Neutral Citation Number: [2014] EWHC 3866 (Admin)

Case No: CO/1531/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2014

Before :

Mr Justice Lindblom

- -

Between :

Linda Kendall	**Claimant**
- and -	
Rochford District Council	**First Defendant**
- and -	
Secretary of State for Communities and Local Government	**Second Defendant**

- -

Ms Jenny Wigley (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Juan Lopez (instructed by **the solicitor for Rochford District Council**) for the **First Defendant**

Hearing dates: 17, 18 and 19 June, and 3 October 2014

- -

Judgment Approved by the court for handing down

Mr Justice Lindblom:

Introduction

1. This case is about the lawfulness of the public consultation undertaken by a local planning authority when preparing a development plan document under the provisions for plan-making in the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").

2. The claimant, Mrs Linda Kendall, is a resident of Rayleigh in Essex, which is in the administrative area of the first defendant, Rochford District Council. By an application under section 113 of the 2004 Act she challenges the council's adoption, in February 2014, of the Rochford District Allocations Plan. She was an objector to the plan during its preparation, and, in September 2013, took part in the examination held by the inspector appointed by the second defendant, the Secretary of State for Communities and Local Government. She now seeks an order to quash the plan, at least in part. She says there were serious flaws in the council's notification and consultation of herself and others during the plan-making process and also, before that, in the preparation of the Rochford District Core Strategy – in breach, she says, of the relevant statutory requirements for plan-making and the regime for Strategic Environmental Assessment ("SEA"). The council resists the application. It maintains that the plan process was, at every stage, transparent, inclusive and fair. It says it complied with all of the relevant requirements for consultation. In his acknowledgment of service the Secretary of State said he intended to resist the application, but he later decided to take no further part in the proceedings.

3. On 11 June 2014 I made an order granting costs protection to Mrs Kendall at the level applicable to Aarhus Convention claims under CPR r.45.43 and PD 45, namely £5,000, with a reciprocal cap of £35,000 on the council's potential liability in costs. I did so for this reason. Although it is not a "claim for judicial review" but a statutory challenge, the substance of Mrs Kendall's application to the court is clearly within the ambit of the Aarhus Convention, and in my view justified the exercise of the court's general discretion as to costs to give both her and the council the level of protection to which they would have been entitled under the arrangements in CPR r.45.43. Since I made that order the Court of Appeal has, on 27 November 2014, allowed the appeal in *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539. It held that the costs protection regime introduced by CPR 45.41 does not comply with the Aarhus Convention because it excludes statutory appeals and applications, and that this systemic flaw cannot be remedied by an exercise of judicial discretion but will require action by the legislature (see paragraphs 34 and 35 in the judgment of Sullivan L.J, with whom Gloster and Vos L.JJ. agreed).

The issues for the court

4. The parties agree that the grounds of Mrs Kendall's application raise three main issues for the court:

    (1) whether the inspector's conclusion that, in preparing the allocations plan, the council had complied with its statement of community involvement and had thus discharged its duty under section 19(3) of the 2004 Act, was irrational (ground 1 of the application);
    (2) whether, in the preparation of the allocations plan, the council failed to comply with article 6 of Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment" ("the SEA directive") and with regulation 13 of the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA regulations") (ground 2); and
    (3) if the council had also failed to comply with article 6 of the SEA directive and regulation 13(2) of the SEA regulations when preparing its core strategy, whether the inspector ought to have acted to make good any harm caused by those failures, having regard to the provisions of regulation 8(4) and (5) of the Town and Country Planning (Local Planning) (England) Regulations 2012 ("the 2012 regulations") relating to the consistency of a local plan with the adopted development plan (ground 3).

The statement of community involvement

5. On 18 January 2007, under the Town and Country Planning (Local Development) (England) Regulations 2004, the council adopted its statement of community involvement as part of its local development framework.

6. In section 1 of the statement of community involvement its three objectives are set out:

> "1. To engage effectively with all sections of the community;
> 2. To use appropriate engagement techniques targeted at the area of concern to ensure that resources are used effectively and efficiently; and
> 3. To use the engagement process to improve the quality of decision-making in the district with regard to planning."

7. The "benefits of community involvement" in planning are summarized in section 2. The benefits identified include "[a] chance for local people to influence the decisions that affect how land is used, and what development takes place, in their district", "[development] of the district that better reflects the view of affected people", "[an] increased understanding of the issues and concerns that people have with regard to the district" and "[an] input of local knowledge and expertise into the planning system". In section 3, on "Participation", the ways in which the council "will encourage the involvement of all communities in planning" are described. Two of the aims stated here are "[being] accessible to members of the public through a variety of media in order to explain to people how and when they can have their say" and "[recognising] that not everyone has access to electronic communications".

8. Section 5 is entitled "Public Engagement Techniques". It says that the council "recognises the need to enable people to participate, to put in place mechanisms that allow people to have their voices heard". It explains how this will be done. It says that "[a] variety of techniques will be used in an attempt to engage with as wide a range of people as possible, subject to time and resource constraints". It identifies nine particular techniques: "Public meetings", "Public exhibitions", "Existing community groups and voluntary organisations", the council's newsletter "Rochford District Matters", "Other local media", "Electronic media", "Access to Planning Officer advice", "Representative groups and bodies", and "Planning Aid". Short comments are made on each technique, including these:

> "Rochford District Matters is a quarterly newsletter that is produced by the Council and sent to every household in the district. This newsletter will be used to keep people up-to-date with the latest planning issues and provide information on how they can get involved.
>
> Other local media. The Council will use other local media to keep people informed of planning matters, this will be primarily through notices in local newspapers. Rochford District Council acknowledges that notices placed in local newspapers will not be seen by everyone and will use this as a method of informing the public in conjunction with other techniques.
>
> Electronic media. The Council's website provides a mechanism through which the public can be kept informed of planning matters. The Council will also use electronic media to receive comments from members of the public. Rochford District Council does recognise that not everyone has access to electronic media and will use this method only in conjunction with other forms of participation."

The comment on "Representative groups and bodies" confirms that the council will "directly consult in writing a number of bodies and groups in the preparation of the Local Development Framework", including "elected representative bodies such as Parish Councils", and that "[such] groups can be [a] useful source of local opinion and information". However, the council "recognises that not all members of a community will share the same views and opinions", and will therefore "not rely simply on comments from bodies to speak for the people they represent, but will also seek the views of individuals". Table 2a indicates which of the nine techniques relate to each stage of plan-making: "Pre-draft consultation", "Pre-submission public participation stage" and "Submission stage (tests of

soundness)". "Rochford District Matters" is mentioned only in the part of the table relating to "Pre-draft consultation". Table 2b indicates which techniques may be used for whom. For the "Wider public" all nine techniques are listed.

9. Section 6 explains the ways in which people will be able to put forward their views on the local development framework. As well as public meetings and exhibitions, it refers to the use of questionnaires, which "will be made available on the Council's website, at the Council's offices and will be sent out by post on request".

10. Section 12, "Resourcing and Reviewing the Statement of Community Involvement", says that the "measure of the success" of the statement of community involvement will include three considerations. The first is "[the] level of community participation that it generates …". The council's intention to use the statement of community involvement flexibly is emphasized:

> "The Statement of Community Involvement does not specify in detail all the community participation activities that will be carried out in order to maintain a flexible approach, allowing participation exercises to be undertaken to meet the particular circumstances of the planning issue in hand. It is intended, however, that the level of engagement will be at or beyond the minimum level required by legislation."

11. In section 13, "Consultees", Table 5 lists the representative groups and organisations which the council intends to consult directly on the various aspects of its local development framework.

12. In March 2013 the council produced an addendum to the statement of community involvement to take account of changes to the statutory framework for the preparation of development plan documents. The addendum acknowledges that "the stages of document production listed in Table 2a … no longer apply – there were three formal stages when this document was adopted, there are now two". It adds that the council nevertheless "remains committed to community involvement in planning decisions; and the principles and engagement techniques set out in [the statement of community involvement] are still relevant, and will still be applied to planning documents being produced under the new planning system".

The core strategy

13. The council adopted the Rochford District Core Strategy on 13 December 2011, after a process begun in 2006. Mrs Kendall did not take part in that process at all. In her evidence in these proceedings she says she was entirely unaware of the core strategy while it was being prepared. The council does not accept that.

14. On 12 August 2009 Mrs Kendall wrote to the council expressing her anxiety about the possibility of gypsies evicted from Dale Farm in Basildon setting up camp on a site which she owned on London Road in Rayleigh, and other land nearby. She raised the possibility of this land being developed for housing. The council replied on 21 August 2009, saying that she should not expect a proposal for housing development to be approved. However, in the core strategy process it was considering a possible allocation of land to the south of London Road for employment development. It told Mrs Kendall that her name had been added to its "consultation database". Mrs Kendall says she does not remember receiving that letter. On 21 September 2009 the council published the submission draft of the core strategy for consultation. It says that on that day it sent a consultation letter to Mrs Kendall. Its Planning Policy Leader, Mr Samuel Hollingworth, has produced a copy of that letter as an exhibit to the first of his four witness statements in these proceedings. Mrs Kendall says she never received it. The submission draft core strategy was submitted to the Secretary of State for examination on 14 January 2010. Examination hearings were held in May and September 2010, and in February 2011. On 18 October 2010 the council consulted on proposed changes to the submission draft in the light of the revocation of the East of England Plan. It says that on that day it sent a consultation letter to Mrs

Kendall. Mr Hollingworth has produced a copy of the letter. Again, however, Mrs Kendall denies having received it.

15. After its adoption the core strategy was challenged by a developer, Cogent Land LLP. That application was dismissed by Singh J. on 21 September 2012 (*Cogent Land LLP v Rochford District Council and Bellway Homes Ltd* [2013] 1 P. & C.R. 11).

16. Policy H2 in section 2 of the core strategy provides for seven extensions to settlements in the district for new housing. One of these is for land "North of London Road, Rayleigh", where the development of 550 dwellings is proposed in the period between 2015 and 2021. The policy says that the "detailed location and quantum of development will be articulated within the Allocations Development Plan Document". Policy H7 sets the council's strategy for the provision of sites for gypsies and travellers. It says "[sites] will be allocated in the west of the District, where transport links and access to services are better". In section 6, which sets the council's strategy for the Green Belt, paragraph 6.6 says that "[the] exact area of Green Belt land to be allocated for development will be dependent on the Allocations Development Plan Document". In section 11, "Economic Development", paragraph 11.32 says that on the Rawreth Road Industrial Estate a site of 5.9 hectares will be reallocated for housing and that existing employment uses there will be relocated. Policy ED4 says the council "will allocate land to the south of London Road, Rayleigh to accommodate a new employment park capable of accommodating businesses displaced by the redevelopment of Rawreth Industrial Estate as well as additional office space".

