Neutral Citation Number: [2011] EWHC 606 (Admin)

Case No: CO/6882/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2011

Before :
Mr Justice Collins
- - - - - - - - - - - - - - - - - - - -
Between :

(1)Save Historic Newmarket Ltd **(2) Tattersalls Ltd** **(3) Unex Group Holdings Ltd** **(4) Jockey Club Estates Ltd** **(5) Newmarket Trainers' Federation** **(6) Godolphin Management Company Limited** **(7) Darley Stud Management Company Ltd**	Claimants
- and -	
(1) Forest Heath District Council	Defendants
-and-	
(2) Secretary of State for Communities & Local Government	
-and-	
Edward Richard William Stanley, 19th Earl of Derby **("Lord Derby")**	Interested Party

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr David Elvin, Q.C. & Mr Charles Banner (instructed by **Ashurst LLP**) for the **Claimants**
Mr Mark Lowe, Q.C. & Mr Michael Bedford (instructed by **the Solicitor to the Council**) for the **First Defendant**
Mr Jonathan Karas, Q.C. (instructed by **Lawrence Graham**) for the Interested Party

Hearing dates: 22 & 23 February 2011
- - - - - - - - - - - - - - - - - - - -
Judgment
As Approved by the Court

Mr Justice Collins:

1. This claim is brought pursuant to s.113 of the Planning and Compulsory Purchase Act 2004. It seeks to quash to the extent the court considers appropriate the Forest Heath Core Strategy (FHCS) which was adopted by the first defendant on 12 May 2010. The policies in the FHCS which are under attack relate to what is described as an urban extension to the north-east of Newmarket for approximately 1200 dwellings as part of a mixed use development. That development is intended to take place over 20 years.

2. The claimants' main concern is that the development will have a seriously adverse effect on the horse racing industry. Newmarket is recognised as being what is described as the capital of the horse racing industry in national and international terms. Apart from the presence of the Jockey Club and Tattersalls and the National Stud, both outside and within the town limits there are many training establishments and so movements of valuable race horses inevitably clash with those of vehicles. Thus any increase in traffic generated by a development may have serious effects. Some 20% of residents are employed in the horse racing industry and any damage to it would be disastrous. This, to be fair to the Council, is recognised in the Core Strategy, but the concern of the claimants, all of whom have an interest and are persons aggrieved, is that the urban extension will have a seriously adverse effect on the industry.

3. Since it is and has always been recognised that the bulk of the proposed development will be on land known as Hatchfield Farm owned by the Interested Party, he applied to be and was joined in these proceedings on 15 September 2010. He supports the first defendant in resisting this claim.

4. Under the 2004 Act, a Development Plan comprises a Regional Spatial Strategy (RSS) and a Local Development Framework (LDF). The LDF itself has a number of components. The relevant one is the Core Strategy. This, like all LDF documents, must be in general conformity with the RSS. It is what is described as a Local Development Document (LDD) within the meaning of s.17 of the 2004 Act. By s.17(3) a local planning authority's LDDs 'must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area'. The definition of a Core Strategy and its designation as an LDD document is achieved by Regulation 6 of the Town and Country Planning (Local Development)(England) Regulations 2004 (SI 2004 No.2204).

   Regulation 6(3) provides that a document of the description in Paragraph (1)(a) is to be referred to as a Core Strategy. Regulation 6(1)(a) refers to any document containing statements of –

   > "(i) the development and use of land which the local planning authority wish to encourage during any specified period;
   >
   > (ii) objectives relating to design and access which the local planning authority wish to encourage during any specified period;
   >
   > (iii) any environmental, social and economic objectives which are relevant to the attainment of the development and use of land maintained in paragraph (i);

> (iv) the authority's general policies in respect of the matters referred to in paragraphs (i) to (iii) …"

5. As their title suggests and the definition in regulation 6(1) indicates, Core Strategies are intended to contain more general policies looking to objectives rather than site specific developments. In PPS12, which discusses local spatial planning, guidance is given in the following terms:-

> "4.5. It is essential that the Core Strategy makes clear spatial choices about where developments should go in broad terms. This strong direction will mean that the work involved in the preparation of any subsequent DPDs is reduced. It is also means that decisions on planning applications can be given a clear steer immediately.
>
> 4.6. Core strategies may allocate specific sites for development. These should be those sites considered central to achievement of the strategy. Progress on the Core Strategy should not be held up by inclusion of non strategic sites."

