



Neutral Citation Number: [2012] EWHC 1411 (QB)

Case No: CO/735/2011

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/05/2012

**Before:**

**MR JUSTICE WILKIE**

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**The Queen on the Application of:**

**Abdul Wakil (t/a Orya Textiles) and Others**

**Claimant**

**- and -**

**London Borough of Hammersmith & Fulham**

**Defendant**

**Orion Shepherd's Bush Limited**

**Interested**  
**Party**

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**Gregory Jones QC and Annabel Graham Paul** (instructed by **Webster Dixon LLP**) for the  
Claimant

**Russell Harris QC and Richard Turney** (instructed by **LB Hammersmith & Fulham Legal Services**) for the Defendant

Hearing dates: 15 & 16 May 2012  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**MR JUSTICE WILKIE**

**Mr Justice Wilkie:**

**Introduction**

1. The thirteen Claimants are freehold or leasehold owners of various trading premises between 30-52 Goldhawk Road W12, which is a terrace of shops, cafes and restaurants fronting onto Goldhawk Road in Hammersmith. They adjoin but do not form part of Shepherd's Bush Market. Most of them do not have English as their first language and all are members of ethnic minority racial groups.
2. The Defendant is the local planning authority for the area. It produced and adopted on 27<sup>th</sup> October 2010 a document which purported to be a Supplementary Planning Document (SPD). That decision is the subject of this challenge. The Interested Party (Orion) is a developer who has now obtained outline planning permission for the regeneration of Shepherd's Bush Market but plays no active role in these proceedings.
3. The grounds of the application for Judicial Review fall within the following categories:
  - (i) There are alleged failures in respect of the consultation procedure.
  - (ii) It is said that the document which was adopted was not in conformity with the relevant development plan document which was the unitary development plan number SBTC3.
  - (iii) It is said that the document the subject of the decision is not, in substance, an SPD under the 2004 Regulations but is in an Area Action Plan which, being a "development plan document" (DPD), should have been subjected, before adoption, to a different procedure which would involve submitting it to the Secretary of State for independent assessment.
  - (iv) It is said that, whether or not the document was a DPD or an SDP, it should have been subject to a Sustainability Appraisal and/or a Strategic Environmental Assessment (SA and/or SEA) and/or that the defendant should have considered whether it should be subject to either of these assessments.
  - (v) It is said that the Council failed to comply with its then duty under section 71 of the Race Relations Act 1976 to have due regard to the need to eliminate unlawful discrimination and victimisation and or to promote equality of opportunity and good relations between persons of different racial groups.

**Background and History**

4. In December 2009 the Defendant produced a planning brief to guide the intended enhancement of Shepherd's Bush Market and the surrounding area. It stated that its aim included:

"to renovate and improve the physical fabric of the existing markets to ensure their long term viability and vibrancy as an iconic destination and to include new shops cafes and restaurants in the development mix with opportunities for independent businesses on the Goldhawk Road frontage to relocate".

5. Within that document there was included a plan entitled "Development Guidelines" which referred to:

"mixed use development with retail and leisure on most ground floors and residential/offices above" and, in respect of the Goldhawk Road frontage, said "building height along this frontage to be appropriate to the general scale of Goldhawk Road i.e. four or five storeys".

6. The planning brief referred to the fact that a survey, to gauge the views of local residents, businesses and traders, was to be undertaken by M & N Communications on behalf of the defendant. M & N did conduct such a survey. To do so it used a survey document which was appended to the M & N consultation report, dated 3 February 2010, to which I will return. The survey document envisaged that one of the categories of consultee which would be part of the survey was "business on Goldhawk Road". In the survey document, the regeneration was described in the following terms:

"the Council proposes the enhancement of the Markets and the development of the surrounding land as a vibrant new mix of small shops, market stalls, leisure uses (such as cafes and bars), housing and offices".

7. It is said by the Defendant that a letter dated 4<sup>th</sup> December 2009 was sent to the business owners on the Goldhawk Road frontage. It was headed "An important letter to Goldhawk Road businesses from H & F Council". It indicated, in clear terms, that it was updating them on the Council's aim to bring substantial improvements to Shepherd's Bush Market and the surrounding area. The Defendant wanted to ensure that valued existing businesses remain as part of the mix and sought their views. In particular it said:

"We believe there would be advantages if we included businesses currently located between 30-52 within the regeneration area so that we can provide a new frontage on the main road. We would want to ensure the existing valued businesses are relocated within this scheme".

8. The letter stressed that no actual firm plans or proposals at this stage were in existence, or final decisions taken, but the views of the businesses were absolutely crucial. It indicated that they would be contacted by representatives of M & N Communications who were conducting a survey. It also identified drop-in sessions to be held at Shepherd's Bush Library.
9. The main deponent for the Claimants, Aniza Meghani, says she became first aware of the proposal to develop the Market in December 2009 when an officer of the Defendant invited her to a meeting and enquired whether they would be interested in being relocated as part of the regeneration of the Market. She indicated that they were not interested in that and were not interested in attending the meeting as they were not part of the Market. She did not recall ever reading the letter to which I have referred and has enquired with shop keepers who do not appear to have received the letter. No one from M & N came to visit her. At that stage she did not understand that the regeneration proposals intended the demolition of the Goldhawk Road premises but she became so aware in September 2010.

