

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

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 23/11/2017

Before :

MR JUSTICE GILBART

Between :

WILLIAM DAVIS LTD
BLOOR HOMES LTD
JELSON HOMES LTD
DAVIDSONS HOMES LTD
BARWOOD HOMES LTD

Claimants

- and -

CHARNWOOD BOROUGH COUNCIL

Defendant

Gwion Lewis and **Matthew Fraser** (instructed by **Bird, Wilford and Sale, Loughborough**) for the **Claimants**
Paul Stinchombe QC (instructed by **Kathryn Harrison, Legal Services, Charnwood Borough Council**) for the **Defendant**

Hearing dates: 25th October 2017

Judgment Approved

GILBART J :

1. I shall refer to a number of statutes, regulations, documents and policies in this judgement, by the following acronyms

Statutes and Regulations

<i>TCPA 1990</i>	Town and Country Planning Act 1990
<i>PCPA 2004</i>	Planning and Compulsory Purchase Act 2004
<i>LP Regs 2012</i>	Town and Country Planning (Local Planning) (England) Regulations 2012

Types of statutory document (defined in *PCPA 2004* and *LP Regs 2012*)

LDD	Local Development Document
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DPD Development Plan Document
SPD Supplementary Planning Document

Secretary of State's Guidance and Policy

NPPF National Planning Policy Framework (2012)
NPPG National Planning Practice Guidance (policy advice
of the SSCLG, published on the internet and revised
from time to time

Charnwood Borough Council Documents

CLPCS Charnwood Local Plan 2011-2028 Core Strategy
HSPD Housing Supplementary Planning Document

Other

CBC Charnwood Borough Council
LPA Local Planning Authority
SSCLG Secretary of State for Communities and Local
Government

2. This application for judicial review, made by five housing developers active in the East Midlands, relates to the publication by CBC of a policy document entitled "Housing Supplementary Planning Document" (HSPD) in May 2017. Permission to make the application was granted by Singh J on 25th July 2017.
3. The Claimants argue that policy HSPD 9 within the document should have been issued in the form of a DPD and not in the form of an SPD. As I shall come to, those descriptions are precisely defined in the *Planning and Compulsory Purchase Act 2004* and related Regulations. DPDs must, if objection is taken to them, be subject to independent examination by the Secretary of State for Communities and Local Government, whereas SPDs are not.
4. I shall address the issues as follows:
 - i) the terms of the CLPCS and HSPD;
 - ii) the developmnt plan in the context of the Planning Code;
 - iii) identifying the development plan;
 - iv) procedures for adoption/approval;
 - v) cases for the Claimants and Defendant;
 - vi) discussion and conclusions.

(i) *The terms of the CLPCS and HSPD*

5. CBC adopted its CLPCS in November 2015. It is part of the development plan for the purposes of the Planning Acts, and contains the strategic policies for the period 2011-2028. The document contains policies, which are set out in bold text in boxes, and supporting text, which appears in numbered paragraphs. That distinction is of importance- see the observations of Richards LJ in *R (Cherkley Campaign Ltd) v Mole Valley District Council & Anor* [2014] EWCA Civ 567 at [21]- [23]. The CLPCS was the subject of the procedures defined in *PCPA 2004* and Part 6 of the *LP Regs 2012*.
6. Policy CS1 of the Development Strategy Chapter stated that CBC would make provision for at least 13,940 new homes between 2011 and 2028. The priority location for growth was the Leicester Principal Urban Area, where housing provision would be made for at least 5500 new homes. The majority of the remaining growth was to be at Loughborough and Shepshed, where there were to be at least 5000 new homes, with 3000 homes west of Loughborough, of which 2440 were to be delivered by 2028, and approximately 1200 homes within and adjoining Shepshed. Another 3000 homes were to be provided in 7 “Service Centres” (in fact small towns and larger villages), and at least 500 homes on sites within other settlements.
7. The Housing Chapter contained both policies and supporting text. One of the matters addressed was that of the types and sizes of homes needed. The text [5.3] referred to the growing need for small households, due to greater longevity, and to the fact that more couples bore children when older. It anticipated increases in the numbers of people over 56 years in age, and particularly so of those aged over 85 [5.4]. It then assessed the profile of the housing stock in the Borough, and considered that the current numbers of 2 bedroom homes should be increased, which required that 30-35% of the housing as delivered should consist of smaller homes of two bedrooms [5.6]. But there was also a need to increase the number of smaller and medium sized homes, preferably provided in houses rather than flats or apartments [5.7]. However, some medium and large family homes would also be required.
8. At [5.8] the document stated

“We expect new housing development to take account of local housing needs and the current mix of homes available in the local area. We will work with our partners to identify the mix of homes required from new developments. This will be done through masterplanning on strategic sites, Neighbourhood Plans for our existing communities and by using evidence from the Strategic Housing Market Assessment, local housing needs surveys and household projections when considering planning applications.”
9. The document then turned to the question of affordable housing, and then at [5.13] stated that the evidence it had obtained showed that 180 houses per annum were required to meet outstanding and newly arising needs. It wanted to see an increase in the amount of affordable homes being delivered [5.14], and stated that it would make sure that new developments should fund an element of

housing without comprising the viability of the housing scheme in question. It stated that CBC had considered the types of housing development to be expected, and the impact which land values would have on viability [5.14]. It went on to say that Policy CS3 identified the size of development where CBC would require the inclusion of affordable housing, and the proportion of affordable homes which CBC would seek [5.14]. At [5.15] it did not want the level of affordable housing it sought to be such as prevent sustainable development from happening, and stated that if a developer considered that the requirement for affordable housing would deprive the scheme of viability financially, then a viability appraisal would be required [5.15].