In 4.7 the point is made that the Core Strategy looks to the long term and in general will not include site specific detail. It may be preferable for a site area to be delineated in outline rather than detailed terms and the detail can be dealt with in subsequent planning documents which do deal with the particular in the light of the general approach set out in the RSS and the Core Strategy.

6. The present system is due to be changed. However, until that happens, it has to be followed. Furthermore, even when the system is changed the Core Strategy will still exist as a development plan within the meaning of s.38 of the 2004 Act. S.38(6) provides that if regard is to be had to any development plan, any determination must be made in accordance with that plan unless material considerations indicate otherwise. Whatever the future holds, until amended, it will inevitably remain as a material consideration.

7. The challenge is brought on two grounds. First it is said that there was a failure to comply with the relevant EU Directive and the Regulations made to implement it in that the strategic environmental assessment (SEA) did not contain all that it should have contained. This if established would render the policy made in breach unlawful whether or not the omission could in fact have made any difference. That, as is common ground, is made clear by the decision of the House of Lords in *Berkeley v SSE* [2001] 2AC 603. Although *Berkeley* concerned an EIA, the same principle applies to a SEA. To uphold a planning permission granted contrary to the provisions of that Directive would be inconsistent with the Court's obligations under European Law to enforce Community rights. The same would apply to policies in a plan.

8. The second ground asserts that there was a procedural defect. It is said that some technical documents, in particular a Transport Impacts Study, a strategic flood risk and water cycle study and an affordable housing viability study were produced after the consultation period prior to the examination held before an inspector to decide whether the Core Strategy should stand as the Council proposed or should be modified. This meant that persons who might have been concerned if they had seen those studies were deprived of the opportunity of commenting on them. Since only

those who had made representations during the consultation exercise were permitted to appear at the examination, some may have wanted to but been unable to appear at and call evidence before the inspector.

9. S.113(3) of the 2004 Act enables a person aggrieved to make an application to this court in respect of a relevant document on the ground that

> "(a) the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with."

S.113(6) enables the court to quash the relevant document wholly or in part and generally or as it affects the property of the applicant if the 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."

There is thus no need to show prejudice to the applicant if s.113(6)(a) applies, but it is required if there is a procedural failure. Since the claimants accept that they had the documents in question and were able to deal with them at the examination the question whether they have suffered substantial or indeed any prejudice has obviously to be considered.

10. I shall consider first the claim that there was a breach of the Directive and the Regulations. The Directive in question is 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. This has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No.1633)(the 2004 Regulations). The Directive in paragraph (4) of the preamble identifies the importance of environmental assessment as a tool for integrating environmental considerations into the adoption of certain plans and programmes. That the Directive and the Regulations apply to the preparation of a Core Strategy is recognised by all parties. Paragraphs (14) & (15) of the preamble provide as follows:-

> "(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme; Member States should communicate to the Commission any measures they take concerning the quality of environmental reports.

> (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."

11. The objectives are spelt out in Article 1. It provides:-

> "The objective of the Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to permitting sustainable development, by ensuring that, in accordance with the Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

Article 2(b) defines an environmental assessment to mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9. Since the urban extension in question is likely to have significant environmental effect and comes within Annex II to Directive 85/337/EEC as amended which applies to the assessment of all public and private projects which are likely to have significant effect on the environment, there is no doubt, and the contrary is not argued, that the requirements set out in the 2004 Directive had to be fulfilled. Article 5 is of central importance since it sets out what an environmental report must contain. It provides:-

> "1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex 1.
>
> 2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
>
> 3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex 1.