The Allocations DPD Discussion and Consultation Document

17. On 17 March 2010 the council published for consultation its Allocations DPD Discussion and Consultation Document, which set out potential options for the allocation of specific sites for development. The consultation period ran until 30 April 2010. Those on the council's consultation mailing list – including, it says, Mrs Kendall – were consulted. The council says that it sent a letter, dated 17 March 2010, to the address Mrs Kendall had given. Mr Hollingworth exhibits a copy of that letter to his first witness statement. The letter said that the draft allocations plan had been "developed through consultation with key stakeholders, land owners and agents, and … with regard to the Core Strategy Submission Document". The allocations plan was "required to conform to the Core Strategy, as it is tasked with assisting in the delivery of the strategy and vision for the District". The results of the "public consultation" would "help form the next stage" of the plan's preparation. The letter explained how responses to this consultation could be made. The "quickest and easiest way" to submit comments, it said, was by using the link on the council's "online system". The consultation documents and background information could be found on the council's website. The addresses of the places where the documents could be viewed were given.

18. The council received no response to that consultation letter from Mrs Kendall. She says that she did not receive it, and that "the first notice" she had of the allocations plan was in November 2012. In paragraph 4 of her first witness statement she says she "cannot recall" any communications that told her about the progress of either the draft core strategy or the draft allocations plan. She says that before November 2012 she received "no formal letter" from the council about its proposals for the part of the district in which she lives. She adds that she "generally [consigns]…unsolicited flyers, free newspapers and junk mail directly into the recycling container that is provided by the [council]".

The Allocations DPD Discussion and Consultation Document Sustainability Appraisal (December 2011)

19. In January 2012 the council published for consultation its Allocations DPD Discussion and Consultation Document – Sustainability Appraisal (December 2011). The consultation period ran from 16 January until 27 February 2012. Mr Hollingworth describes this exercise in his fourth witness statement. Those directly invited to comment included "infrastructure providers, representative groups, [residents'] associations, agents and developers". Comments were invited by e-mail from those for

whom the council had an e-mail address. Mr Hollingworth exhibits a copy of the council's e-mail, and a list of the e-mail addresses to which it was sent, redacted to comply with the Data Protection Act 1988. Those for whom the council did not have an e-mail address were sent a consultation postcard headed "Have Your Say …". This explained where the December 2011 draft sustainability appraisal could be viewed and how further information on it could be obtained, stated the period within which responses to the consultation had to be submitted, and gave the e-mail address to which comments could be sent and a telephone number to use if one wanted further information. Mr Hollingworth has produced a copy of the postcard and a list of the addresses to which it was sent, again redacted to comply with the Data Protection Act.

20. On the "Allocations Development Plan Document" webpage of the council's website, information on the "Allocations Development Plan Document: Discussion and Consultation Document" could be found via a hyperlink under "Related Links". That webpage, in turn, explained that a copy of the draft sustainability appraisal could be downloaded via the link provided under "Related Documents" and was available for comment. It gave the date by which responses had to be submitted and the e-mail address to which comments were to be sent. Mr Hollingworth exhibits prints of both webpages as they were in January 2012.

21. The comments received at that stage were taken into account by the council when it revised the sustainability appraisal.

The Allocations DPD Discussion and Consultation Document Updated Sustainability Appraisal (July 2012)

22. On 13 August 2012 the council published for consultation its Allocations DPD Discussion and Consultation Document Updated Sustainability Appraisal (July 2012). Appendix 13 to this version of the sustainability appraisal presented a summary of the issues raised and the council's response on each. This further consultation ran until 10 September 2012. It is described by Mr Hollingworth in his fourth witness statement. The council directly invited comments from "Parish/Town Councils, infrastructure providers, representative groups, [residents'] associations, agents and developers", as well as everyone who had commented on the December 2011 draft sustainability appraisal, including members of the public who had done so. Mr Hollingworth has produced a copy of the council's e-mail of 13 August 2012, and a redacted list of the addresses to which it was sent. Again, consultation postcards were sent to those for whom the council did not have an e-mail address, this time headed "Comments invited", with details similar to those in the postcards used in the previous consultation. Mr Hollingworth has produced a redacted list of the addresses to which the postcard was sent. Once again, the council published details of the consultation on its website, on the "Allocations Development Plan Document" webpage, directing one through a hyperlink to the "Allocations Development Plan Document: Discussion and Consultation Document" webpage for more information. Mr Hollingworth exhibits prints of the relevant webpages as they were in August 2012. The text on the "Allocations Development Plan Document" webpage included this:

> "Consultation: The potential environmental, economic and social impacts of the options set out in the plan are required to be assessed. The initial assessment was consulted on in January/February 2012 and an update to this, called the Allocations DPD: Discussion and Consultation Document Updated Sustainability Appraisal has now been published.
>
> Further comments are now invited on the updated Sustainability Appraisal and the Discussion and Consultation Document prior to preparing the next version of the Allocations DPD."

That webpage gave an e-mail address to which comments could be submitted, stated the period of the consultation, explained that the comments already submitted during the 2010 consultation on the options in the Discussion and Consultation Document were still valid and need not be resubmitted, and gave a telephone number and e-mail address for the council's Planning Policy team.

The Allocations Plan Submission Document (November 2012)

23. On 29 November 2012 the council published for consultation its Allocations Plan Submission Document. This consultation ran until 25 January 2013. During the consultation period a number of other documents produced during the preparation of the draft plan, including the sustainability appraisal, were available to those who wished to see them.

24. In section 1 of this draft of the plan, the "Introduction", the council referred to the role of the sustainability appraisal in the preparation of the plan. Paragraph 1.18 explained what had been done thus far:

> "The initial stage of the Allocations Document, called the Discussion and Consultation Document, was published for consultation in 2010. This document was assessed for its environmental, economic and social impacts (Sustainability Appraisal). This assessment and an analysis of the consultation responses received, as well as existing and new evidence that has emerged, have informed the development of this document. This document has also been appraised in sustainability terms."

Paragraph 1.19 stated:

> "The results of the Sustainability Appraisals, including non-technical summaries, and the Consultation Summary for each stage of the Allocations Document (combined in the Consultation Statement) are available as separate documents."

Paragraph 1.20 confirmed that "[the] Sustainability Appraisal, as well as the Consultation Statement, form part of the evidence base of the Local Development Framework".

25. Policy SER1 in this draft of the plan proposed an allocation for housing – 550 dwellings – on land to the north of London Road in Rayleigh. Policy BFR4 proposed an allocation for housing on the Rawreth Industrial Estate. Policy NEL1 proposed an allocation for employment development on land to the south of London Road. Policy NEL2 proposed an allocation of land to the west of the A1245 for heavy industry. Policy GT1 proposed an allocation for 15 pitches for gypsies and travellers, next to the site proposed for industrial development under Policy NEL2 at West Rayleigh.

26. Mr Hollingworth exhibits to his fourth witness statement a copy of the council's consultation letter of 29 November 2012, which was sent out by e-mail, and a redacted list of the e-mail addresses to which it was sent. The letter was headed "Have your say on the future development of the District: consultation on the Allocations Submission Document and Hockley Area Action Plan Submission Document". It said that the "proposed final versions" of these two plans had been published, and that comments on the soundness and legal compliance of "these documents" should be submitted by 5 p.m. on 25 January 2013. The "quickest and easiest" to do this was by using the council's "online system". The letter also recommended visiting the council's website "to view the documents, access background information and, if required, obtain help on using the online consultation system". It said that the council recognized that not everyone had access to the internet and that it was "important that no one [was] excluded from participating". Those who wanted to submit their views but were unable to do so online were advised to get in touch with the council's Planning Policy team by telephone. The documents could be viewed at local libraries, the council's offices or online. The council sent consultation postcards to those on its mailing list for whom it did not have e-mail addresses, including Mrs Kendall. The postcard was headed "Have Your Say …". Its content largely replicated that of the consultation letter.

27. The "Allocations Development Plan Document" webpage of the council's website stated the consultation period, and explained that more information could be obtained from the Planning Policy team, giving a telephone number and an e-mail address. The webpage specifically devoted to the consultation, which was headed "Allocations Submissions Document – Have Your Say", explained that the version of the plan now being consulted upon was that which the council proposed to submit to the Government for examination. It said the council had published the draft plan for consultation and was

"inviting interested parties to submit representations on it". Representations made in this consultation would be submitted to the Government, together with the draft plan, and would be considered by the inspector at the examination. They could be submitted online or by post. The webpage also listed a large number of "Related Documents", including the "Allocations Submissions Document Sustainability Appraisal", which could be accessed via the hyperlinks provided. The hyperlink for the sustainability appraisal said: "View the environmental, economic and social impact assessments of the Allocations Submission Document".

28. Mr Hollingworth says that Mrs Kendall "registered on the [council's] online consultation system on 16 January 2013". On 23 January 2013 she used that system to submit her response to the consultation on the pre-submission draft of the allocations plan. She objected to proposed Policy SER1 for development to the north of London Road, Rayleigh, urging the council to "seek … run down, plotland and brownfield sites that exist North of Rawreth Lane and other areas as an alternative".

The council's consultation statement

29. In accordance with regulation 22(c) of the 2012 regulations the council produced a consultation statement to accompany the draft allocations plan.

30. In its section 1 the consultation statement said that the preparation of the allocations plan had been an "iterative process" and that each stage had been subject to public consultation. It explained how "local communities and other key partners" had been involved in its preparation, which bodies and persons the council had invited to make representations under regulation 18, how those bodies and persons had been invited to make representations, what the main issues raised by the representations had been, and how the representations had been taken into account (paragraph 1.2). Representations had been invited at both of the two "key stages" in the preparation of the allocations plan: the "Discussion and Consultation" stage and the "Submission" stage (paragraph 1.4).

31. In section 2 the council said that the principles for community involvement and consultation set out in the statement of community involvement had been adhered to (paragraph 2.2). Section 3 described in detail how consultation had been undertaken on the Allocations DPD Discussion and Consultation Document, and summarized the results of that consultation in a table (Table 2). Section 4 identified the main issues raised at that stage and explained how they had been addressed. It said there had been "a significant response from a wide range of stakeholders, including members of the public, developers, landowners and specific consultation bodies" (paragraph 4.1). Paragraphs 4.2 to 4.5 set out the issued raised during the consultation. Several "alternative site options" for housing and employment development had been suggested and these had been considered in the sustainability appraisal (paragraphs 4.3). The "general locations" for such development had been addressed as "strategic issues" during the preparation of the core strategy (paragraph 4.4). Every site suggested in each of those "general locations" had been assessed (paragraph 4.5). The proposed allocations for residential and employment development had been prepared "taking into account the consultation responses" (paragraph 4.7). In section 5 the council described (in Table 3) the methods of consultation it had used at the "Pre-Submission Stage". The responses to consultation at this stage were summarized policy by policy (in Table 4).

32. Section 7 of the consultation statement provided a "Summary and Overview", which said that the council had "consulted throughout the preparation of the Allocations Document in accordance with the Statement of Community Involvement". Those who had responded to consultation had been "predominantly against any additional development in the District, particularly on Green Belt land".

Mrs Kendall's representations to the inspector

33. On 29 May 2013 the inspector published his "Issues and Questions".

34. On 16 August 2013 Mrs Kendall submitted two statements for the examination. In the first of these statements she set out her objections to Policy SER1, Policy BFR4, Policy NEL1, and Policy NEL2; in the second, her objection to Policy GT1.