10. Policy CS 3 reads as follows

“Strategic Housing Needs

We will manage the delivery of at least 13,940 new homes between 2011 and 2028 to balance our housing stock and meet our community’s housing needs

We will do this by:

- Seeking the following targets for affordable homes within housing developments, having regard to market conditions, economic viability and other infrastructure requirements:
 - 30% affordable housing within the sustainable urban extensions north east of Leicester and west of Loughborough and the direction of growth north of Birstall;
 - On sites of 10 dwellings or more in the following urban areas and service centres

Location	Target
Thurmaston Shepshed	25%
Birstall Loughborough Anstey Barrow upon Soar Mountsorrel Silsby Syston	30%
Quorn Rothley	30%

- On sites of 5 dwellings or more in the following rural locations

East Goscote Thurcaston	30%
(list of 26 settlements)	40%

- Seeking an appropriate mix of types, tenures and sizes of homes, having regard to identified housing needs and the character of the area;
-
- Securing the delivery of affordable homes on-site and integrated with market housing unless there are exceptional circumstances which contribute to the creation of mixed communities
-
- Monitoring the delivery of affordable homes through our Annual Monitoring Report.”

11. The policies were the subject of the Examination of the Core Strategy by an inspector of the SSCLG, and found to be sound (for the procedure see s 20 *PCPA 2004* and Part 6 “Local Plans” of the *LP Regs 2012*, both considered *below*.)
12. In January 2017 CBC issued a draft HSPD for consultation. It contained policies and supporting text on the topics of, inter alia, “Affordable Housing” and “Housing Mix.” The Housing Mix text again explored the topic of sizes, types and tenures of housing. It included reference to a 2017 “Housing and Economic Development Needs Assessment.” At [3.7] of the final version, it stated that that needs assessment had assessed the optimum mix of property sizes to meet housing needs over the next 25 years. At HSPD 9 it included a policy entitled “Housing Mix,” which read

“in accordance with Core Strategy Policy CS3 the following broad proportions will be used in order to deliver an appropriate mix of sizes of homes:

Size	Affordable	Market
1 bed	60-70%	0-10%
2 bed		30-35%
3 bed	25-30%	45-55%
4+ bed	5-10%	10-20%

Where development proposes (sic) a significantly different mix to that identified in the table it must be justified through evidence of identified housing needs and character of the area in accordance with Policy CS3 taking into account;

- evidence of housing need including reference to the housing register;
- existing mix and turnover of properties;
- nature of the development site;
- character of the wider area the site is located within;
- detailed design considerations; and
- economic viability.”

13. CBC has stated in its pre-action response that no viability assessment was carried out in respect of policy HSPD 9. It contended that it would be assessed on a case by case basis.
14. The HSPD was the subject of procedures under Part 5 of the *LP Regs 2012* (of which more below). The housebuilders objected to the proposed policy. As well as pursuing objections based on matters of planning judgement and the merits, arguing that the policies were too prescriptive, specific arguments were made that this was not an appropriate topic for an SPD, and that such a policy could not be made via an SPD, but could only be made within a DPD.
- (ii) *The Development Plan in the context of the Planning Code*
15. *TCPA 1990* (the principal Act) and related legislation comprise the Planning Acts. This is not an area which readily admits the application of precepts from private law. I refer to the well known words of Lord Scarman in *Pioneer*

Aggregates (UK) Ltd v The Secretary of State for the Environment [1985] 1 AC 132 HL at 140. As he made clear, it is a comprehensive code. The issue before the House of Lords was whether it was possible for a planning permission to be abandoned by conduct. Lord Scarman (with whom the other members of the Appellate Committee agreed) held that there was no such general principle of abandonment in planning law, but in doing so he addressed the wider question of how one treats issues dealt with by the Planning Code. At page 140 Lord Scarman said this:

"Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury District Council v. Secretary of State for the Environment* [1981] AC 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole."

16. A central feature of the Planning Code is the development plan; see s 70(2) *TCPA 1990* and s 38(6) *PCPA 2004*. By s 70(2) *TCPA 2004*, which deals with the consideration of applications for planning permission, regard must be had to the development plan, and by s 38(6) *PCPA 2004*

"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."

17. The effect of those provisions is important; the existence of a policy in a properly adopted development plan is not a mere material consideration. An up to date development plan policy will, in the normal course of events, attract significant weight, as s 38 *PCPA 2004* shows. While the weight it attracts in any given case is for the decision maker, it cannot be disregarded. That decision maker will be the local planning authority at first instance, and then the SSCLG, on a called in application under s 77 *TCPA 1990* or by him or one of his Inspectors on appeal under s 78 *TCPA 1990*.

18. The law on decision making in the Planning Code is now well settled (perhaps save only whether there is a duty to give reasons for the grant of a planning permission. This matter does not raise that issue). The significance of the

development plan is readily apparent from the relevant principles. In determining a planning application, the LPA or SSCLG must act as follows. (In the case of LPAs, while reasons to grant permission are generally not given, the principles also apply to the deliberations by which it reached its conclusion; typically, the reasoning will be in the officer's report, and/or in the Minutes of the relevant committee). The decision maker must

- i) have regard to the statutory development plan (see s 70(2) *TCPA 1990*);
- ii) have regard to material considerations (s 70(2) *TCPA 1990*);
- iii) determine the proposal in accordance with the development plan unless material considerations indicate otherwise (s 38(6) *PCPA 2004*);
- iv) apply national policy unless he gives reasons for not doing so- see Nolan LJ in *Horsham District Council v Secretary of State for the Environment and Margram Plc* [1993] 1 PLR 81 following Woolf J in *E. C. Gransden & Co. Ltd. v. Secretary of State for the Environment* [1987] 54 P & CR 86 and see Lindblom J in *Cala Homes (South) Ltd v Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin), [2011] JPL 887 at [50];
- v) consider the nature and extent of any conflict with the development plan: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 at [22] per Lord Reed;
- vi) consider whether the development accords with the development plan, looking at it as a whole- see *R(Milne) v Rochdale MBC (No 2)* [2000] EWHC 650 (Admin), [2001] JPL 470, [2001] Env LR 22, (2001) 81 P & CR 27 per Sullivan J at [46]- [48]. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. It must assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it; per Lord Clyde in *City of Edinburgh Council v. the Secretary of State for Scotland* [1997] UKHL 38, [1997] 1 WLR 1447, 1998 SC (HL) 33 cited by Sullivan J in *R(Milne) v Rochdale MBC (No 2)* at [48].