> 4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report."

The information required by Annex 1 includes the likely significant effects on the environment, the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme and, most importantly, by (h):-

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

12. Article 12(2) requires Member States to ensure 'that environmental reports are of a sufficient quality to meet the requirements of this Directive …'. Quality involves ensuring that a report is based on proper information and expertise and covers all the potential effects of the plan or programme in question. In addition, since one of the purposes of the Directive is to allow members of the public to be consulted about plans or programmes which may affect them, the report should enable them to understand why the proposals are said to be environmentally sound. To that end, the report must not only be comprehensible but must contain the necessary information required by the Directive. The Directive by Article 6(2) requires that the public likely to be affected must be given an effective and early opportunity within appropriate time frames to express their opinion on the plan or programme and the accompanying environmental report before the adoption of the plan or programme. As must be obvious, a Core Strategy will develop over a period of time. The usual practice, which was followed in this case, would be to consult on various draft proposals until the LPA was able to decide what it wanted to put in place.

13. In this case, the process commenced in March 2005. I shall have to refer to the relevant documentation in due course. It was not until March 2009 that the council put forward its final proposals which were to go before an inspector. These were put to any member of the public who wished to make representations and who might want to appear before the inspector. His decision would be final in the sense that he could approve or modify the Core Strategy. If he decided any modifications were needed, the council could either implement the Core Strategy as modified or decide not to implement it in which case the process would have to start again.

14. The 2004 Regulations largely follow the language of the Directive. Regulation 5 requires the carrying out of an environmental assessment where the first formal preparatory act of a plan or programme to which the Regulations apply is on or after 21 July 2004. Regulation 13(1) requires that every draft plan or programme for which an environmental report has been prepared and its accompanying environmental report must be made available for the purposes of consultation to all those whom the LPA considers are or are likely to be affected by or have an interest in the decisions involved in the assessment and adoption of the plan. This can be and was done by use of the Council's website. Regulation 12 sets out what the assessment must contain. It must identify 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 (Regulation 12(2)(a) and (b)). It

must also contain the information set out in Schedule 2, which reflects Annex 1 to the Directive (Regulation 12(3)). Paragraph 6 of Schedule 2 sets out a comprehensive list of the various significant effects which must be identified. It reads:-

> "The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues such as-
>
> (a) Biodiversity;
>
> (b) population;
>
> (c) human health;
>
> (d) fauna;
>
> (e) flora;
>
> (f) soil;
>
> (g) water;
>
> (h) air;
>
> (i) climatic factors;
>
> (j) material assets;
>
> (k) cultural heritage, including architectural and archaeological heritage;
>
> (l) landscape; and
>
> (m) the inter-relationship between the issues referred to in sub-paragraphs (a) to (l)."

15. In its guidance on implementation, the EU Commission said this in paragraphs 4.6 and 4.7:-

> "4.6 If certain aspects of a plan or programme have been assessed at one stage of the planning process and the assessment of a plan or programme at a later stage of the process uses the findings of the earlier assessment, those findings must be up to date and accurate for them to be used in the new assessment. They will also have to be placed in the context of the assessment. If these conditions cannot be met, the later plan or programme may require a fresh or updated assessment, even though it is dealing with matter which was also the subject of the earlier plan or programme.
>
> 4.7 It is clear that the decision to reuse material from one assessment in carrying out another will depend on the structure of the planning,

> the contents of the plan or programme, and the appropriateness of the information in the environment report, and that decisions will have to be taken case by case. They will have to ensure that comprehensive assessments of each element of the planning process are not impaired, and that a previous assessment used at a subsequent stage is placed in the context of the current assessment and taken into account in the same way. In order to form an identifiable report, the relevant information must be brought together: it should not be necessary to embark on a paper-chase in order to understand the environmental effects of a proposal. Depending on the case, it might be appropriate to summarise earlier material, refer to it, or repeat it. But there is no need to repeat large amounts of data in a new context in which it is not appropriate."