35. In the "Summary" in her first statement Mr Kendall said that she considered it to be "a full reflection of [5,067] individuals of Rayleigh and district that have supported [my] position that the present allocation submissions document is unfit for purpose". The proposed allocation for housing in Policy SER1 was "unjustified primarily due to the failure to consult adequately with the residents of the District, as required by primary legislation …". There were "alternative brownfield sites and less valuable greenfield areas, within Rochford, that can meet the Government targets for housing, without the necessity to ruin this area of Rawreth and west Rayleigh". As for Policy NEL2, which proposed the relocation of industrial activities from the Rawreth Industrial Estate to land to the west of the A1245, there had been a "lack of any meaningful consultation", and the "business community" had had "little or no consultation" upon it. The proposal in Policy BFR4 for the relocation of industrial businesses from the Rawreth Industrial Estate could lead to the "closure of private businesses, with no consultation with those most affected". On the proposed allocation of a site to the south of London Road under Policy NEL1 there had been "little or no negotiation with the business community", and a "lack of any meaningful consultation … with the residents of the district …". In appendix 7 to this statement Mrs Kendall gave details of 16 suggested alternative sites for allocation in Rayleigh, Hockley and Rawreth. In another appendix she produced a petition, which had been created electronically, with the names of 5,062 objectors on it. There were only five supporters. Mrs Kendall claimed that 93% of the total of 5,067 had been "unaware of proposals prior to July 2013". The population of Rochford was, she said, "83,500".

36. In her statement on Policy GT1 Mrs Kendall said that the proposed site for gypsies and travellers was strongly opposed by the "local community together with Rayleigh's existing traveller community". A public meeting in July 2013, at which this proposal had been discussed, had been attended by "in excess of 600 local residents". The Facebook page of a group established to resist the allocation had attracted "2,286 members". The 5,062 objectors whose names appeared on the petition were opposed to the proposal "to establish a single traveller site for the entire Rochford district". Again, said Mrs Kendall, 93% of these objectors had known nothing of the proposal until July 2013.

The council's examination statements on consultation

37. On 16 August 2013 the council submitted a statement to the inspector, responding to his question, "Have the consultation procedures undertaken been adequate and in compliance with the Statement of Community Involvement and the Town and Country Planning (Local Planning) (England) Regulations 2012?" This document confirmed what the council had said in the consultation statement: that the draft allocations plan had been prepared in accordance with the statement of community involvement, and also with the 2012 regulations – in particular regulation 18. The council had used "a wide range of media to advertise community engagement and consultation events" – its planning mailing list, its website, parish council notice boards, and "local media", including "Rochford District Matters". Six public meetings had been held – in Rayleigh, Rawreth, Hullbridge, Hockley, Canewdon and Ashingdon – all of them well attended by local residents. The main issues raised at both stages of the preparation of the allocations plan had been identified in the consultation statement. Appended to this statement were examples of the media coverage given to the draft allocations plan (Appendix 1) and examples of articles published in "Rochford District Matters" (Appendix 2).

38. In a further statement, headed "Council's Response to Inspector's Further Matters (September 2013)", the council addressed Mrs Kendall's comments about its consultation on the draft allocations plan. It said it had "sought to raise awareness of emerging planning policy for the District, initially during the preparation of the Core Strategy". It described the various ways in which this had been done in Rayleigh and Rawreth between 2006 and 2009. In the preparation of the allocations plan it had used "a wide range of media to advertise the consultation": its planning mailing list, its website, parish council notice boards, local newspapers such as the "Evening Echo" and the "Rayleigh and Eastwood Times",

and "Rochford District Matters". A public meeting had been held in Rayleigh in March 2010, and another in Rawreth in April 2010. More than 500 representations had been made on the options for Rayleigh during the consultation in 2010. Comments had been made by Rayleigh Town Council and Rawreth Parish Council, by several residents' and community associations, and by several local businesses. Those who had responded to the consultation and those on the council's mailing list were invited to comment on the submission draft of the plan in November 2012. The consultation was publicized in press releases, posters on Parish Council notice boards, and an article in "Rochford District Matters". 49 representations on the proposed allocations in Rayleigh had been made during consultation on the pre-submission draft. All of the representations submitted during each stage of consultation had been considered. The main issues raised, and the changes made to the plan, were recorded in the consultation statement.

The examination

39. The examination hearing began on 3 September 2013 and continued until 11 September. Mrs Kendall took part in the session held on 10 September 2013 when issues relating to the proposed allocations in Rayleigh were discussed.

The council's proposed modifications

40. On 17 October 2013 the inspector sent the council a letter setting out his interim views on the further modifications that would be needed to make the allocations plan sound. These included changes to the policies for development in Rayleigh, including the deletion of Policy NEL1. The inspector invited the council "to propose further Main Modifications to the Plan to deal with the matters of soundness [to which he had referred] after carrying out any necessary Sustainability Appraisal and Habitats Regulations assessment". The main modifications should be consulted upon for at least six weeks. He would take the responses to that consultation into account when preparing his report. Between 26 November 2013 and 17 January 2014 the Council consulted on the main modifications. Mrs Kendall submitted her responses to the consultation on the schedule of main modifications on 16 and 17 January 2014. She supported the deletion of Policy NEL1 but maintained her objections to the other allocations in Rayleigh.

The inspector's report

41. On 14 February 2014 the inspector submitted his report to the council.

42. He considered "Consultation" in paragraphs 7 to 11. In paragraph 7 he acknowledged that sections 19(3) and 20(5)(a) of the 2004 Act required him to consider whether the council had complied with its statement of community involvement, and that regulation 18 of the 2012 regulations required local planning authorities to take into account any representations made to them during the preparation of a local plan. In paragraph 8 he referred to the statement of community involvement:

> "The Statement of Community Involvement (SCI) is dated January 2007. It confirms that the Council will use a number of techniques at various stages of the development plan process. The objectives of the SCI are, briefly, to engage effectively with all sections of the community; to use appropriate techniques and to improve the quality of decision-making. The Council has provided copious details of the steps it has taken to inform people about the RASD although Regulation 18(2)(c) allows discretion in terms of who it is appropriate to invite representations from. Although there are quibbles about how this was undertaken I am satisfied that the Council has carried out the relevant techniques listed in the SCI."

In paragraph 9 of his report the inspector considered what Mrs Kendall had told him about the number of objectors who had been unaware of the proposed policies for development in Rayleigh. He said:

> "Nevertheless the situation in Rayleigh is that very many people had been unaware of the specific proposals contained in Policies BFR4, SER1, NEL1, NEL2 and GT1. About 93% of over 5,000 objectors are in this category. It is impossible to be certain how this situation arose given the efforts made by the Council over a considerable period of time. There were also 195 objections to the Discussion and Consultation Document in 2010 about 550 dwellings to the north of London Road so some people did know about this proposal. However, from what I have read and heard, it may be that there was over-reliance on the use of Rochford Matters [sic] (a free newspaper) and that the information given about the RASD and the CS that preceded it was general rather than specific due to the Council's reluctance to summarise. That said, there is no evidence that the specific measures set out in the SCI have not been followed. Furthermore, it should be borne in mind that there is no requirement to consult with everyone likely to be affected by a local plan in a particular way. Consequently I am satisfied that the broad expectations of the SCI and the Regulations have been complied with."

In paragraph 10 the inspector rejected criticisms that had been made of the council's consultation on the proposed allocations for development in South West Hullbridge and Canewdon. If the council had not allocated sites preferred by local residents, this did not necessarily mean that representations had been ignored, but merely that the council had "reached a different view having gone through a long process of sifting and assessing options through various means over time". Again, his view was that the statutory requirements for consultation had been complied with. His "overall conclusion", in paragraph 11, was "that the steps undertaken in relation to consultation are both sound and legally compliant".

43. The inspector considered the proposed policies for development in Rayleigh in paragraphs 40 to 58 of his report. He found the proposed allocation of housing on the Rawreth Industrial Estate in Policy BFR4, as modified, consistent with Policy H1 of the core strategy and "sound" (paragraphs 40 to 42), the housing allocation for land to the north of London Road in Policy SER1 consistent with Policy H2 of the core strategy and "sound" (paragraphs 43 to 53). The core strategy had "already set a course". The sites Mrs Kendall had suggested as alternatives had been "looked at in detail over some considerable time" (paragraph 53). The allocation of land to the south of London Road for employment development under Policy NEL1 was "not deliverable" and its removal from the allocations plan would be consistent with the core strategy (paragraphs 54 to 56). The allocation of land to the west of the A1245 for "heavier industrial uses" under Policy NEL2 was acceptable (paragraphs 57 and 58).

44. In paragraphs 76 to 82 the inspector set out his conclusions on the allocation of land for 15 pitches for gypsies and travellers at West Rayleigh under Policy GT1. This policy was consistent with Policy H7 of the core strategy and with national policy, and was "sound". Objectors had referred to 44 families being accommodated on this site, but the site was not big enough for that number.

45. In his summary "Assessment of Legal Compliance" in paragraph 85 of his report, the inspector concluded that the allocations plan met all relevant legal requirements. As for the "Statement of Community Involvement … and relevant Regulations", he said that the "consultation has been compliant with its requirements, including that on the Council's proposed changes". The plan therefore complied both with the 2004 Act and the 2012 regulations. In his "Overall Conclusion and Recommendation", in paragraph 87, he concluded that, with the recommended main modifications, the plan satisfied the requirements of section 20(5) of the 2004 Act and met the criteria for soundness in the National Planning Policy Framework ("the NPPF").

The adoption of the allocations plan

46. The council adopted the allocations plan on 25 February 2014. The adoption statement for the plan confirmed that it had been subject to independent examination by an inspector, who had found it to be sound, subject to a number of modifications made under section 23 of the 2004 Act.

47. The Allocations SA/SEA Adoption Statement explained how sustainability considerations had been "integrated into" the plan. It set out the history of the several stages in the SEA for the allocations plan, described how the options considered and the consultation responses on the plan and the sustainability appraisal had been taken into account, and gave the council's "reasons for choosing the [plan] in light of other reasonable alternatives". Each stage in the preparation of the allocations plan had "been the subject of [a sustainability appraisal] which [had] been prepared alongside the appropriate document". The sustainability appraisal prepared for the Allocations Plan Submission document had "found that overall there would be significant sustainability benefits in adopting the Plan as proposed". The modifications produced by the council after the examination had also been "subject to sustainability appraisal". At that stage an addendum to the sustainability appraisal had been produced, which had concluded that there would still be significant sustainability benefits to adopting the plan if the proposed modifications were incorporated in it.

48. The consultation undertaken on the draft plan and the sustainability appraisal in 2012 was described. The "draft SA Report" had been published in early 2012 and "key stakeholders", including "statutory consultees, developers and agents", consulted over six weeks in January and Febraury 2012. The document had also been published on the council's website. The issues raised and the responses submitted had been summarized in Appendix 12 to the "Updated SA (July 2012)". These responses had been "taken into account as appropriate". Because of "the delay between the publication of the Discussion and Consultation Document and the draft SA Report" the council had provided "stakeholders with an additional opportunity to comment on both documents together, and in particular the implications of the SA Report for the initial stage of the Allocations DPD on the options within the Discussion and Consultation Document". The "key stakeholders" had been invited to comment again on these documents over four weeks in August and September 2012. The issues raised and the responses had been summarized in Appendix 13 of the "Updated SA (July 2012)". The responses have been "taken into account as appropriate."