19. The interpretation of policy is for the Court, but its application to the context of a particular proposal is for the decision maker.

20. It has always been the case since the original *TCPA 1947* that the policies of a proposed development plan should be the subject of consultation, and where objection is made, independent examination. *PCPA 2004* and the related *LP Regs 2012* made considerable changes to the mechanics of the system for bringing forward policies, whether those which have the status of development plan policies for the purposes of the legislative code, or have a less significant role.

21. Albeit that the procedures for the adoption of a development plan have altered over the years, it is still a fundamental feature of the system that policies which form part of the development plan must be subjected to proper scrutiny, including independent scrutiny.

22. As will be apparent from the above, the SSCLG sits at the apex of the system of planning control. As well as determining appeals and called in applications, he also has the role of issuing policy, and of exercising general supervision. The *PCPA 2004* includes, for example, default powers for him to intervene if an LPA fail or omit to do anything necessary for it to do in connection with the preparation of a DPD (s 27) or, if he considers that a LDD is unsatisfactory (s 21), or of direction with regard to the revision of LDDs (s 26).
23. In drawing up DPDs or LPDs, LPAs must have regard to national policies and advice issued by the SSCLG (s 19(2)) and such other matters as he prescribes (s 19(2)(j)). Every DPD must be submitted to the SSCLG for independent examination (s 20(1)) by a person appointed by the SSCLG (s 20(4)) to whom he may issue directions to take or not take any step, or to require that person to consider any specified matters, or to give an opportunity (or further opportunity) to be heard, or to take any specified procedural step (s 20(6A)). There is also a specific statutory requirement that anyone exercising a function in relation to LDDs must do so with the objective of contributing to sustainable development (s 39(2)) and must have regard to national policies and advice issued by the SSCLG (s 39(3)).
24. National policy for the purposes of s 19 (2) and s 39(3) includes that given in NPPF (National Planning Policy Framework) and in NPPG, which resides on the Department of Communities and Local Government website. The effect of the provisions relating to the SSCLG and national policy is to seek to ensure that policies in DPDs reflect national policy, albeit as applied to local circumstances. In that context, it is relevant to note what national policy (in the form of NPPF) says about the preparation of local plans, and issue of the mix and type of housing.
25. Before turning to later passages in NPPF it is to be noted that it emphasises the importance of what it calls “Achieving Sustainable Development” at paragraphs [5]-[17]. Paragraph [14], which is of critical importance within NPPF, tells LPAs that the presumption in favour of sustainable development means in the case of plan making that;
- i) LPAs should positively seek opportunities to meet the development needs of their area;
 - ii) Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless
 - a) any adverse impacts would significantly and demonstrably outweigh the benefits, when assessed against the policies in NPPF as a whole, or
 - b) specific NPPF policies indicate that development should be restricted.
26. NPPF [150]- [182] deal with the making of Local Plans. Housing is addressed at [159], whereby LPAs should have a clear understanding of housing needs in their area, and should prepare a Strategic Housing Market Assessment, which should identify the scale and mix of housing and the range of tenures likely to be needed

by the local population over the plan period, which among other matters addresses the need for all types of housing, including affordable housing and the needs of different groups in the community, and caters for housing demand and the scale of housing supply necessary to meet it. The examination of Local Plans is dealt with at [182]. It sets out policy that the plan should be “positively prepared”— i.e. that it is based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, and that it is consistent with national policy, which is said to require that the plan should enable sustainable development in accordance with policies in NPPF.

27. The policies on housing appear at section 6 of the NPPF at [47]-[55]. It is important in the context of this matter to note the words of [47], whereby in order to “boost significantly the supply of housing” LPAs should

“use their evidence base to ensure that their Local Plan meets the full objectively assessed needs for market and affordable housing in the housing market areas, as far as is consistent with the policies set out in (NPPF).....”

28. Paragraph [50] states that, with the purpose of delivering a wide choice of high quality homes, widening opportunities for home ownership and creating sustainable, inclusive and mixed communities, LPAs should

- i) plan for a mix of housing based on current and future demographic trends, market trends and the needs of different groups in the community,
- ii) identify the size type, tenure and range of housing that is required in particular locations, reflecting local demand, and
- iii) where they have identified that affordable housing is needed, “set policies for meeting this need on site..... Such policies should be sufficiently flexible to take account of changing market conditions over time.”

29. I have spent a few paragraphs on the terms of NPPF, because of the relevance of national policy to plan making by the LPA. Is it the case that the effect of NPPF is that issues over the type and mix of housing should be addressed via Local Plans, or can it await an SPD? I shall return to that topic in my conclusions.

(iii) *Identifying the Development Plan*

30. By s 38(1) and (3) of the *PCPA 2004* a development plan is defined, for the purposes of the issues at play here, as consisting of

- i) The regional strategy (if any), and
- ii) The development plan documents (taken as a whole) which have been adopted or approved.

31. A DPD is defined in s 37 *PCPA 2004* as

“a local development document which is specified as a development plan document in the local development scheme.”

32. By s 17(7) PCPA 2004, regulations may prescribe which descriptions of documents are to be prepared as local development documents ((17) (7) (za)). A document can only be a local development document if adopted as such by an LPA, or approved by the SSCLG under sections 21 or 22.