As the second half of 4.7 makes clear, the final report may rely on earlier material but must bring it together so that it is identifiable in that report. This is consistent with the requirement that members of the public must be able to involve themselves in the decision-making process and for that purpose receive all relevant information. It cannot be assumed that all those potentially affected would have read all or indeed any previous reports (in the context of this claim previous environmental assessments).

16. The process adopted is in the planning jargon described as iterative. Thus it is open to an authority to reject alternatives at an early stage of the process and, provided that there is no change of circumstances, to decide that it is unnecessary to revisit them. That is what the Council did in this case. But the claimants submit that it has not in any of the SEAs which it produced given its reasons for deciding to reject the alternatives and that in any event it has failed properly to refer to the necessary information so as to enable the person affected to find it. In addition, initially when the alternatives were rejected the proposal was for 500 dwellings over a 15 year timescale but this was subsequently increased to 1000 and then 1200 when the housing provision was extended over a further 10 year period. That at any rate was what I was told. While the extension of time may explain the increase, the effect of 1200 as the end result will be greater than that of 500 and the effect of 500 could be considered and would be likely to be material in deciding whether any increase was desirable in environmental terms.

17. It is clear from the terms of Article 5 of the Directive and the guidance from the Commission that the authority responsible for the adoption of the plan or programme as well as the authorities and public consulted must be presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option (See Commission Guidance Paragraphs 5.11 to 5.14). Equally, the environmental assessment and the draft plan must operate together so that consultees can consider each in the light of the other. That was the view of Weatherup J in the Northern Irish case *Re Seaport investments Ltd's Application for Judicial Review* [2008] Env. LR 23. However that does not mean that when the draft plan finally decided on by the authority and the accompanying environmental assessment are put out to consultation before the necessary examination is held there cannot have been during the iterative process a prior ruling out of alternatives. But this is subject to the important proviso that reasons have been given for the rejection of the alternatives,

that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary, by repeating them, to know from the assessment accompanying the draft plan what those reasons are. I do not think the *Seaport* case, which turned on its own facts including the lapse of time of over a year between the assessment and the draft plan, can provide any further assistance.

18. It is accordingly necessary to follow the documentation, bearing in mind that the required information must be contained in the environmental assessment which accompanies the draft plan. In its statement of Community Involvement produced in October 2004 (although entitled a draft statement, there was no other and so it was treated as final) the Council described how it would conduct the necessary consultative process. It stated (p 7 of the Statement):-

> "Consultation methods
>
> When we submit a development plan document for independent examination to the Secretary of State we will publish a notice and invite representations to be made within a specified period of six weeks. We will also send two copies of the development plan document and the following documents to the Planning Inspectorate:
>
> - The final report of the sustainability appraisal
> - Any supporting technical documents such as the urban capacity study and housing needs surveys
> - A copy of the Statement of Community Involvement
> - A statement of compliance, which should also indicate how we have addressed the main issues raised in representations received."

The sustainability appraisal included the environmental assessment.

19. The first draft document was produced in March 2005. It described itself as Initial Strategic Environmental Assessment Report and Sustainability Appraisal and Scoping Report Consultation Draft. In paragraph 1.3, its approach is described thus:-

> "The requirement to carry out a Sustainability Appraisal and a Strategic Environmental Assessment are distinct. However, Government guidance states that it is possible to satisfy both through a single appraisal process. This is the approach the District Council intends to take with the Forest Heath LDF. This document is both a sustainability appraisal and a strategic environmental assessment, but hereafter it will be referred to simply as a 'sustainability appraisal' on the basis that this is the more comprehensive and inclusive term."