49. The section of the adoption statement explaining the council's reasons for selecting the allocations in the plan acknowledged that the SEA directive required "reasonable alternatives" to be considered. The reasons for the council's choice of the allocations in the plan and its rejection of other options were summarized in Appendix 2.

Issue (1) – section 19 of the 2004 Act and regulation 18 of the 2012 regulations

50. Section 20(5) of the 2004 Act provides that the purpose of an independent examination of a development plan document is to determine three questions: first, whether it satisfies the requirements of sections 19 and 24(1), regulations made under section 17(7) and any relevant regulations under section 36; secondly, whether it is sound; and thirdly, whether the local planning authority has complied with its duty to co-operate under section 33A. As for the first of those three matters, section 19(3) provides that "[in] preparing the local development documents (other than their Statement of Community Involvement) the authority must also comply with their Statement of Community Involvement". Section 20(7) provides that where the person appointed to carry out the examination, having carried it out, considers that it would be reasonable to conclude that the document satisfies sub-section 5(a) and is sound, and that the authority has complied with its duty to co-operate under section 33A, he must recommend that the document be adopted and give his reasons for that recommendation.

51. The 2012 regulations were made under a number of statutory powers, including those conferred by sections 17(7) and 36 of the 2004 Act. Regulation 18 relates to the preparation of a local plan. Paragraph (1) of regulation 18 requires a local planning authority to notify each of the bodies or persons specified in paragraph (2) of the subject of a local plan which it proposes to prepare, and to invite each of them to make representations about what a local plan on that subject ought to contain. Paragraph (2) provides that 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;

(b) such of the general consultation bodies as the local planning authority consider appropriate; 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."

Paragraph (3) of regulation 18 requires the local planning authority, in preparing the local plan, to take into account any representation made to it in response to its invitations to make representations under paragraph (1).

52. In this case there is no challenge to the statement of community involvement itself, nor has any criticism been made of it. Neither in her objection to the draft plan nor in her representations to the inspector did Mrs Kendall complain that the council had failed to put in place a proper strategy for consultation on emerging development plan documents. And there is no such complaint in her application to the court.

53. As pleaded in the Part 8 claim form, and very thoroughly elaborated by Ms Jenny Wigley on behalf of Mrs Kendall in her oral and written submissions, ground 1 of the application challenges the inspector's conclusion, in paragraph 9 of his report, that "the broad expectations" of the statement of community involvement and the 2012 regulations have been complied with. The allegation here is one of perversity. The issue presented to the court is not whether the inspector was right to conclude that the council had complied with the statement of community involvement but whether his conclusion was within the range of reasonable judgment. In the light of the "huge number" of objectors who had been unaware of the proposed allocations for development in Rayleigh and in Hullbridge, Ms Wigley submits, it was "not open" to the inspector to conclude that the council had complied with the statement of community involvement in accordance with section 19(3) of the 2004 Act, or with the requirements of regulation 18 of the 2012 Regulations. Contrary to the express objectives of the statement of community involvement, the council "clearly failed" to "engage effectively with sections of the community" and failed to "use appropriate engagement techniques targeted at the area of concern to ensure that resources are used effectively and efficiently". The inspector could not sensibly come to the view that the allocations plan satisfied the requirements of section 20(5)(a), and it was "not open" to him to recommend its adoption. Relying on the well-known observations of Lord Woolf M.R. in *R. v North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213 (at p.258C-E), Ms Wigley submits that there was no reasonable basis for the inspector's conclusion that the council's consultation on the draft allocations plan had been carried out properly when the proposals in the draft plan were still at a formative stage, or that it was consistent with the statutory requirements.

54. I cannot accept that argument.

55. Any claim for judicial review or statutory challenge based on an allegation of irrationality faces a daunting and difficult task (see, for example, the well-known observations of Lord Bingham of Cornhill C.J. in *R. v Secretary of State for the Home Department, ex parte Hindley* [1998] Q.B. 751, at p.777). In this case the task is harder still because the allegation, in essence, is that it was impossible for the inspector rationally to conclude that the council had applied the approach to community involvement in plan-making described in a document which it had itself prepared and adopted under the relevant statutory procedure. That is a bold allegation to make.

56. The duty imposed on a local planning authority by section 19(3) is, in effect, a duty to act in accordance with its own statement of community involvement. It is not a duty to do anything more. Section 19(3) does not require the authority to satisfy either itself or the inspector conducting the examination of its draft plan that all the residents of its area, or all the residents of a particular part of its area, or a minimum number or proportion of those residents, were in fact aware of the draft plan at any particular stage in its preparation. It does not require, or permit, the inspector to apply objectives or obligations beyond those contained in the statement of community involvement itself. The question for him under section 20(5)(a) is simply whether the authority has complied with the statement of community involvement as it is, not as it might have been.

57. The essential purpose of the council's statement of community involvement, as I see it, is to set in place a workable strategy for consultation, for use both in plan-making and in development control. As a strategy for consultation it is framed in deliberately broad terms. It does not prescribe a uniform approach for every plan-making process. It recognizes the need for flexibility. It allows the council to decide how it should proceed when preparing a particular development plan document or when dealing with a particular application for planning permission. In the context of plan-making it allows for the fact that this is both a sequential and an iterative exercise, involving a hierarchy of development plan documents and the preparation of successive drafts of each. It does not prevent the council from consulting in different ways on different plans. The concept of the council having to "comply" with the statement of community involvement, as section 19(3) requires, must be seen in this light.

58. Regulation 18 of the 2012 regulations is not concerned specifically with an authority's use of its statement of community involvement. It affords ample scope for the authority to exercise its own judgment in deciding whom it is going to consult on a draft plan, and how. Paragraph (2)(c) allows the authority to decide for itself which residents and businesses should be invited to make representations on a draft plan. Once again the authority is only required to invite representations from those whom it considers "appropriate" to ask. That is for the authority to judge in the particular circumstances of the process in hand, bearing in mind the stage the process has reached.

59. As Mr Juan Lopez for the council points out, the underlying complaint in ground 1 of the application is not that the council failed to provide those whom it did consult adequate information about its proposals in the draft allocations plan, or that it allowed too little time for them to respond, or that what they had to say about the draft plan was not taken into account in the plan-making process. Rather, the complaint goes to the effectiveness of the council's consultation in bringing the content of the draft plan to the attention of Mrs Kendall herself, and, it is said, to a large number of other residents of the district as well.

60. Mrs Kendall was directly consulted on the allocations plan. She lodged her objection to it, and pursued that objection at the examination. Many other residents of the district supported her. And she was not alone in complaining about the council's consultation. There is no dispute about any of that.

61. But I do not think the inspector was bound to find that the council had fallen short of meeting its statutory obligations relating to public consultation, either generally or, in particular, for the community in Rayleigh. I reject the submission that he could only reasonably conclude that the council had failed to comply with the statement of community involvement and to do what was required of it by regulation 18.

62. I can go further than that. If ground 1 of Mrs Kendall's application had asked the court to determine whether the council did comply with the section 19(3) of the 2004 Act, and with regulation 18 of the 2012 regulations, I would unhesitatingly hold that it did. I see no reason to doubt the description of the steps taken by the council to publicize and consult upon the draft allocations plan that is given in its consultation statement and in its further examination statements on consultation. The essential facts recorded in those documents are now confirmed in Mr Hollingworth's evidence. They make it plain that the council, when preparing the allocations plan, acted consistently with the objectives of the statement of community involvement, adopted "public engagement techniques" appropriate in that process, and exercised its discretion properly in each of the three respects referred to in regulation 18(2). In my view, in the light of the evidence before the court, the council did not breach any of the requirements of section 19(3) and regulation 18 when preparing and adopting the allocations plan. It complied with them all. The inspector's conclusions to that effect were not only reasonable; they were also, I believe, right.

63. The evidence Mrs Kendall has provided to the court in her three witness statements does not convince me that anything Mr Hollingworth has said in his evidence is unreliable. I accept the account he gives of the steps the council took in consulting on the draft plan. Where his account differs from Mrs Kendall's I prefer his, not because I doubt Mrs Kendall's sincerity – which I do not – but simply

because, as a planning officer of the council with the relevant first-hand knowledge, he is in a position to explain exactly what the council did, and he has done so.

64. The inspector tackled the two main matters he had to consider on "Consultation" – compliance with section 19(3) and compliance with regulation 18 – together. This was sensible. The two questions are separate and different, but they obviously bear on each other.

65. There is nothing in the relevant part of the inspector's report – paragraphs 7 to 11 – to suggest that he failed to understand the objectives of the statement of community involvement. He summarized them accurately in paragraph 8. He acknowledged the "quibbles" over the council's use of the techniques of public engagement referred to in the statement of community involvement. His conclusion, stated at the end of paragraph 8, is unequivocal. He was satisfied that the council had made use of the "relevant techniques". He acknowledged the discretion inherent in regulation 18(2)(c), which he rightly saw as germane both to the council's performance of its duty under regulation 18 and to section 19(3). On both questions he was content.

66. I see no reason to disagree. Before preparing his report the inspector informed himself about the steps the council had taken in consulting on the draft allocations plan as it emerged. I take his reference to "copious details" in paragraph 8 of his report to mean the lengthy account provided in the consultation statement and the shorter version of it in the council's examination statements on consultation. Those documents gave him more than adequate detail to inform the judgments he had to make. They provided a sure foundation for his conclusions on "Consultation". Their factual content is mirrored in Mr Hollingworth's evidence to the court. There is no objective evidence – as opposed to comment and assertion – to disprove it. Mrs Kendall's witness statements, though they display her own sense of grievance, do not do that.

67. The inspector did not overlook the concerns that had been expressed to him about the council's consultation both in Rayleigh and in Hullbridge and Canewdon. He considered those concerns. He referred in paragraph 9 of his report to the objections which had been made to the proposed allocation of the site north of London Road for housing development as evidence of some people having been aware of that proposal. But he did not ignore the fact that in the online petition presented to him by Mrs Kendall almost all of those whose names appear were said to have been unaware of the proposed allocations for development in Rayleigh. He recorded this evidence without rejecting it as untrue – so far as it went. He also accepted that the council had relied more than it might have done on its use of "Rochford District Matters" to inform people about the core strategy and the draft allocations plan, and that what it had said about the provisions in the draft plans had been general rather than specific. So it cannot be said that he disregarded the evidence of a large number of people having at one time been unaware of the proposed allocations in Rayleigh.