33. Under the *LP Regs 2012* Regulation 5 and 6:

“Local development documents

5. (1) For the purposes of section 17(7)(za)(1) of the Act the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

- (i) the development and use of land which the local planning authority wish to encourage during any specified period;
- (ii) the allocation of sites for a particular type of development or use;
- (iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
- (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b)

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

- (i) relates only to part of the area of the local planning authority;
- (ii) identifies that area as an area of significant change or special conservation; and
- (iii) contains the local planning authority’s policies in relation to the area; and

(b) any other document which includes a site allocation policy.

Local plans

6. Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan.”

34. By regulation 8(1), a “local plan or a supplementary planning document” (the use of the alternative conjunction will be noted) “must..... indicate whether the document is a local plan or a supplementary planning document.”

35. Policies in an SPD must not conflict with the adopted development plan (Reg 8(3)) whereas those in a local plan must be consistent with it (8(4)), but while it may contain a policy which supersedes one in the development plan, if it does so, it must state that fact and identify the superseded policy (8(4) and (5)).

(iv) *Procedures for adoption/approval*

36. I have referred above to s 20 *PCPA 2004*, which requires that every development plan document is referred to the SSCLG for “independent examination... by a person appointed by the (SSCLG)” (s 20(2) and (4)). That process involves giving to those who have made representations seeking change in a development plan document the right to appear before that person and be heard (s 20(6)). That independent person, if he concludes that relevant requirements are met and the plan is sound, must recommend adoption with reasons (s 20(7)) or if he does not, must recommend non-adoption with reasons (s 20(7A)). He can recommend modifications to the LPA (s 20(7B and C)). The recommendations and reasons must be published. The SSCLG may intervene (s 21 and s 27).

37. The critical parts of the *LP Regs 2012* relating to approval and adoption appear at Parts 5 (SPDs) and 6 (“Local Plans”). An SPD must be made the subject of public participation (Regs 12 and 13) but consideration of any objections is for the LPA itself, by means of an adoption statement (Regs 11 and 12).

By contrast, the adoption of a “local plan” requires steps to carry out the obligations in s 20 *PCPA 2004*. They include notification of the proposed preparation of a local plan. That is addressed in Regulation 18, whereby

“18. (1) A local planning authority must—

- a) notify each of the bodies or persons specified in paragraph (2) of the subject of a local plan which the local planning authority propose to prepare, and
- b) invite each of them to make representations to the local planning authority about what a local plan with that subject ought to contain.

(2) The bodies or persons referred to in paragraph (1) are—

- a) such of the specific consultation bodies as the local planning authority consider may have an interest in the subject of the proposed local plan;¹
 - b) such of the general consultation bodies as the local planning authority consider appropriate;² and
 - c) such residents or other persons carrying on business in the local planning authority's area from which the local planning authority consider it appropriate to invite representations.
- (3) In preparing the local plan, the local planning authority must take into account any representation made to them in response to invitations under paragraph (1).
38. Anyone may make representations by a date specified (Reg 20). The principal Act (*PCPA 2004*) requires at s 20 that every development plan document (DPD) is submitted to the SSCLG for independent examination. The procedures are set out at Regs (17) to (31).
39. It follows that if a document is to be treated as a "local plan" it must go through the statutory procedures which apply.
- (v) *Cases for the Claimants and Defendant*
40. The Claimants' case relied heavily on the decision of Jay J in (*R (Skipton Properties Ltd) v Craven District Council* [2017] EWHC 534, where he addressed an interim policy, not part of the development plan, on the proportions of affordable housing to be sought when planning permissions for housing were granted. Jay J there interpreted Regulation 5(1)(a)(i) and (iv) of the *LP Regs 2012* as applying to the level of contributions to affordable housing. The same principles apply to a policy on the mix of dwelling types.
41. This is a policy which falls squarely within Regulation 5(1)(a)(i), and Regulation 5(1)(a)(iv).
42. The Claimants seek to distinguish the decision of a deputy judge, Mr John Howell QC, in *R (RWE Npower Renewables Ltd) v Milton Keynes BC* [2013] EWHC 751 on his interpretation of that regulation, and Regulation 5(1)(a)(iv), which he interpreted narrowly, on the basis of avoiding overlap between it and the sub-paragraphs (i)-(iii) of Regulation 5(1).

¹ "Specific consultation bodies" are those defined as such in Reg (2), being the usual range of statutory consultees, whereas

² "general consultation bodies," includes voluntary bodies and community groups, but also bodies representing the interests of those carrying on business in the area (*ibidem*).

43. On Ground 1 Mr Lewis contended that HSPD 9 was expressed in imperative terms (the prescribed percentages “will be used”). That went beyond what Policy 3 of the CLPCS 3 said. Further, the HSPD misquoted the CLPCS as broadly seeking that a third of the new housing would consist of 2 bedroom units. CS 3 said no such thing. It appeared in the text, and not in the policy: reliance was placed on the distinction emphasised in the *Cherkley Campaign* case (supra) at [21] per Richards LJ.
44. In fact HSPD 9 sought to prescribe different percentages for all house sizes, and as between market and affordable housing. It related to “the development and use of land which the local planning authority wish to encourage during any specified period” and therefore fell within Reg 5(1)(a)(i). But it also contained “development management and site allocation policies, which are intended to guide the determination of applications for planning permission” and therefore also engaged Reg 5(1)(a)(iv). On that basis it could only be promoted by way of a local plan as defined. Jay J was right in *Skipton* at [90] to hold that the fact of a policy’s overlap with sub-paragraph (iii) did not negate the effect of it falling within (i) or (iv).
45. The Claimants relied on NPPF [158]-[159], and the references to “Local Plan” and “plan period” as showing that NPPF expected issues of housing mix to be addressed in the local plan, and therefore not in an SPD.
46. Objection was taken on this ground by two housebuilding objectors directly, and by others by implication.
47. On Ground 2, Mr Lewis argued that the viability of development was patently a material consideration. The Council, in seeking to argue that viability would be assessed at the application stage, was conflating two different issues
- i) The viability of a particular scheme;
 - ii) The effects on all schemes of such a policy.
48. This, said the Claimants, amounted to a basic public law error.
49. On the issue of relief, the Claimant argues that the whole of the HSPD should be quashed, because it contains policies that should have been included in a DPD.
50. The case for the Defendant was as follows. Its central point was that if the HSPD fell exactly within the description given in Reg 5(1)(a)(iii), then it did not have to be treated as a Local Plan, whether or not there was overlap with the other categories. Mr Stinchcombe QC relied on the approach of Mr John Howell QC in *RWE Npower* at [65]- [83]. That approach is as follows
- i) if a policy in a document simply repeats what is in the adopted local plan or in another Local Development Document, it does not then fall within Reg 5(1) at all ([68]-[69]);
 - ii) the reference to “development management” in sub-paragraph (iv) cannot extend to all matters of development management or development control, since that would mean that there could never be SPDs ([74]);