In 1.4 it is described as the first stage of the sustainability assessment (SA) of the emerging Local Development Framework. This includes the Core Strategy. In Paragraph 19, the national and international importance of Newmarket is recognised. In Paragraph 36, under the heading 'unique heritage of Newmarket' it is noted that Newmarket is the only place in the world which still has horseracing stables operating in and around the town centre. Thus, one of the purposes of the LDF will be to safeguard 'the unique character of Newmarket and historic racecourse racing grounds'.

20. Since this was a scoping report, it indicated what in general terms was the scope of the issues that needed to be addressed. It recognised the need to protect the unique character of Newmarket as the centre of the horseracing industry and the numerous stables and training establishments in and around the town. It also recognised that there would be a need to take some greenfield sites to meet the future increase in housing which would be required.

21. Between March and July 2005 the Council prepared an issues and options paper together with an associated SA. This was published in September 2005. The question posed was where new development should go. The key question was whether most new development should go to Newmarket or whether it should be spread more evenly between Brandon and Mildenhall, the two other market towns within the Council's area. Further, should new development be allocated for the larger villages which were identified? Should other villages be included? Further, and specifically to Newmarket, an issue identified was to ask what role it should have in accommodating the demand for new development. Five options for a Core Spatial Strategy were identified. They were:-

> 1. Should the majority of new developments be directed to Newmarket because it is the most sustainable settlement in the District?
>
> 2. Should there be a more even spread of development between the three market towns of Brandon, Mildenhall and Newmarket?
>
> 3. Should development be spread between the three market towns and some or all of the sustainable villages?
>
> 4. Should development be spread between the three market towns and some or all of the sustainable villages plus other villages?
>
> 5. Should the vast majority of development be concentrated on a single new settlement … with very limited development in any of the towns or sustainable villages?

There was also raised as an issue whether residential development on greenfield sites should be preferred if the national and regional target of 60% brownfield development was not being met in the District.

22. Under Housing, issue 17 asked what number/proportion of new dwellings should go to the three towns and what number/ proportion in the villages. One question not asked was how the total number of new dwellings required should be split between

the individual towns or villages depending on which of the alternatives 1 to 5 set out above was chosen.

23. The accompanying SA was in a form which was used in every SA produced in the iterative process. A matrix set out the various options which were then given a score from 1 to 5. 1 represented the option considered most in line with sustainable development, 5 the least. Reasons for the various choices were said to be given. The best option (given 1) for the location of main development was that it should be spread between the three market towns and sustainable villages. This was because it would be most in line with the RSS objective. Question 28 asked whether the established use of horse racing land/buildings in Newmarket should be protected in order to produce the unique character and economy of the town. The public response to those issues was to prefer the option of spreading new development mainly to the three market towns and to agree that the horse racing land and buildings must be protected.

24. Following consideration of the responses, in August and September 2006, the Council published an SA of the preferred options. The SA set out in Table 1 how it was said there was compliance with the requirements of the Directive as to what had to be contained in an SEA. It was said that the likely significant effects on the environment, the measures envisaged to offset possible significant adverse effects and 'an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information' were all in Section 6 of the document. This was a table which set out against each policy the number of objectives upon which that policy would have an impact ranging from a major positive impact through to a major negative impact. In addition, if the impact was neutral or unknown, that was recorded.

25. Policy 23 was the relevant policy in the Table, headed 'Scale and Location of Housing provision: Whole Policy'. Overall, as the comments stated, the policy was said to be 'slightly beneficial but some uncertainty and negatives relate to environmental objectives …'

26. Table 17 (part of the 2006 SEA) set out the proposed number of dwellings in each location deemed appropriate. Newmarket's allocation was 500 altogether of which 400 were to be on 'land east of Fordham Road at Hatchfield Farm'. In answer to the question whether the housing should be spread more or less equally between the 4 main settlements (in addition to the 3 market towns a settlement at Red Lodge could take a considerable number of new dwellings) it was said that 41% to Newmarket with 33% to Red Lodge, 15% to Mildenhall and 11% to Brandon reflected the sustainability of the biggest settlement, Newmarket and the aspirations of the Red Lodge masterplan.

