014 and was published at the same time as the draft plan. That reflected the consultations and evidence from 7 July 2014 workshop. That eventually became the SA/SEA and was considered by the independent examiner. The plan was not adopted until April 2016 following the positive recommendation of the independent examiner.

Discussion and conclusions

88. This part of ground 1 is interrelated with the other two which I have already dealt with. It is right that the SA/SEA process needs to be iterative so that it can inform the development plan as it evolves. The problem here is that in relation to sites on the western part of Henfield the SA/SEA document did not change to reflect what I have found to be changed circumstances. Even when first published in December 2014 it

did not accurately reflect the contents of the workshop on 7 July or deal with the issues raised as a result of the Barratt appeal.

89. The defendant has submitted that the use of planning workshops was a sensible approach. It was only after that in July 2014 that the first version of the SA/SEA was produced.

90. I agree that planning workshops can be a sensible approach and can perform a valuable contribution to the development plan process; they are part of the way in which the public can participate in the local plan-making process. However, that does not mean to say that they should be run according to an entirely local agenda. They feed into a process which needs to comply with EU obligations. Although the workshop did provide a forum for indicating that the difference between sites on the west and east was marginal for shopping, commuting and leisure it did not provide a basis for supporting a contention that sites on the west would lead to unsustainable pressure on the local road network. None of that was incorporated into the SA/SEA. As I have found, the process was flawed because it did not present an accurate picture of the alternatives so that they could be considered on a comparable basis. The real problem here was that the parish council failed to grapple with the changing highways information in relation to sites on the west of Henfield.

91. It follows this ground also succeeds.

Ground 2: Was the BUAB of Henfield unfairly fixed?

92. The claimants submit that the BUAB is integral to the spatial strategy of the HNP. By policy 1 development proposals located inside the BUAB will be supported where they accord with other provisions of the development plan. In contrast, outside the BUAB the policy is more restrictive so that minor development only is permitted outside the BUAB.

93. The claimants submit that there is no assessment of the environmental impact of the proposed BUAB or any reasonable alternatives. There was no explanation for the delineation of BUAB or why it should be preferred to any alternatives.

94. In particular, no consideration was given to the inclusion of land to the north of West End Lane (the Barratt site) which had extant permission for 160 residential dwellings and which abutted the western edge of the BUAB but the inclusion of land on the eastern side of Henfield, namely land east of Manor Close which had also been granted permission on appeal. It was irrational to exclude the Barratt site on the west but to include land east of Manor Close on the east. That led to the HNP proceeding on a false basis.

95. The defendant submits that the claimants are relying upon the same approach as they did in relation to ground 1.

96. The key is that the policy guides where development is to go. As planning permission had been granted for the Barratt site there was no need to include it. It was not irrational to do so.

97. Even if there was an error of law, the defendant submits it would not be material given that the rationale for the spatial strategy at 4.13 of the HNP is to identify sites that immediately join the eastern boundary of the village because they are considerably closer to the majority of village services located on or around High Street. Accordingly, the key consideration for where development should go in the HNP is the sustainability of its location in relation to the majority of services.

Discussion and conclusions

98. Paragraph 4.13 of the HNP sets out the rationale for the choice of the BUAB, namely, proximity to services for sites on the eastern edge of Henfield.

99. It follows that whether sites were granted planning permission on an appeal is not determinative as to where the BUAB should be drawn. The decisions on appeal may contribute as to where the line should be drawn but, in themselves, would not be conclusive.

100. The real problem is that there does not appear to have been any assessment of the environmental impact of the BUAB which appears inextricably linked, understandably, with the chosen spatial strategy. There is no explanation in the SA/SEA as to why the proposed delineation is preferred to any alternatives. The line was amended to take into account the consent granted for land to the east of Manor Close but no explanation is given for not extending it to the west to include the Barratt site. The issue was raised by the claimants in their representations on the draft HNP in November 2015 but, apparently, ignored by the independent examiner, the defendant and the interested party in the plan making process. It follows that approach, too, was in breach of EU obligations.

Ground 3: Reasons

101. The claimants acknowledge that since the judicial review has been issued the defendant has issued a regulation 19 decision statement. That, however, it is still contended, is inadequate as it fails to provide adequate reasons.

102. The claimants accept that there is a duty on local planning authorities to make a neighbourhood development plan following a positive result in the referendum. The only circumstances in which the duty is disapplied are by virtue of section 38A(6), "…if they consider that the making of the plan would breach, or would otherwise be incompatible with, any EU obligation or any of the Convention rights."

103. The claimants submit that the regulation 19 decision notice should address the referendum result and whether the making of the plan would breach or otherwise be incompatible with any EU obligation or Convention rights. It is submitted that the duty is heightened in circumstances where the decision maker is aware of concerns that the making of the plan would not be compatible with EU obligations.

104. In this case the decision statement makes no reference to compliance with EU obligations. Nor is the defendant able to cure the defect by reliance on the council's report on its decision statement.

105. The defendant submits that it is important to bear in mind the context in which this challenge is brought. The independent examiner's report has not been the subject of legal challenge. The defendant upheld its approach and there has been no change in circumstances since those decisions. In that context it was acceptable for the defendant to deal with matters as it did.

106. The defendant accepts that the independent examiner did not go into detail in her recommendations but she had flagged-up the rationale to the strategy which favoured development on the eastern side of Henfield in her first report. In February 2016 she said that she was satisfied that the HNP was compatible with EU obligations and, as modified, would meet the basic conditions in that respect as there had been no subsequent alterations to the ECHR and EU obligations to impact upon the HNP.

Discussion and conclusions

107. It follows from the flaws identified in ground 1, in particular, that both the independent examiner and the defendant were proceeding on a false basis. At no stage did the independent examiner give the slightest hint as to why rejection of option C caused unsustainable pressure on the local road system. Likewise, the defendant failed to address that issue. Both the independent examiner's report and the defendant's decision statement fail to explain why they reached the conclusions that they did on compliance with EU obligations with appropriate rigour or particularity or how they concluded that their assessment of reasonable alternatives was compliant with the SEA Directive and Regulations.

108. The absence of reasons, even bearing in mind the context, which is a point fairly made by the defendant, means that this ground, too, must succeed.

109. Although the claimants did not challenge the independent examiner's report or the defendant's dealing with it they are still entitled to challenge, under section 61N, the consequences of the referendum which lead to the making of the HNP on the statutory grounds contained within that section.

110. As the flaws identified in the plan-making system in grounds 1 and 2 were that the HNP was in breach of the SEA Directive and Regulations, for reasons that I have already set out, the reasons given by the defendant in its decision statement were bound to be and were inadequate. They came nowhere close to dealing with the principal controversial issues of why the HNP complied with EU obligations.

111. This ground succeeds also.

112. This claim is allowed.