- iii) sub-paragraph (iv) differs from (i) – (iii) because it deals with regulating the use of development generally, while the latter deal with particular developments or uses of land which the LPA is promoting (75)];
 - iv) the policy in question was seeking to encourage the granting of permission to wind turbines, so that sub-paragraph (iv) did not apply.
51. *RWE Npower* was to be preferred to *Skipton* on the interpretation of the Regulations. It was not necessary for Jay J to have decided on another interpretation because in the *Skipton* case there was no saved LP policy to which the policy in issue could be supplementary (see [94])
 52. The SPD here does not seek to control the mix of ratios, but merely sets out the CBC preference or starting point. The fact that there is to be a mix of units is in the *CLPCS* with approximately one third being said to be 2 bedroom units. HSPD 9 is simply giving detail to supplement the Core Strategy (*CLPCS* [5.6]).
 53. The policy does not fall within sub-paragraph (iv) as that does not extend to a policy relevant to the determination of a planning application (*RWE Npower* at [74])
 54. The mix of housing is the pursuit of a social objective, which therefore puts it within sub-paragraph (iii).
 55. The *CLPCS* has been adopted after passing through the process, including being found to be “sound.” The objectives of policy CS3 to encourage housing in stated numbers and an appropriate mix of the same having regard to identified housing needs and character of the area. It is sensible for CBC to set out a more detailed specification of the needs and the mix so as to attain those objectives. It is sensible to do that by an SPD which can be updated following consultation.
 56. On Ground 2 it is argued that the importance of economic viability was recognised, by the addition of it as a bullet point in the “Housing Mix guidance box” to acknowledge the relationship mix has with viability. Viability has therefore been addressed. The mix in HSPD 9 is therefore the Council’s starting point as a reflection of the latest evidence base.
 57. If relief is granted, only HSPD9 should be quashed. The rest of the SPD is severable.
- (vi) *Discussion and conclusions*
58. As is readily apparent from the submissions made to me, the central issue is whether the policies in HSPD 9 were such that they ought to have been in a DPD as a “Local Plan.”
 59. The relevant provisions were analysed with characteristic thoroughness by Jay J in *R (Skipton Properties Ltd) v Craven District Council* [2017] EWHC 534, where he considered whether a policy on affordable housing contributions was required by the *LP Regs 2012* to be adopted as a development plan document, or alternatively as a supplementary planning document. The relevant LPA contended that it was not a development plan document. At [18] ff he described the effect of the *LP Regs 2012*

“18 Regulation 2 of the 2012 Regulations defines "local plan" as "any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the Act these documents are prescribed as DPDs" (see also regulation 6). Further, "supplementary plan document" ("SPD") means "any document of a description referred to in regulation 5 (except an adopted policies map or a statement of community involvement) which is not a local plan".

19 By regulation 5:

"Local Development Documents

(1) For the purposes of section 17(7)(a) of the Act the documents which are to be prepared as [LDDs] are –

(a) any document prepared by a local planning authority individually or in co-operation with one or more local planning authorities which contains statements regarding one or more of the following -

(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) the allocation of sites for a particular development or use;

(iii) any environmental, social design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission.

...

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are –

(a) any document which -

...

(iii) contains the local planning authority's policies in relation to the area;

..."

20 Thus, the effect of regulations 2 and 6 is that the local plan (and, therefore, the development plan) comprises documents of the description referred to in regulation 5(1)(a)(i), (ii) or (iv), or 5(2)(a) or (b). Documents which fall within the description referred to in regulation 5(1)(a)(iii) or (1)(b) cannot be DPDs.

21 SPDs are subject to regulations 12 and 13 of the 2012 Regulations, and specific public consultation requirements. DPDs are subject to the different consultation requirements of regulation 18.

22 SPDs, which are not a creature of the PCPA 2004, are defined negatively (see regulation 2(1)) as regulation 5 documents which do not form part of the local plan, i.e. are not DPDs. By the decision of this court in R (RWE Npower Renewables Ltd) v Milton Keynes Borough Council [2013] EWHC 751 (Admin) (Mr John Howell QC sitting as a DHCJ), not all documents which are not DPDs are SPDs. As I have said, SPDs are only those documents which fall within regulation 5(1)(a)(iii) or (1)(b) of the 2012 Regulations. Documents which are neither DPDs nor fall within any of the provisions of regulation 5(1) are capable of being LDDs but – in order to differentiate them from DPDs and SPDs - are "residual LDDs". At paragraphs 57-59 of this judgment in RWE, Mr Howell QC made clear that it is not the location of a document within the prescribed

categories which is critical; what matters is that the document fulfils the separate criteria of section 17(3) and (8) of the 2004 Act.