27. The preferred options paper stated that as Newmarket was the most self sufficient and hence the most sustainable town in the District, the priority would be to allocate as much new development at Newmarket as possible, balanced by the need to protect its unique character and its landscape setting. Preferred Policy 2 was to direct the majority of new development to the three market towns. Preferred policy 22 (referred to in the SA as 23) proposed the development of 5,341 dwellings between 2006 and 2021. The allocation for Newmarket was to be about 700 dwellings and, in addition,

more specifically, 'a Greenfield urban extension to the north east of Newmarket (500 dwellings) as part of a mixed use development, subject to highway improvements to the A141/A142 junction'. It was said that at least 60% of the overall allocation in the District would be on previously developed land.

28. Under the heading 'Alternative approaches considered (Paragraph 3.4.5) this is said:-

> "The District's housing requirement is decided by the RSS. The District Council supported the draft requirement at the examination in public (EIP) but indicated that this was considered to be the upper limit of what could be delivered sustainably. At the issues and options consultation broadly supported this approach. Issues such as the windfall and non-implementation allowances are based on past evidence.
>
> The broad locational aspects of policy 22 are based on policy 2 and the alternatives considered at the issues and options stage are outlined in the policy 2 section. The approach taken in policy 22 needs to be in general conformity with higher level plans, particularly RSS14, and to take account of the local evidence base, particularly the urban capacity study. The following key factors have been influential in rejecting alternative approaches.
>
> - Of all the settlements Newmarket has the best range of services/facilities and employment opportunities. However, there are limited opportunities for further development without a Greenfield urban extension to the development boundary.
>
> - The urban capacity study (UCS) demonstrates that Red lodge could accommodate a significant proportion of dwellings within the existing development boundary. This is based on implementing previous allocations in the existing Local Plan which had planned on Red Lodge being regenerated to become a key service centre.
>
> - Table 2 shows that the key service centres are providing a higher proportion of dwellings from unimplemented planning permissions than the towns. If overall (between 2001-2021) the majority of dwellings are to be accommodated in the towns, than there needs to be a high proportion of allocations in the towns to redress the balance."

29. Those reasons are not in the SEA. The alternatives considered under Policy 2 are the five set out in paragraph 21 above. I should add that the need to protect the horse racing industry is emphasised in the document.

30. In July and August 2008 the Council produced what are entitled its final policy options and an accompanying SA. Option CS2 provided that Greenfield land would be allocated as an urban extension to the north west (sic) of Newmarket for approximately 1000 dwellings as part of a mixed use development subject to highway improvements to the A14/A142 junction to be built between 2010 and 2020". What

had previously been described as land to the north east in proposed policy 22 of the September 2006 document was the same as that now said to be the north west of the town. The adopted plan refers to the land as being to the north east. Thus the reference in option CS2 was erroneous, which is unfortunate. The whole of CS2 was new and had not been the subject of consultation. The increase from 500 to 1000 is obviously material since the result is taken to 2020. This seems to be the year before the total of 500 was earlier supposed to be met and so the explanation that the increase was to meet an increase in the years over which the target was to be met does not seem to be correct. Whichever it be, there was, as I have said, on any view a material change of circumstances which should have been addressed in the SA. However, policy CS7 allocated for greenfield development 500 between 2010 and 2015 and 500 between 2015 and 2020.

31. In March 2009 the Council produced its policies which it proposed to submit to the inspector together with a SA. Policy CS1.7 stated:-

> "Greenfield land will be allocated as an urban extension to the north east of Newmarket to approximately 1200 dwellings as part of a mixed use development subject to any necessary highway improvements along Fordham Road to the High Street and improvements to the A14/A142 junction to be phased between 2010 and 2031."