68. However, the inspector did not equate that ostensible lack of awareness of the proposals in the draft plan with a failure on the part of the council to comply with the statement of community involvement, or with its having breached any of the requirements of regulation 18, including the requirements of 18(1) and (2)(c). And I do not think there was any reason for him to do so. Ms Wigley suggested that the number of people who indicated in Mrs Kendall's online petition that they had been unaware of the proposals for Rayleigh cannot be reconciled with what the council said in the consultation statement and its examination statements on consultation, and shows the inspector's conclusion in paragraph 9 to be unsound. I do not agree. Nor do I accept that that conclusion of the inspector is undermined by the letters provided to the court in Mrs Kendall's evidence, in which a number of residents of Rayleigh complained of inadequate consultation, being "kept in the dark" and the council's "secrecy" about policies for development in Rayleigh in the draft allocations plan.

69. As Mr Lopez submits, the paucity of response to some of the proposals in the draft plan does not show that the council had failed to use appropriate techniques in its consultation on those proposals. The same may be said of the low level of attendance at the pre-hearing meeting on 19 June 2013. The fact that a relatively very large number of people objected to the proposed allocations in Rayleigh once the local community had been "galvanised" – Mrs Kendall's own word in her second witness statement –

does not mean that the much lower level of response to the council's consultation must be seen as evidence of its failure to comply with the statement of community involvement. The effectiveness of an authority's consultation on a draft plan is not necessarily reflected in the number of objectors to a particular proposal once opposition to that proposal has gathered momentum.

70. Mrs Kendall has described in her evidence how the online petition was generated. The petition certainly demonstrates how useful the internet can be when one is marshalling objections to a draft plan. It does not disclose precisely what those who put their names to it knew about the policies in the adopted core strategy and the proposals in the draft allocations plan at the time when they did so. The inspector seems to have taken it as a reliable indication of the number of people who had at one time been unaware of the council's proposed allocations for development in Rayleigh. But he did not infer from this that the council had failed to comply with the statement of community involvement.

71. In my view the inspector asked himself the right question. The right question was whether there was any evidence of the council having failed to deploy the "specific measures" in the statement of community involvement which were appropriate in the circumstances. The inspector found none. That is the crucial finding in paragraph 9 of his report. Having stated it, he added the observation that an authority is not required to consult in any particular way with everyone likely to be affected by the proposals in a local plan – which of course is correct. And at the end of paragraph 9, having taken full account of Mrs Kendall's evidence on consultation, he concluded that the "broad expectations" of the statement of community involvement had been met. This was consistent with his conclusion in paragraph 8 that the relevant statutory requirements for consultation had been complied with. A similar analysis and conclusion followed in paragraph 10, where he dealt with the alleged defects in the consultation on the proposals for South West Hullbridge and South Canewdon. He was clearly of the view that the council had done what was required of it in consulting on the draft plan as widely and as thoroughly as it should, using the appropriate techniques. Having considered what the council told him about the steps it had taken to consult residents and businesses in its area, if he had thought it had fallen short of satisfying the requirements of regulation 18(1) and (2)(c) he would have said so. He did not.

72. Those conclusions of the inspector seem to me to be unassailable. The council's evidence to the court shows them to be well founded.

73. I do not accept that the inspector should have given greater weight than he did to the council's "over-reliance" on "Rochford District Matters". After the council had amended the statement of community involvement with the addendum of March 2013, aligning it with the new statutory arrangements for plan preparation in which a pre-draft stage was no longer required, the use of "Rochford District Matters" ceased to be a relevant technique of consultation for newly produced draft plans. It is one form of "Local Media", but not the only one. It is not referred to as a prerequisite for consultation in every plan-making process, nor was it before the amendment. There is no explicit promise that it will be always be used. Even when it is used, the statement of community involvement does not specify how much detail about the council's proposals should be included in it. No legitimate expectation of its being used, or of the way in which it is to be used, can be said to arise (see the judgment of Sullivan L.J. in *R. (on the application of Majed) v Camden London Borough Council* [2009] EWCA Civ 1029, at paragraph 14).

74. In this case, as Mr Hollingworth explains (in paragraph 19 of his first witness statement), the council did use "Rochford District Matters" as a means of bringing the draft allocations plan and its process to the attention of the public. Mrs Kendall denies having received the copy of it in which the process was mentioned. That, however, is not evidence that the council failed to arrange for the distribution of "Rochford District Matters" either generally throughout the district or in the part of the district in which Mrs Kendall lives. The council does not admit that there were any problems in its distribution in Rayleigh in the relevant period. The picture before the inspector was the same. It did not persuade him that the council's possible "over-reliance" on "Rochford District Matters" as a means of communicating with the public about the draft plan had undermined the consultation exercise as a whole, or made it inconsistent with the statement of community involvement. He was, I believe, entitled to take that view.

75. None of the other techniques which were used by the council for notifying and consulting the public about the draft plan – including its publication of notices in the local press, its consultation of local community groups and voluntary organisations, and the use of its website – seems to have been carried out inappropriately, or at the wrong stage of the process (see the judgment of Sullivan J., as he then was, in *R. (on the application of Greenpeace Ltd.) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), at paragraph 74).

76. For those reasons ground 1 of Mrs Kendall's application fails.

Issue 2 – article 6 of the SEA directive and regulation 13 of the SEA regulations

77. Under article 5(1) of the SEA directive, when an environmental assessment is required under article 3(1), an environmental report must be prepared, "in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated". Article 6, "Consultations", states in paragraph 1 that a draft plan or programme and the environmental report prepared under article 5 "shall be made available to the authorities referred to in paragraph 3 … and the public". Paragraph 2 states:

> "The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure."

Paragraph 3 requires member states to designate the authorities to be consulted "which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes". Paragraph 4 states:

> "Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned."

Paragraph 5 states that the detailed arrangements for the information and consultation of the authorities and the public are to be determined by the member states. Article 8 requires that the environmental report prepared under article 5 and the opinions expressed under article 6 be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

78. Those provisions of the SEA directive are transposed into domestic legislation by the SEA regulations.

79. Regulation 13, "Consultation procedures", provides in paragraph (1) that every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report – "the relevant documents" – are to be made available for consultation in accordance with the provisions that follow. Paragraph (2) states:

> "As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall –
> (a) send a copy of those documents to each consultation body [as defined in regulation 4];
> (b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority's opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under [the SEA Directive] ("the public consultees");

(c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained; and
(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent."

Paragraph (3) states that the period referred to in paragraph (2)(d) "must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents."

80. This ground of Mrs Kendall's application, like ground 1, goes only to the procedural integrity of the plan-making process. It is not suggested that there was no environmental assessment within the definition in article 2(b) of the SEA directive. No complaint at all is made about the content of the environmental report prepared for the draft allocations plan, in the form of the sustainability appraisal. It is not suggested that any of "the likely significant effects on the environment" was missed or inadequately described and evaluated, or that the selection and treatment of "reasonable alternatives" were insufficient or unclear. I am concerned here only with the question of whether in its formal consultation on the draft allocations plan and the sustainability appraisal together, in 2012, the council failed in any way to comply with regulation 13 of the SEA regulations, and whether there was in that particular respect a breach of article 6 of the SEA directive.

81. Ms Wigley's submissions concentrate on one aspect of the council's consultation under the regime for SEA – the consultation of the "public consultees". She does not suggest that the council omitted to send copies of the draft allocations plan and the sustainability appraisal to the "consultation bodies" or that it failed to invite any of them to express its opinion on those documents. The contentious issue concerns only the effectiveness of the council's consultation of the general public. The essential allegation is that the "affected public" were not given the opportunity they should have had to express their opinions on the draft allocations plan together with "the accompanying environmental report" before the plan was adopted, and that there was, therefore, a clear breach of regulation 13(2) and (3). Either the council took a perversely narrow view of who the "public consultees" were, leaving out people who were obviously going to be affected by the decisions involved in the assessment and adoption of the allocations plan, in particular the residents of Rayleigh, or else it recognized that those people were going to be affected by those decisions but nevertheless failed to consult them as it should have done.

82. Ms Wigley contends that none of those who lived near the proposed allocation sites in Rayleigh were directly consulted, at any stage, on the draft plan and its sustainability appraisal together. This, she says, is plain from Mr Hollingworth's evidence. It is also plain from the council's allocations SA/SEA adoption statement, which reveals that consultation on the sustainability appraisal was only with "key stakeholders". The council never directly notified any individual members of the public – not even those on its planning policy mailing list – of its consultations on the draft plan together with the sustainability appraisal. It never published any details of those consultations in "Rochford District Matters" or in any other local newspaper. When it did consult the general public it relied solely on its website. This was contrary to the council's promise in the statement of community involvement that it would use "electronic media" in consultation "only in conjunction with other forms of participation". It was not an effective means of consulting the public. As the statement of community involvement acknowledges, access to the internet is far from universal. Even for those who did have access to the internet, navigating the website to find the page on which the invitation to comment was placed was far from straightforward. But crucially, both in January and February 2012 and in August and September 2012, members of the public – certainly the inhabitants of Rayleigh – would not have been aware that consultation under the SEA regulations was taking place unless they happened to have heard about it by chance. This basic failure to comply with regulation 13 was not overcome by the consultation on the submission draft of the allocations plan which began in November 2012. In that consultation there was no invitation to express an opinion on the sustainability appraisal. To include it as a "Related Document" accessible on the website – one of more than 40 in the list – was not to invite comment on it. Besides, this was far too late to be an "early and effective opportunity" within article 6(2).

83. I can see some force in those submissions.

84. As Singh J. observed in *Cogent Land* (in paragraph 118 of his judgment), the question of whether the opportunity given to the "public consultees" to express their opinions on a draft plan and its accompanying environmental report has truly been "early and effective" will depend on the circumstances of the particular case (see the decision of the Court of Justice of the European Union on a reference by the Court of Appeal of Northern Ireland in *Department for the Environment of Northern Ireland v Seaport (N.I.) Ltd*. (Case C-474/10), 20 October 2011, at paragraphs 49 and 51).

85. What were the circumstances here?

86. By the time the council first consulted on the sustainability appraisal together with the draft allocations plan in January 2012 it had just completed the prior stage of plan-making for the district by preparing and adopting the core strategy, a process with its own SEA. That process later withstood challenge in *Cogent Land*. The draft allocations plan translated the broader patterns of development established in the core strategy into specific allocations of land. As a process, the SEA undertaken for the allocations plan was a continuation of the SEA undertaken for the core strategy.

87. The council consulted on the sustainability appraisal and the draft allocations plan at an early stage of the plan's preparation: first, in January and February 2012, and then some six months later in August and September 2012. I have already described what the council did (see paragraphs 22 to 25 above). At both stages the council's approach was very much the same. Those directly consulted, in addition to the consultation bodies, included parish councils, representative bodies and groups of various kinds, and residents' associations. The sustainability appraisal was placed on the council's website with a general invitation to the public to submit comments on it. Anyone who wanted to do so could view the document at the council's offices or download it from the website. Comments could be submitted either by post to the council's offices or online. At the second stage the council also directly invited those who had commented on the previous draft of the sustainability appraisal to submit further comments if they wished. And at that stage both the consultation postcard and the consultation e-mail were unmistakably invitations to comment on both the draft allocations plan and the sustainability appraisal at the same time. When the draft allocations plan got to its final stage as the submission draft, in November 2012, and the council consulted formally on that document for a further period of eight weeks, the sustainability appraisal remained available at its offices and accessible on the website.