23 Thus, there are three discrete categories, namely:

(1) DPDs: these are LDDs which fall within regulation 5(1)(a)(i), (ii) or (iv). They must be prepared and adopted as a DPD (as per the requirements of Part 6 of the 2012 Regulations). They must be subject to public consultation (regulation 18) and independent examination by the Secretary of State (section 20 of the PCPA 2004). As I have said (see paragraph 16 above), an issue potentially arises as to whether a document which does not fall within these regulatory provisions may nonetheless be a DPD because a local planning authority chooses to adopt it as such.

(2) SPDs: these are LDDs which are not DPDs and which fall within either regulation 5(1)(a)(iii) or (1)(b). They must be prepared and adopted as SPDs (as per the requirements of Part 5 of the 2012 Regulations). SPDs do not require independent examination but they do require public consultation (regulations 12 and 13).

(3) Residual LDDs: these are LDDs which are neither DPDs or SPDs. They must satisfy the criteria of section 17(3) and (8) of the PCPA 2004, and must be adopted as LDDs (as per (2) above). There are no public consultation and independent examination requirements: see paragraphs 44-46 of the decision of this Court on [R \(Miller Homes\) v Leeds City Council \[2014\] EWHC 82 \(Admin\)](#). At paragraph 17 above, I said that LDDs are material considerations in planning applications although they do not have the status of DPDs. I consider that the same logic should hold that LDDs which are SPDs carry greater weight in such applications than do residual LDDs.”

60. I entirely agree with that analysis, which seems to me to be unassailable. After addressing the arguments of the parties, the following passage (paragraphs [75]- [94]) appears where Jay J considers the effect of the regulations on the type of policy document that should be deployed to deal with issues relating to affordable housing:

“75 First, if the document at issue contains statements which fall within any of (i), (ii) or (iv) of regulation 5(1)(a), it is a DPD. This is so even if it contains statements which, taken individually, would constitute it an SPD or a residual LDD. This conclusion flows from the wording "one or more of the following", notwithstanding the conjunction "and" between (iii) and (iv).

76 Secondly, I agree with Stewart J” (in *Miller*) “that "regarding" imports a material nexus between the statements and the matters listed in (i)-(iv). Stewart J referred to "document" rather than to "statements", but this makes no difference. There is no material distinction between "regarding" and other similar adjectival terms such as "relating to", "in respect of" etc.

77 Thirdly, I agree with Mr Howell QC” (in *RWE Npower*) “that there may be a degree of overlap between one or more of the (i)-(iv) categories, although (as I have already said) a document which must be a DPD (because it falls within any

of (i), (ii) and/or (iv)) cannot simultaneously be an SPD. This last conclusion may well flow as a matter of language from the true construction of regulation 5(1)(a)(iii), but it certainly flows from the straightforward application of regulations 2(1) and 6.

78 Fourthly, it would have been preferable had regulation 5(1)(a)(iii) followed (iv) rather than preceded it. However, the sequence does not alter the sense of the provision as a whole. Nor do I think that much turns on the relative order of (i) and (iv).

79 Fifthly, I note the view of Mr Howell QC that regulation 5(1)(a) pertains to statements which contain policies. This reflects section 17(3) of the 2004 Act – LDDs must set out the local planning authority's policies relating to the development and use of land in its area. I would add that section 17(5) makes clear, as must be obvious, that an LDD may also contain statements and information, although any conflict between these and policies must be resolved in favour of the latter. Regulation 5(1)(a) fixes on "statements" and not on policies. However, in my judgment, the noun "statements" can include "policies" as a matter of ordinary language, and any LDD properly so called must contain policies. It follows that any document falling within (i)-(iv) must contain statements which constitute policies and may contain other statements, of a subordinate or explanatory nature, which are not policies.

80 Sixthly, the difference in wording between regulation 5(1)(a)(i) and (iv) featured in the argument in *Miller* but not on my understanding in the argument in *RWE*. For the purposes of (i), the statements regarding the development and use of land etc. *are* the policies, or at the very least include the policies. On a strict reading of (iv), the statements at issue are "regarding ... development management and site management policies". In other words, the statements are not the policies: they pertain to policies which exist in some other place. I will need to examine whether this strict reading is correct.

81 Seventhly, given that we are in the realm of policy, "however expressed", it seems to me that by definition we are dealing with statements of a general nature. A statement which can only apply to a single case cannot be a policy. To my mind, the difference between a policy which applies to particular types of development and one which applies to all developments is one of degree not of kind. The distinction which Mr Howell QC drew in *RWE* (see paragraph 75 of his judgment, and paragraph 69(6) above) is nowhere to be found in the language of the regulation, save to the limited and specific extent that regulation 5(1)(a)(ii) uses the adjective "particular". Looking at regulation 5(1)(a)(i), I think that this could not be a clearer case of a policy of general application ("development and use of land"), subject only to the qualification of the development being that which the authority wishes to encourage.

82 Eighthly, regulation 5(1)(a) must be viewed against the overall backdrop of the 2004 Act introducing a "plan-led" system. Local planning authorities owe statutory duties to keep their local development schemes and their LDDs under review: see, for example, section 17(6) of the 2004 Act.

83 Does the NAHC 2016 fall within regulation 5(1)(a)(i)? Mr Bedford draws a distinction between affordable housing and residential development. On his approach, affordable housing is a concept which is adjunctive to that which is "development" within these regulations or the 2004 Act; and, moreover, the NAHC 2016 predicates a pre-existing wish or intention to carry out residential development. I would agree that if the focus were just on the epithet "affordable", there might be some force in the point that it is possible to decouple the NAHC 2016 from the scope of regulation 5(1)(a)(i), which is concerned only with "development".

84 I was initially quite attracted by Mr Bedford's submissions, and the attraction did not lie simply in their deft and effective manner of presentation. On reflection, I am completely satisfied that they are incorrect, for the following cumulative reasons.