As can be seen, this differed from what had been in CS2 in the 2008 "final" options in an increase from 1,000 to 1,200, an extension of the period from 2020 to 2031 and required improvements to Fordham Road. Policy CS7, which dealt with overall housing provision, indicated a minimum provision in the district of 6,400 dwellings and a further 3,700 between 2021 and 2031. For Newmarket on the Greenfield sites (i.e. that in question in this case) there were proposed 500 between 2010 and 2015, 500 between 2015 and 2020 and 200 in each of the periods 2020 to 2025 and 2025 to 2031.

32. The accompanying SA, should have contained all the material required by the Directive and the Regulations. The appraisal methodology is described in Paragraph 2 and in 2.1 we find this:-

> "Stage B: Developing and refining options and assessing effects
>
> The draft Core Strategy was developed in 2005 and a Sustainability Appraisal (SA) undertaken of five alternative approaches. In September 2005 the draft Core Strategy and SA were published for consultation. The results of these consultations have assisted the development of a set of preferred options.
>
> During 2006 the Preferred Options for the Core Strategy and the Site Specific issues and Options were prepared. The Preferred Options have been subject to an SA/SEA and both documents were consulted on in October 2006.

> In 2008 the Core Strategy Final Policy Option document was published. The Final Policy Option was subject to an SA/SEA which was consulted on in August/September 2008."

The documents referred to were on the Council's website and could, it is said, have been brought up by any interested consultee. It is to be noted that under Stage E, the Council said that it would consult on the documents 'and deal with appraising significant changes'.

33. As to the previous SA, it is said that all required information is to be found in Section 6. At the outset of Table 1, which is headed 'Compliance with requirements of the SEA Directive', this is stated as a requirement of the Directive:-

> "Preparation of an environmental report in which likely effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and geographical scope of the plan or programme, are identified, described and evaluated."

In the column headed 'Compliance' against this are the words 'This report'. Thus any consultee would expect the report to contain all that was cited above. But nowhere does it identify or evaluate reasonable alternatives or explain why they are rejected in favour of what is proposed.

34. Section 6 contains Table 4 headed 'Appraisal Summary of Core Strategy Policies'. It is in the same form as that contained in the 2008 SA. Nothing is said under housing (Policy 7) about alternatives, nor is it explained why the increase in numbers from 500 to 1,000 to 1,200 had been decided and whether the effect, which is obviously greater, would make any difference in the evaluation carried out in the SA.

35. In responding to the consultation, the Interested Party asked that the plan should identify Hatchfield Farm as the strategic allocation to the north east. Internal Council reports dealing with this are relied on by Mr Elvin. The response suggested by a report of the Strategic Directive to the Local Development Working Group of 8 July 2009 was that the 'expansion north east of Newmarket should be kept as a broad location rather than allocated as a strategic site.

The response continued:-

> "For it to be identified as a strategic site it would need to have been tested against all other reasonable alternatives. The Council would also need to include the specific infra-structure requirements of any strategic sites which are allocated which again has not been done in absolute detail. Any change to promote land north east of Newmarket as a strategic site would lead to the holding up of the Core Strategy, as the further testing of alternatives and the preparation of a specific infrastructure requirement were undertaken. This would conflict with the requirements of PPS 12 that progress on the core strategy should not be held up by the inclusion of non strategic sites. The approach adopted has been agreed with the Government Office."