88. Mr Lopez submits that the periods over which these consultations extended were long enough to ensure that the "public consultees", as well as the consultation bodies, had the chance to express their opinions on the relevant documents well before the plan was adopted, and that this opportunity was provided early enough, and was also effective enough, to comply with article 6(2) and regulation 13. The council did each of the four things required of it under regulation 13(2), within the broad discretion conferred by its provisions. The statement of community involvement does not limit the council's discretion by tying it to any particular technique or techniques for engaging individual members of the public in a plan-making process, or in the process of environmental assessment which is an integral part of it.

89. I accept that an authority's discretion under regulation 13(2) is broad. The duty in regulation 13(2)(b) relates to the "public consultees", not to the general public or every individual member of the public resident in the authority's area. The authority decides which "persons" are affected or likely to be affected by, or to have an interest in, the decisions involved in the assessment and adoption of its plan. It decides what steps it should take to bring the plan and environmental report to the attention of the "public consultees". No particular steps are indicated, and none are excluded. Thus the authority is permitted – indeed, required – to decide who should be consulted, and how. Paragraph 2(c) allows it to choose where the plan and its environmental report may be viewed, and expressly permits the use of a website for this purpose. Paragraph (2)(d) allows the authority to select the address to which the "public consultees" must respond, and to set the period within which their opinions must be sent. The decisions it makes on all these matters can of course be reviewed by the court on public law grounds.

90. The potential for problems to arise if an authority resorts to the internet alone when consulting the public were noted by the Court of Appeal, albeit in a very different kind of process from this, in *R. (on the application of Breckland District Council and others) v The Boundary Committee* [2009] EWCA Civ 239. In his judgment in that case the President of the Queen's Bench Division said (at paragraph 72):

> "We also decline to say – for it is no longer material – whether the information that was published in the Autumn of 2008 and the means whereby it was brought to the attention of the public was adequate. No doubt publication of dense material on the internet will sufficiently alert local authorities who are waiting for it that it is there. Given time, they can, we imagine, deal with it when much of the data came from them in the first place. It must at best be an open question whether such publication alone would constitute sufficient consultation of the public, who (a) need to know that it is there, (b) need to know that it is the final stage of a larger consultation and to know where to find the earlier material of which it is part, and (c) probably need a synopsis of its headline conclusions and to be told where to find the supporting material if they want to look at it – see again paragraph 58 above. It is, however, for the Committee to decide, subject to what we have said in paragraphs 43 to 46 above, how and what to publish as part of their adapted process."

Those observations, whilst obiter, seem pertinent here, and, in my view, lend some support to Ms Wigley's argument on ground 2.

91. The two consultations to be considered in determining whether there was a breach of article 6(2) and regulation 13 are those which were devoted specifically to the draft plan together with the sustainability appraisal, and not the one that succeeded them when the council was seeking views only on the draft plan itself. In those two consultations the council saw the need to consult more widely than the consultation bodies and the "infrastructure providers, representative groups, [residents'] associations, agents and developers" – as Mr Hollingworth describes them – whose comments it sought by direct contact with them. It recognized that if it was to satisfy the requirements of regulation 13(2) and (3) so far as the "public consultees" were concerned it would have to do more than that. It was for this reason, presumably, that it decided to put on its website an invitation to the general public to submit their views on the two documents. It knew that the decisions it would be making in the SEA of the allocations plan and its eventual adoption were decisions of significance for the entire population of its district. It could only reasonably conclude, and in my view it obviously did, that the "public consultees" in this process necessarily included the general public as well as those whom it directly consulted in the ways Mr Hollingworth describes.

92. The real problem here is the one highlighted by Ms Wigley: that in purporting to discharge its duty to consult the "public" under article 6 of the SEA directive, the council relied on its website in the way that it did – which in Rayleigh was exclusively, or almost so – not only as the sole means by which it invited the general public to comment on the draft plan and its sustainability appraisal but also as the sole means by which it made known to them that this is what it was doing. Only a very small number of individual members of the public were consulted directly. Those who were not consulted directly, the overwhelming majority, were left to find the consultation for themselves on the internet, either once they had been prompted by someone else to do so or acting on their own initiative. Unless one knew that the sustainability appraisal for the draft allocations plan was being prepared and unless one was resourceful or inquisitive enough to be regularly checking the council's website to find out if formal consultation on those two documents had begun, one would not have known of their existence or that consultation upon them had begun. One would not have known where to go to look at the documents or to get hold of copies, or that the formal opportunity to comment on them had come, or the timescale for doing that.

93. I do not think that was good enough. As is explicit in article 6(2) and implicit in regulation 13(2)(d) and (3), the opportunity given to the public to express their opinions on the documents, including, perhaps most importantly, their opinions on the assessment of alternative allocations in the sustainability appraisal, had to be not merely an "early" opportunity but also an "effective" one. It would only have

been an effective opportunity if those being consulted were conscious of it and able to act on it in time. For the "consultation bodies" and for those "public consultees" whom the council consulted proactively the opportunity to comment was, I am sure, both early enough – coming as it did at a stage when the proposals in the draft plan were still evolving – and effective. For individual members of the public it would have been early enough if they were aware of it. So the crucial question is whether, for them, it was an effective opportunity in that particular respect. In my view it was not. An individual member of the public would only have been aware of the council's consultation on the draft plan together with the sustainability appraisal, and able to act on it, if he had discovered it for himself on the website or found out about it in some other way, and there was still time for him to submit his comments before the deadline.

94. I cannot accept that the council could properly consult the general public under the SEA regulations in that way. Its failure effectively to notify the public that it was using its website to consult them on the draft allocations plan and the sustainability appraisal and its failure to use an extra means of consultation, which would have extended the consultation to people who, for whatever reason, were unable to use the internet, amounted, in this case, to a breach of article 6 and regulation 13. This is not to say that it was unreasonable for the council to use its website as a means of consulting the public. Regulation 13 does not preclude that. Nowadays a website will generally be a convenient and useful means of inviting views on a draft plan and its environmental report. In this case it clearly was. The consultation material was complete. The invitation to comment was clear. The consultation came at a timely point in the plan-making process. And it allowed enough time for the public to express their opinions on the documents. Where the council went wrong was not in what it did but in what it failed to do. In addition to using the website as it did, it ought to have announced and carried out its consultation on the draft plan together with the sustainability appraisal by some other means which would not have excluded those without access to the internet. It was the council's omission to do those two things that put it in breach of regulation 13 and article 6. To this extent, therefore, I accept Ms Wigley's submissions on ground 2.

95. What should follow from this? The court is not automatically compelled to grant a remedy of some kind to Mrs Kendall. The remedies available under section 113 of the 2004 Act are discretionary. In exercising its discretion the court must consider whether or not in the particular circumstances of the case before it a remedy ought to be granted. I shall turn to that question after considering the next and last of the three main issues.

Issue (3) – regulation 8 of the 2012 regulations

96. Regulation 8 of the 2012 regulations contains general provisions for the form and content of local plans and supplementary planning documents. Regulation 8(4) states:

> "Subject to paragraph (5), the policies contained in a local plan must be consistent with the adopted development plan."

Regulation 8(5) provides:

> "Where a local plan contains a policy that is intended to supersede another policy in the adopted development plan, it must state that fact and identify the superseded policy."

97. The premise in ground 3 of Mrs Kendall's application is that the council's consultation on the draft core strategy and its sustainability appraisal, like that in the allocations plan process, was deficient because it did not extend beyond "key stakeholders". In breach of articles 6 and 8 of the SEA directive, Ms Wigley argues, the council failed to give members of the public an early and effective opportunity to express its opinions on the sustainability appraisal for the core strategy as it emerged and thus to influence the policies in it. At least one of the objectors to the draft allocations plan, Mr Wild, expressed his anxiety about the flaws in the consultation on the core strategy in his objection. The allocations plan process gave the council the chance to repair those flaws. The council did not do so.

However, says Ms Wigley, the inspector who considered the draft allocations plan was obliged to do what he could to nullify the breaches of the SEA directive in the core strategy process. It is the duty of the competent authorities in each member state to take, within the sphere of their competence, all measures necessary to make good any harm caused by a breach of European law (see the judgment of the European Court of Justice in *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] Env. L.R. 27, at paragraphs 62 to 70). Ms Wigley submits that the inspector could and should have recommended to the council modifications to the allocations plan to supersede policies in the core strategy. The council could have adopted the allocations plan with those modifications, so long this was done explicitly – as regulation 8(5) requires.

98. I think those submissions are misconceived.

99. In the first place, I am not persuaded that they can properly be entertained by the court under section 113 of the 2004 Act. Section 113 permits a "development plan document" or a "local development plan" (subsection (1)(d)), to be challenged by a "person aggrieved" on the grounds that it is "not within the appropriate power" or that "a procedural requirement has not been complied with" (subsections (1) and (3)), provided that the application is made within six weeks of its adoption (subsections (4) and (11)(c) and (d)). Subsection (2) provides that such a plan "must not be questioned in any legal proceedings except in so far as is provided [within section 113]". The purpose of the statutory time limit is to achieve certainty as to the legal validity of the plan in question. In *The Manydown Company Ltd. v Basingstoke and Deane Borough Council* [2012] EWHC 977 (Admin) (at paragraph 84) I considered the circumstances in which the preclusion in section 113(2) would not bite, and, in particular, the possibility of a claim for judicial review being pursued to challenge a decision made by a local planning authority before it had started the statutory plan-making process. The circumstances here are wholly different from those in *Manydown*. This ground of Mrs Kendall's application calls into question the lawfulness of a plan – the core strategy – which went all the way through its statutory process to adoption in December 2011, more than two and a half years before these proceedings were issued, and has already been the subject of an unsuccessful application for an order to quash it, brought on grounds relating to its SEA. In my opinion such a challenge offends the principle of administrative certainty underlying section 113(2).

100. Secondly, even if ground 3 of is properly within the court's jurisdiction in these proceedings, and even if the allegations made about the lack of proper consultation in the core strategy process were correct, there is nothing the court could do to the core strategy itself. The court could not now quash the core strategy, remit it to the council, make any other order suspending its effect, or require the council to do anything to alter or review the policies it contains. Mrs Kendall's claim form does not seek any such remedy. None is available. Whatever the outcome of these proceedings, the core strategy will subsist, in its present form, as a component of the statutory development plan.

101. Thirdly, the inspector in the allocations plan process would, in my view, have been straying far beyond "the sphere of [his] competence" if he had tried to address such concerns as were raised before him about the SEA undertaken by the council for the core strategy. It was not his job to tackle any alleged breach of article 6 of the SEA directive in the council's preparation and adoption of the core strategy. No such error had been established before the court in the challenge to the core strategy in *Cogent Land*. In those proceedings the SEA for the core strategy had been considered and found to be lawful, and the core strategy itself upheld. The inspector's duties under section 20(5) of the 2004 Act did not impose any burden on him to investigate the lawfulness of that previous statutory process, and, if he discovered some legal fault there, to find a way of putting it right. To suggest that he ought to have advised the council to prepare modifications to the draft allocations plan which would have put it in conflict with the core strategy, inconsistent therefore with the adopted development plan, and contrary to the normal rule in regulation 8(4), is wholly unrealistic. What would those modifications have been? How would they have rectified the alleged defects in the consultation on the sustainability appraisal for the core strategy? Ms Wigley's submissions provide no answer to those questions. The principle of European law on which she relied, emphasized by the court in *Wells*, did not enlarge the inspector's role in the way she suggested.