85 First, the Defendant wishes to promote affordable housing throughout its area in the light of market conditions. It no longer has an affordable housing policy in its adopted local plan, but there is such a policy (differently worded) in its emerging local plan. In the meantime, the Defendant wishes to promote affordable housing in conformity with the overarching policy direction of paragraphs 17 and 50 of the NPPF and the 2014 Ministerial Statement. Indeed, the language of the NPPF is reflected in the NAHC 2016 itself. Affordable housing policies are ordinarily located in local plans because they relate to the development and use of land.

86 Secondly, affordable housing forms a sub-set of residential development. The latter may be envisaged as the genus, the former as the species. It is artificial to attempt to separate out "affordable housing" from "residential development". This entails an excessive and unrealistic focus on narrow aspects of tenure. As Mr Jones convincingly pointed out, the NAHC 2016 ranges well beyond tenure (which is simply another way of expressing what affordable housing is) into matters such as size of dwelling, distribution of types of housing across developments etc.

87 Thirdly, the correct analysis is that the NAHC 2016 promotes residential development which includes affordable housing. The latter is expressed as a percentage of the former. The setting of that percentage will inevitably have an impact on the economics of all residential development projects, because it impinges directly on developers' margins. Setting the percentage too high would kill the goose laying these eggs. Setting the percentage too low would lead to insufficient quantities of the affordable housing the Defendant wishes to encourage. The common sense of this is largely self-evident, and is reflected both in the language of paragraph 50 of the NPPF and paragraph 2 of the NAHC 2016 itself – "[s]uch policies should be sufficiently flexible to take account of changing market conditions over time".

88 Fourthly, it is incorrect to proceed on the basis that (in accordance with Mr Bedford's primary submission) residential development should be taken as a given, with the affordable housing elements envisaged as a series of restrictions and constraints. Arguably, some support for this approach may be drawn from paragraph 26 of *Miller*, although that case turned on its own facts. This approach

ignores the commercial realities as well as what the NAHC 2016 specifically says about the need for pre-application discussions, with insufficient attention to affordable housing requirements likely leading to the refusal of an application. In my judgment, all elements of a housing package which includes affordable housing are inextricably bound.

89 Fifthly, the language of regulation 5(1)(a)(i) mirrors section 17(3) of the 2004 Act, "development and use of land". These terms are not defined in the 2004 Act. "Development" is defined in section 55 of the Town and Country Planning Act 1990 and includes "material change of use". "Use" is not defined, although such uses which cannot amount to a material change are. Mr Bedford submitted that regulation 5(1)(a)(i) is tethered to section 55; Mr Jones submitted that the concept is broader. In my judgment, even on the assumption that section 17(3) of the 2004 Act should be read in conjunction with section 55 of the 1990 Act, nothing is to be gained for Mr Bedford's purposes by examining the latter. "Use" is not defined for present purposes, still less is it defined restrictively. I would construe section 17(3) as meaning "development and/or use of land". If residential development includes affordable housing, which in my view it does, there is nothing in section 55 of the 1990 Act which impels me to a different conclusion.

90 I mentioned in argument that there may be force in the point that the NAHC 2016 sets out social and economic objectives relating to residential development, and that this might lend support to the contention that the more natural habitat for an affordable housing policy is regulation 5(1)(a)(iii) rather than (i). On reflection, however, there is no force in this point. There is nothing to prevent a local planning authority including all its affordable housing policies in one DPD. Elements of these policies may relate to social and economic objectives. However, these elements do not notionally remove the policy from (i) and locate it within (iii). The purpose of regulation 5(1)(a)(iii) is to make clear that a local planning authority may introduce policies which are supplementary to a DPD subject only to these policies fulfilling the regulatory criteria. The Defendant has made clear that it may introduce an SPD, supplementary to its new local plan, which sets out *additional* guidance in relation to affordable housing.

91 In any event, on the particular facts of this case it is clear that the NAHC 2016 could not be an SPD even if I am wrong about it being a DPD. This is because there is nothing in the saved policies of the 1999 Local Plan to which the NAHC is supplementary, despite Mr Jones' attempts to persuade me otherwise. This is hardly surprising, because the whole point of the NAHC 2016 is to fill a gap; it cannot logically supplement a black hole. That it fills a gap is, of course, one of the reasons I have already identified in support of the analysis that the NAHC 2016 is a DPD.

92 In my judgment, the correct analysis is that the NAHC 2016 contains statements in the nature of policies which pertain to the development and use of land which the Defendant wishes to encourage, pending its adoption of a new local plan which will include an affordable housing policy. The development and use of land is either "residential development including affordable housing" or "affordable housing". It is an interim policy in the nature of a DPD. It should have been consulted on; an SEA should have been carried out; it should have been submitted to the Secretary of State for independent examination.

93 Strictly speaking, it is unnecessary for me to address regulation 5(1)(a)(iv). However, in deference to the full argument I heard on this provision, I should set out my conclusions as follows:

(1) despite the textual difficulties which arise (see paragraph 78 above), and notwithstanding the analysis in *Miller* (which addressed the claimant's formulation of its case), I cannot accept that it is necessary to identify a development management policy which is separate from the statements at issue. As I have already pointed out, the whole purpose of regulation 5 is to define LDDs *qua* policies, by reference to statements which amount to or include policies. A sensible, purposive construction of regulation 5(1)(a)(iv) leads to the clear conclusion that the NAHC 2016 could fall within (iv) if it contains development management policies (subject to the below).

(2) I would construe the "and" in regulation 5(1)(a)(iv) disjunctively. This is in line with regulation 5(1)(a)(iii) (see the first "and", before "economic") and the overall purpose of the provision. As Mr Howell QC has rightly observed, a conjunctive construction would lead to absurdity. It would have been better had the draftsman broken down (iv) into two paragraphs ("development management policies which ..."; "site allocation policies which ...") but the upshot is the same.

(3) I agree with Mr Howell QC, for the reasons he has given, that it is possible to have LDDs which are outside regulation 5 but that it is impossible to have DPDs which are outside the regulation. This is another reason for supporting a disjunctive construction.