36. In fact, when the Interested Party made the point that Hatchfield Farm should be specified as the site for the urban development, the officers took the view that Go-East should be asked for its advice. On 22 December 2008 Marie Smith, who is the Forward Planning Manager employed by the Council, e-mailed Go-East. In it, she said this:-

> "Due to the nature of Newmarket which is constrained/protected almost entirely by the horse racing policies, the only suitable site which could reasonably come forward is Hatchfield Farm.
>
> With this in mind, the Council would like to pursue a Strategic Site rather than a broad location which will eventually form a site within the Site Specific Allocations anyway. However, I am conscious that I have not consulted on 'Strategic Sites' throughout the issues and options stage. Would the Council be able to pursue such a proposal coming forward in the proposed submission consultation following the Final Policy Option consultation and the representations received?
>
> If I cannot pursue this option, do I use PPS 12 Paragraphs 4.6 and 4.7 which further state that a Core Strategy can allocate Strategic Sites as long as it does not delay the Core Strategy process?"

37. In her witness statement, Ms Smith says (paragraph 86) that she did not receive a written reply but was telephoned and (although she made no notes of the conversation at the time) she recalled that 'the discussions related to the detailed evidence that would be needed to support a site allocation, which would delay the submission of the Core Strategy, rather than to any alleged inadequacies in the existing SA/SEA work'. She also says that saying Hatchfield Farm was the only suitable site was not accurate because it 'overlooked the existence of other land in the vicinity which would also be part of the urban extension (such as the George Lambton Playing Fields) and it ignored the fact that not all of the Hatchfield Farm site might be needed'. She says that the reference cited in Paragraph 35 above to the need for testing against reasonable alternatives was not a reference to testing the principle of urban extension against reasonable extensions which had, she says, been done as part of the SA/SEA work in 2005 and 2006. It was a reference to whether the site eventually allocated should be all or some parts only of Hatchfield Farm with other land in the vicinity.

38. Mr Elvin argued that because the Council had initially and indeed in answer to the interested party's representations indicated a wish to refer to Hatchfield Farm by name, the reason for its removal was because it was believed that it avoided a need for the SA to include an assessment of alternatives. I see no reason to doubt Ms Smith's evidence that that was not the position. However, there is a degree of artificiality in the way the Council have dealt with this since the area (which includes Hatchfield Farm) proposed for the development is very close to being specific. Certainly if not the whole a large part of Hatchfield Farm will be used. Thus the need for a proper consideration of any alternatives and of the effects of the increases in the number of dwellings is all the more important.

39. In her statement (Paragraphs 88 and 89), Ms Smith asserts that the increase in the scale of residential development did not alter the principle as to the choice of the proposed location compared to reasonable alternatives. She and other officers did

consider the implications of the changes but concluded that there were no realistic alternatives to the spatial strategy that had already been identified. While that view may have been justified, it should have been dealt with and reasons given in the SA why it had been taken,

40. In my judgment, Mr Elvin is correct to submit that the final report accompanying the proposed Core Strategy to be put to the inspector was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements of the Directive and so relief must be given to the claimants.

41. The second ground can be dealt with more briefly. I will assume because I do not need to decide that the need for a Transport Study should have been appreciated by the Council so that it was at fault in not obtaining one earlier. I make it clear that I am not deciding that there was any fault. But albeit it came later it was dealt with by the claimants in the course of the examination. Thus there was no direct prejudice to them in the failure to put it in the general consultation before the hearing.

42. It is submitted that there was prejudice because others who did not see it might, if they had, have wished to make representations and so were unable to involve themselves in the examination. I am prepared to accept the possibility of prejudice to a party who has failed to succeed before an inspector where others have been prevented by a procedural defect from appearing. However, it is impossible to see how there would be any prejudice where the matter not put to consultation has been dealt with by the party unless there is something which could have been put by whoever was unable to appear, which was unknown to the party in question and which might have affected the result.

43. In this case, there is no evidence that anyone might have wanted to appear nor that there could have been any additional matter which was not dealt with by the claimants and which could have been advanced. Certainly there can be no sensible suggestion that there was any additional material which might have affected the result. Thus there was no prejudice and so the procedural defect (if there was one: it is very doubtful that there was) cannot avail the claimants. The second ground I reject.

44. However, the claimants succeed on their first ground. I shall hear counsel on the order I should make as a result.