102. I therefore reject Ms Wigley's argument on this issue.

Discretion

103. At the hearing counsel made oral and written submissions on discretion and remedy. After the hearing I gave them the opportunity to make further submissions in writing in the light of my conclusions: on ground 1 that the council's consultation on the draft plan itself was lawful; on ground 2 that, for the reasons I have given, was a breach of article 6(2) and regulation 13 in the particular respect I have mentioned; and that there is nothing in ground 3. Both counsel have taken that opportunity – Ms Wigley in her submissions of 1 December 2014, and Mr Lopez in his submissions in response, lodged with the court on 10 December 2014.

104. The statutory jurisdiction within which these submissions must be considered is, as I have said, a discretionary one. Under section 113(6) of the 2004 Act the provisions for remedies in subsection (7) apply:

> "… if the High Court is satisfied –
> (a) that a relevant document is to any extent outside the appropriate power;
> (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement."

Subsection (7) provides that the court "may" either quash the relevant document or remit it to a person or body with a function relating to its preparation, publication, adoption or approval. It is open to the court to quash a plan either in its entirety or only in part (section 113(7)(a) and (7C)). The court can also remit the whole or part of the plan to the local planning authority (section 113(7)(b)), with appropriate directions (section 113(7A), (7B) and (7C)).

105. In *Walton v Scottish Ministers* [2012] UKSC 44 the Supreme Court clarified the law on the exercise of judicial discretion in cases where a breach of a European directive governing environmental assessment has occurred. The fullest treatment of this matter is to be found in Lord Carnwath's judgment (in paragraphs 103 to 140). Lord Carnwath reviewed relevant domestic and European case law, including the decision of the House of Lords in *Berkeley v Secretary of State for the Environment (No.1)* [2001] 2 A.C. 603, *R. (on the application of Edwards) v Environment Agency* [2009] 1 All E.R. 57, *Wells*, and *Inter-Environnement Wallonie ASBL v Region Wallonie* (Case C-41/11) [2012] 2 C.M.L.R. 21. His citations from these cases included the passage in paragraph 67 of the court's judgment in *Wells* where it distilled the principles of "equivalence" and "effectiveness" (paragraph 135). Those two principles informed the conclusions he reached in this part of his judgment:

> "138. It would be a mistake in my view to read these cases as requiring automatic "nullification" or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells* makes clear, the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered "impossible in practice or excessively difficult". Proportionality is also an important principle of European law.
>
> 139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.

> 140. Accordingly, notwithstanding [counsel's] concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime."

Agreeing with Lord Carnwath, Lord Hope observed (in paragraph 155 of his judgment) that "[the] fact that an individual may bring an objection on environmental grounds derived from European directives does not mean that the court is deprived of the discretion which it would have at common law, having considered the merits and assessed where the balance is to be struck, to refuse to give effect to the objection". He went on to say (in paragraph 156) that "[the] scope for the exercise of that discretion is not therefore as narrow as the speeches in *Berkeley* might be taken to suggest", and that "[where] there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great …, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck". Lord Reed (in paragraphs 77 to 81 of his judgment) declined to express a decided view on the scope of the court's discretion in the specific context of the Scottish legislation at issue, but did not dissent from Lord Carnwath's conclusions on the relevant case law. Lords Kerr and Dyson (at paragraph 157) agreed with all of the other three judgments.

106. It is clear, therefore, on domestic authority at the highest level, that there will be cases where a breach of the SEA directive is proved but it will nevertheless be inappropriate, and disproportionate, for the court to grant any remedy. Is this such a case?

107. Ms Wigley submits that the court ought not to exercise its discretion to deny Mrs Kendall an order within the range of relief available under section 113. It can craft an appropriate remedy without causing disproportionate delay and expense in the plan-making process. Ms Wigley points, for example, to the orders made by Collins J. in *Save Historic Newmarket v Forest Heath District Council* [2011] EWHC 606 (Admin) and by Ouseley J. in *Heard v Broadland District Council* [2012] EWHC 344 (Admin), both which avoided quashing a plan in its entirety. Specifically, she invites me to "remit (or quash) policies SER1, BFR4, NEL1, NEL2 [sic] and GT1 with a direction that they be treated as if they had not been … adopted; a direction that there be full public consultation in relation to those policies and the relevant sections of the sustainability report (updated if necessary or appropriate), including in particular the assessment of alternative allocations; a direction that there be full consideration as to the requirement to hold an independent examination of those policies amended as appropriate in light of the consultation responses received; that if an independent examination is considered necessary, it be held by an Inspector appointed by the Secretary of State with the procedure then following the statutory course towards adoption (all pursuant to s.113(7B)) …".

108. Ms Wigley argues that because of the defective consultation on the sustainability appraisal, the public generally, and Mrs Kendall in particular, were denied the opportunity to "give their input" on the several options considered for each of the policies in the draft allocations plan that were of concern to her. As those options show, the latitude the council had when allocating sites for development was not unduly curtailed by the policies already in place in the core strategy. The statement of community involvement acknowledges that the "benefits of community involvement" in a plan-making process, and the purpose of consultation, go well beyond the statutory requirement to achieve a plan that is sound. This is also clear from paragraphs 150 and 155 of the NPPF. The involvement of local communities in the process is an essential part of it.

109. In this case, says Ms Wigley, it cannot be assumed that proper public consultation on the sustainability appraisal would have made no difference to the outcome of the plan process. A fresh consultation exercise, compliant with article 6(2) and regulation 13, which would enable Mrs Kendall and other members of the public to consider the options in the sustainability appraisal and to offer their views about them, might lead to different responses and a different outcome. The court should not impose any burden on Mrs Kendall to show that the outcome would or might have been different if the breach of article 6(2) had not occurred. To do that would be to make the exercise of the rights conferred by the

SEA directive excessively difficult and to deprive Mrs Kendall of the guarantees introduced by articles 6 and 8 (see the decision of the Court of Justice or the European Community in *Gemeinde Altrip and others v Land Rheinland-Pfalz* (Case C-72/12) [2014] P.T.S.R. 311, at paragraphs 52 to 54). Reading into the concept of "substantial prejudice" in section 113(6)(b) the requirement for a claimant to show such prejudice in the case of a proven breach of the SEA directive could not be reconciled with the decision in *Wells*. The appropriate test for the denial of relief in a case such as this is whether the decision-maker has demonstrated that the decision would inevitably have been the same if it had complied with the relevant statutory obligation.

110. In support of that proposition Ms Wigley cites the recent decision of Cranston J. in *R. (on the application of Joicey) v Northumberland County Council* [2014] EWHC 3657, in which he considered other cases where obligations in "right to know legislation" had been breached, including *R. (on the application of Moseley) (in substitution of Stirling Deceased) v London Borough of Haringey Council* [2014] UKSC 56. In paragraph 50 of his judgment Cranston J. referred to the decision of the Court of Appeal in *R. (on the application of Holder) v Gedling Borough Council* [2014] EWCA Civ 599, which reinforced the long-established principle that where a material consideration has not been taken into account in a planning decision the court should grant relief unless it is satisfied that the decision-maker would have reached the same decision (see the judgment of Glidewell L.J. in *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P. & C.R. 343, at p.353 and the decision of the Court of Appeal in *Simplex G.E. (Holdings) v Secretary of State for the Environment* (1989) 57 P. & C.R. 306). In paragraph 51 of his judgment Cranston J. referred to the decision of the Court of Appeal in *R. (on the application of Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 W.L.R. 3315. In that case the primary care trust had failed to consult those affected by a change in the provision of medical services. The Court of Appeal held that when the court was considering the exercise of its discretion in those circumstances the probability of the outcome being the same if the consultation had been properly carried out was not enough to justify withholding a remedy. The defendant "would have to show that the decision would inevitably have been the same with proper consultation, if the claimant is to be denied relief". Cranston J. held that this was "the appropriate test in the analogous situation of a breach of "right to know legislation": the claimant will be entitled to relief unless the decision-maker can demonstrate that the decision it took would inevitably have been the same had it complied with its statutory obligation to disclose information in a timely fashion". In this case, Ms Wigley submits, the council would have to do that if it were to dissuade the court from granting relief, and it cannot.

111. Mr Lopez opposes that argument. He submits that the approach to the exercise of judicial discretion indicated by Lord Carnwath in *Walton* ought to be followed here. Lord Carnwath's analysis remains the definitive jurisprudence on discretion in cases where a breach of European law on environmental assessment has been established. *Altrip* does not displace the principles which he identified. Nor do the domestic cases on consultation in other statutory contexts. In the light of those principles, the court should have no difficulty in concluding that this is a case in which it would be right to exercise its discretion to withhold relief. The breach of article 6 did not negate the rights conferred by the SEA directive. In the course of the plan-making process the public were able to enjoy the substance of those rights, including the right to take part effectively in the process with the benefit of a competently prepared environmental report – the sustainability appraisal. They had a fair opportunity to express their opinions on the consideration given in the sustainability appraisal to the allocations proposed in the plan and the reasonable alternatives, at a time when the plan was still at a formative stage and subject to independent scrutiny by the inspector. The council consulted on the draft plan both before and after the sustainability appraisal had been prepared and published. There is no evidence of any substantial prejudice either to Mrs Kendall or anyone else as a result of the council's failure to undertake its formal consultation of the "public consultees" entirely as it should have done at the particular stage of the plan-making process when it did so. It is telling that even when the updated sustainability appraisal was published with the council's proposed modifications in November 2013, Mrs Kendall had nothing to say about its content. In any case there is no reason for the court to conclude that if the breach of article 6(2) and regulation 13 had not occurred, the outcome of the plan-making process might have been any different. Indeed, the court can only sensibly conclude that it would inevitably have been the same.

112. Mr Lopez also submits that to grant relief would clearly be prejudicial to the public interest. It should be remembered that if any or all of the policies in the allocations plan were quashed or remitted, the core strategy would survive as part of the development plan. The strategic principles set by the core strategy for the policies of the allocations plan would therefore remain. But the specific allocations and the policies that ensure the predictability, scale and sustainability of development on those sites – the soundness of which is not impugned in these proceedings – would be set aside. Until the council had gone through the relevant parts of the plan-making process all over again it would be left to deal with proposals in those general locations as they emerged, applying the policies of the core strategy and the NPPF, including those relating to the five-year supply of housing (in paragraphs 47 and 49 of the NPPF), and to the implications of the development plan being "absent, silent or [in a relevant respect] out-of-date" (in paragraph 14). To create that situation at this stage would be patently contrary to the public interest. For the court to grant the remedy sought by Ms Wigley would therefore be manifestly disproportionate.