(4) I disagree with Mr Howell QC that regulation 5(1)(a)(i) and (iii) applies to particular developments or uses of land, whereas (iv) is general (see paragraph 79 above).

(5) The real question which therefore arises is whether the NAHC 2016 contains development management policies which guide or regulate applications for planning permission. It may be seen that the issue here is not the same as it was in relation to regulation 5(1)(a)(i) because there is no need to find any encouragement; this provision is neutral.

(6) I would hold that the NAHC 2016 clearly contains statements, in the form of development management policies, which regulate applications for planning permission. I therefore agree with Stewart J's *obiter* observations at paragraph 37 of *Miller*.

94 There is force in Mr Bedford's objection that a disjunctive reading of regulation 5(1)(a)(iv) leaves little or no space for (ii) and site allocation policies, given the definition of the latter in regulation 2(1). However, this is an anomaly which, with respect, is the fault of the draftsman; it cannot affect the correct approach to regulation 5(1)(a)(iv). There is more limited force in paragraph 74 of the judgment of Mr Howell QC in RWE, but I would make the same point. Regulation 5(1)(a)(i) and (iv) do not precisely overlap (see paragraph 93(5) above); (iii) is in any event separate because it only applies in relation to statements of policy objectives which are supplemental to a specific DPD.

Further, anomalies pop up, like the heads of Hydra, however these regulations are construed. These, amongst others, are good reasons why the 2012 Regulations should be revised.”

61. I agree with that analysis. Insofar as it differs from that of Mr John Howell QC in *RWE*, I prefer that of Jay J, which in my judgement reflects the basic underlying policy of the legislation and of the code, namely that the development plan is the place in which to address policies regulating development. That is what this policy undoubtedly did, albeit that CBC describe it as a starting point. As Mr Lewis pointed out, the policy in HSPD 9 undoubtedly requires the applicant for permission to show that the mix set out in the policy is not the one to use.
62. Mr Stinchcombe’s first argument – i.e. that the policy relates only to matters falling within sub-paragraph (iii) - is unsustainable. The mix of housing proposed in an application could lead to a refusal on the grounds that it is unacceptable, or on an outline application could lead to the imposition of a condition applying a particular mix. In either case, the way in which that land would be developed is affected. A housing mix policy is thus “a statement regarding... the development of land” and falls within sub-paragraph (i). It also falls within the scope of development management and probably within the scope of site allocation. It will undoubtedly be used “in the determination of planning applications.” It thus falls within sub-paragraph (iv) as well.
63. That being so, it is unnecessary to interpret (iii). There is nothing in the Regulations which require the interpretation of the sub-paragraphs in an exclusive manner. I agree with Jay J that the drafting of these Regulations is very poor, and can lead to confusion, or to lengthy arguments on interpretation with not much regard being had to the realities of development control. It is in that context that I refer to the concept of the Planning Code, and within it to the role of the development plan, and to the importance given by the code to proper examination of the development plan, and to the fair consideration by an independent person of objections and representations made. From the point of view of all types of participant in the planning process, the process of development plan approval and adoption is important. Individual planning applications, appeals and inquiries will, save in unusual cases, be focussed on the effect of developing the site in question. Development plan processes, including the independent examination, also look at issues relating the wider pattern of development, and at policies which apply across the Local Plan Area, as well as the site specific issues relating to sites where there is objection to their inclusion or omission. The Code, including that in its current form, maintains that principle.
64. If the CBC arguments were to prevail, then arguments on the overall mix of housing across the LP area, and across differing sites, would have as their “starting point” or “preference” as Mr Stinchcombe put it, or a “presumption” as Mr Lewis put it, a particular mix of housing which the LPA would want to see achieved. Whatever the choice of noun, that is a policy which could, and if my interpretation of the Regulations is correct, should have been open for debate within the Local Plan context. Although the text of the *CLPCS* referred to a mix, it was, no doubt quite deliberately, omitted from the policy, CBC then accepting that it should not figure within it. While I accept that subsequent evidence has come forward from a strategic housing assessment, that cannot be a reason for using an SPD as the vehicle for making an alteration.

65. I have not referred to the guidance in *NPPF* as an aid to interpreting the legislation. If my interpretation and that of Jay J is in error, *NPPF* cannot be relied on to argue for a different approach. But it is appropriate to note as a postscript that the terms of *NPPF*, cited above, make it plain that this should have been the subject of a DPD in accordance with Regulations 5 and 6. I refer in particular to the terms of paragraphs [14], [47], [50] [159] and [182]. The Claimants, while mentioning the role of statutory guidance, have pinned their colours to the interpretation issue. But it is worth noting that if CBC is correct, then the topic of housing mix can and probably should be omitted from any Local Plan policy, even though it must form part of the strategic housing assessment which informs such a policy. That will amount to a significant departure from the policies in *NPPF*.
66. As to Ground 2 this is really another argument in favour of the first ground. The economic arguments are important both at the stage of policy formulation, and at the application stage. If an overall policy sets a particular percentage contribution then it must assume some role within determination of an application, and of any arguments (including viability) advanced in support of that application.
67. On the other hand, economic viability as an issue gets more broad brush once one leaves a particular site and seeks to argue the issue more generally. But as *NPPF* shows, issues such as demand, market conditions and sustainability are all relevant to Local Plan preparation. It is otiose to set housing targets, or seek to encourage the housebuilding industry to provide homes, without addressing whether the policies one seeks to put in place would frustrate those objectives.
68. CBC concedes that it will always consider the economics of development, but also concedes that there was no such assessment before the policy was issued. I consider that this ground is made out.
69. As to relief, the only arguments which I heard of any substance related to HSPD 9. I am not willing to strike down other policies whose provenance was not contested before me. I shall therefore limit the relief granted to the quashing of that policy.