113. In my view Mr Lopez's submissions are essentially correct. As he submits, the principles recognized by the Supreme Court in *Walton* should guide the court in a situation such as this. Those principles are, in my view, sufficient for the decision I have to make. They do not need to be enlarged or refined. They remain authoritative in this area of the law. They have not been disturbed or modified by any of the domestic case law to which Ms Wigley referred. And they are not inconsistent with the court's decision in *Altrip*. Applying those principles in the particular circumstances of this case, I cannot accept that it would be a reasonable and proportionate exercise of the court's discretion to make the order sought by Ms Wigley, or to grant relief in some other form.

114. An obvious feature of the case law on discretion, both domestic and European, is that the court must exercise its discretion paying particular attention to the facts and circumstances of the case in hand. This is well illustrated, for example, in *Joicey*. As one can see from paragraphs 42 to 44 of Cranston J.'s judgment, the authority's failure in that case to follow the relevant statutory requirements seems to have been egregious – my word, not Cranston J.'s. But in any event that case serves to show very clearly that whenever the court has to exercise its discretion on the granting of relief, it must do so with realism and common sense, and having regard to the particular decision-making process it is considering, viewed as a whole.

115. This point is also well illustrated by the passage of the court's judgment in *Altrip* on which Ms Wigley relies. In paragraph 52 of its judgment the court observed that where the "burden of proof" is shifted on to the applicant "to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked", this is "capable of making the exercise of the rights conferred on that person by Directive 85/337 ["the EIA directive"] excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments". The court went on to say, in paragraph 53, that the new requirements of article 10(a) of the EIA directive mean that "impairment of a right cannot be excluded unless … the court … is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court … , that the contested decision would not have been different without the procedural defect …". The court continued, in paragraph 54:

> "In the making of that assessment, it is for the court … concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of [the EIA directive]."

I do not think this is in any way at odds with the principles referred to by Lord Carnwath in *Walton*. I should add that I do not approach the exercise of my discretion in this case on the basis that Mrs

Kendall is under an onus to prove anything. However, it would be wrong to approach the matter as if it was a merely theoretical exercise, performed in an evidential vacuum.

116. It is necessary, first of all, to focus on the precise nature of the breach of the SEA directive in this case. The breach can only be looked at in the context of the whole process, as it must be, once it has been seen for what it actually was. And only then can one judge whether any real prejudice flowed from it, and whether the outcome of the process might conceivably have been different if it had not occurred.

117. What then was the nature of the breach in this case? This is not a case, such as *Berkeley*, where no environmental assessment has been carried out under the regime established by the relevant directive and regulations. An environmental report was prepared – the sustainability appraisal – in which the likely significant environmental effects of the plan strategy and reasonable alternatives were identified, described and evaluated. The sustainability appraisal was produced in a timely fashion, and is legally valid. It demonstrably influenced the preparation of the allocations plan. Information on the council's decision to adopt the plan was provided in the adoption statement, explaining its reasons for adopting the plan in the light of the reasonable alternatives. Nor is this a case in which there was no formal public consultation on the environmental report. There were two rounds of public consultation under regulation 13, and the results of it were taken into account in the plan-making process. But there were, as I have held, shortcomings in that consultation – because of the council's over-reliance on its website. Both the "consultation bodies" and the "public consultees", including the general public, were consulted: the "consultation bodies" impeccably, the "public consultees" in good faith but in a less than wholly effective way. This, therefore, was a partial failure to discharge the requirements for consultation in regulation 13. To the extent I have described (in paragraphs 89 to 94 above), the council's formal consultation of the public under that regulation was not properly undertaken, and to that extent the council exceeded its broad discretion to consult the public in the way that it considered appropriate.

118. What was the context within which the breach occurred? Under section 113(4) and (11)(c) a challenge to a plan for any unlawfulness in its preparation may only be launched once the plan has been adopted. This has the advantage of enabling the court to look at the statutory plan-making process in its entirety. And in this case that is what the court should do. The relevant context here, in my view, comprises the whole history of statutory process leading to the adoption of the allocations plan.

119. The consultation conducted by the council under regulation 13 was only one component of a much larger and longer process culminating in the adoption of the allocations plan. That process continued the council's plan-making beyond its adoption of the core strategy. The core strategy had itself been subjected to environmental assessment. The draft allocations plan itself was formally consulted upon twice, and scrutinized independently at the examination hearing. Public consultation on the draft plan began some four years before adoption, when the council consulted on the potential options for allocation which were set out in the Allocations DPD Discussion and Consultation Document in March 2010. In considering ground 1 of Mrs Kendall's application I have found that the public, including Mrs Kendall, were lawfully consulted on the draft plan from the outset, and at every relevant stage. The SEA for the plan was an integral part of the plan-making process. The preparation of the sustainability appraisal ran in parallel with the preparation of the plan itself. Its role in the plan-making process was explicitly acknowledged in the Allocations Plan Submission Document (at paragraph 1.18). It was in the public domain for a substantial part of the process while the draft plan was evolving. It was publicly available as a document from the time of its production in draft in January 2012 and, after that, throughout the remaining stages of the plan-making process until the plan was eventually adopted more than two years later in February 2014 – including the formal consultation on the Allocations Plan Submission document between November 2012 and January 2013, the examination held by the inspector in September 2013, and the consultation on the council's proposed modifications between November 2013 and January 2014.

120. The reality here, as I see it, is that the plan-making process as a whole gave the public a sufficient opportunity to reflect upon and respond to the policies and allocations proposed in the draft plan in the light of the sustainability appraisal. They had the opportunity, in the course of the plan-making process,

to consider the options evaluated in the sustainability appraisal, to prepare their objections to the draft plan in the light of those options, to urge the council to reconsider its preference for the sites it had chosen to allocate in the plan or to consider any other alternatives, and to argue the case for any of those alternatives or any other options they sought to promote, both when the draft plan was discussed at an examination held by an independent inspector and when modifications to it were produced and consulted upon. On any sensible view, I think, this was to afford the public effective participation in the plan-making process, consistent with the objectives of the SEA directive and the rights it enshrines.

121. This does not mean that there was no breach of the SEA directive, only that any harm done by the breach that did occur was, in my view, fully repaired within the plan-making process itself and well before the plan's eventual adoption. The breach, such as it was, did not result in Mrs Kendall or anyone else being denied the substance of any right arising under European law. It did not frustrate the essential aim of the SEA directive, expressed in article 1, "Objectives" – namely "to provide 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 … an environmental assessment is carried out …". Nor did it constitute a substantial failure to allow Mrs Kendall or anyone else to participate in the process, or to have their say within it – as is envisaged in two of the recitals:

> "(15) In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion."

and

> "(17) The environmental report and the opinions expressed by the relevant authorities and the public … should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

122. On all the evidence and submissions now before the court, can it be concluded that there was any substantial prejudice to Mrs Kendall – the sole claimant in these proceedings – or to any other individual member of public? In my view it cannot. Mrs Kendall took part in the plan-making process. There is no evidence from which it could properly be inferred that in preparing and pursuing her objections to the draft allocations plan she was significantly prejudiced by the defects I have found in the council's formal consultation under regulation 13. She objected to some of the proposals in the draft plan and put forward a number of alternatives to them, all of which the inspector considered. In paragraph 1 of her third witness statement she says that she "would have considered it important to [her] at the time of making [her] submissions on the Allocations Plan to have had the Council's reasons for its preferred options and what other options had been considered explained to [her] through the SA/SEA process and to have been given an opportunity to respond to those reasons in [her] submissions, drawing on [her] local knowledge of the area having lived in Rayleigh for the past 40 years". In paragraph 7 she says that at the time when she submitted her online response to consultation on the draft allocations plan in January 2013, "but preferably earlier", it would have been "of interest" to her to know about the sustainability appraisal and to know that she "could have made comments on the reasons given for the choices made in the plan and the alternatives considered", and that she would have done so. She does not expand on this. She does not say that if she had had been aware of the formal consultation on the draft allocations plan together with the sustainability appraisal she would have expressed her objections to the draft plan in a materially different way. She does not say what change or addition, if any, she might actually have wanted to make to those objections, or to the representations she made to the inspector, or to what she said at the examination hearing. And there is no evidence of that kind from anyone else.

123. Is it conceivable that the outcome of the plan-making process would have been different if the breach had not occurred? I cannot believe that it is. The way I have put this question corresponds to what the court said in paragraph 52 of its judgment in *Altrip*. But if the touchstone here is whether the council has shown that the outcome would inevitably have been the same, my answer is no different. I am satisfied that the outcome would inevitably have been the same. I see no reason to think that Mrs Kendall or anyone else might have put forward a significantly different case in opposition to the allocations proposed in the plan. But that is not the crucial question here. The crucial question is whether a different plan might have emerged. I do not accept that it might. I think it is impossible to imagine that if the council had complied perfectly with the requirements for consultation of the "public consultees" under regulation 13, as well as complying – as I have held it did – with the statutory requirements for consultation on the draft plan itself, it might have promoted a different draft plan at the examination, or that the inspector might have come to a different conclusion on the soundness of the allocations in that draft plan and the modifications required to it, or that in the end a different plan might have been adopted.

124. In my view therefore, this is not a case in which any real prejudice, let alone substantial prejudice, has arisen either to Mrs Kendall's interests or to anybody else's, and there is no basis upon which the court could realistically conclude that the outcome of the plan-making process would have been other than exactly the same as it was if the breach of the SEA directive had not occurred.

125. Would there be prejudice to the public interest if the relief sought by Mrs Kendall is granted – albeit not countervailing prejudice in the sense of its having to outweigh some prejudice to Mrs Kendall? Clearly there would, for the reasons given by Mr Lopez. It would be measured in the delay and expense entailed in repeating the part of the plan-making process by which Mrs Kendall is aggrieved, and the repercussions for development control while that is going on. The harm to the public interest, not least in Rayleigh, in having only part of the allocations plan in place while proposals for development continue to come forward is obvious. In my view, therefore, the balance of prejudice in this case is firmly tipped against relief being granted.

126. To strike down an adopted plan, whether in whole or in part, is always a draconian step for the court to take. Sometimes, of course, it has to be done. The facts and circumstances of every case where there has been some breach of European legislation for environmental assessment will be different. But in the particular circumstances of this case, which are no doubt unusual, I am sure it is neither necessary nor appropriate to grant a remedy, even in the relatively limited form now contended for by Ms Wigley. To do that here would be disproportionate, and wrong. Therefore, applying the modern law on discretion as illuminated by the Supreme Court in *Walton*, I regard this as one of those cases in which it is right to withhold relief.

127. Finally, I should add this – obvious though it may be. Even in this era of electronic communication, my judgment here should not be seen as encouraging local planning authorities, when consulting the public under the SEA regulations, to rely on their websites in the way the council did. I do not seek to do that. But, as I have said, in this instance the council's errors were not such as to vitiate either the environmental assessment itself or the plan-making process as a whole.

Conclusion

128. For the reasons I have given, Mrs Kendall's application is dismissed.