10. In September 2010 a further draft planning and regeneration brief was published. It referred to revisions having been made to the December 2009 version following the public consultation exercise.
11. It says, amongst other things, the following:

“Introduction

1.1... The whole area needs upgrading and renovating if the market is to perform its role in the future. There is an opportunity to do this now in conjunction with the development of adjacent land in a way that will regenerate and make a major difference to this part of the town centre.

1.2 The Market is identified in the Council Unitary Development Plan 2007 ... in policy SBTC3 which says that the Council will support the retention and improvement of the Market, acknowledging that it is an important feature of the town centre. In more recent emerging policy a wider market regeneration area is included within the White City opportunity area identified in the Borough's Local Development Framework Core Strategy Options. That document sets out the preferred options “to regenerate and provide an enhanced focus and destination in the western part of the town centre by refurbishing the market and other land as a vibrant mixed use town centre development of small shops, market stalls, leisure uses, residential and offices. [Note: it is expected that the Council will publish its proposed Core Strategy in October 2010]

1.3 The Shepherd's Bush Market brief provides detailed guidance on how the area should be regenerated and it is proposed that it will be adopted as a Supplementary Planning Document to the Council Unitary Development Plan Policy SDTC3... however before consulting the adoption of the brief the Council is consulting again will local people, market traders and businesses and other interested parties ...

Vision

1.4 ... The unique character and diversity of the famous existing market should be at the core of regeneration but be enhanced and complemented by new shops, residential, leisure and cultural activities where independent specialist small businesses and the creative arts can thrive ...

Objectives ...

- To complement and integrate the markets renovation for retail and leisure led mixed use scheme that will provide a vibrant ground floor mix of shops cafes and restaurants (providing opportunities for independent businesses and for the relocation of businesses from the Goldhawk Road frontage); with a mixture of residential and offices on upper floors essential to the urban mix...

2. Site and surroundings;

2.1 ... the area that forms the planning and regeneration area is highlighted on the site plan below ... it includes;

... property at 30-52 Goldhawk Road ...

2.4 it is proposed that properties at 30-52 Goldhawk Road should be included in the development area. These are of poor visual quality and of a scale that is no longer appropriate to this part of the Goldhawk Road townscape. It is also important to include the frontage so that better access to the market and the central part of the site can be provided better connecting the regeneration area with Goldhawk Road. There should be opportunities to relocate these businesses within the main development on suitable terms ...

4. Development guidelines and principles ...

4.4 Proposals must be phased to minimise disruption to the operation of the market where possible having regard to the amenity of the adjoining residents. Phasing should also enable the potential of relocation of businesses on Goldhawk Road to new premises within the scheme ...

Land use mix ...

4.9 ... new accommodation suitable for the relocation of the businesses at 30-52 Goldhawk Road should be provided subject to viability and to agreement with any developer on reasonable and appropriate terms ...

4.11 Residential accommodation should be included on upper floors and the opportunity should be explored to include some ground floor family accommodation with private gardens along the boundary with existing housing in Pennard Road ...

4.12 Affordable housing should be provided to the maximum reasonable extent provided this is possible within an acceptable scheme that achieves the main objective of the brief ...

4.17... On Goldhawk Road ... the general height ... is four storeys. The general height should be respected in any new frontage building. A frontage height of four to five storeys would be appropriate in this townscape context but exceptional design may enable greater height in part. The frontage should be in the form of a largely continuous facade providing a well defined edge to the street. It would be important that the new Goldhawk Road elevation which signposts the entrance to the site in an attractive and distinctive manor with a design and scale appropriate to the townscape. The frontage is long and it will be important that in providing the setting and access the new design does not "over expose" the market area to the street thereby affecting its intimate character. It would need to be a piece of high quality architecture which respects the rhythm and the scale of the adjoining buildings and terraces..."

12. The initial period of consultation in respect of this exercise was to expire on 11<sup>th</sup> October 2010. However, at a public meeting on 6<sup>th</sup> October, the Defendant's officers either agreed to extend the formal consultation until the 18<sup>th</sup> October, or gave

assurances that late responses to the consultation exercise which came in before the 18<sup>th</sup> October would be considered by the Defendant. In particular two further “drop-in” sessions were arranged for the 15<sup>th</sup> and 16<sup>th</sup> October 2010.

13. During the initial, un-extended period, 153 responses were received out of which 118 related to the potential demolition of 30-52 Goldhawk Road and the potential loss of those premises as attractive buildings and shops. That response was summarised and included at Appendix 2 of the report placed before the Council on 27<sup>th</sup> October. In respect of the opposition to the demolition of 30-52 Goldhawk Road, the officers included in that summary a response in the following terms:

“the inclusion of the land created by the demolition of 30-52 Goldhawk Road is essential to achieve the comprehensive regeneration of the market. While we understand the historic importance of this row of shops they are now of poor appearance. They have suffered from inappropriate alterations over many years and have lost most of the architectural detailing which once contributed to their character and appearance. They are also in a state of disrepair, action – no action”.

14. At the meeting of the Council on the 27<sup>th</sup> October an Addendum was handed out to the councillors which summarised the comments which had been received outside the statutory consultation process. Those comments excluded those made during the drop-in session held on the 15<sup>th</sup> and 16<sup>th</sup> October as they were included in Appendix 2 to the main report. Once again, the 30 or so “late comments” were predominantly concerned with the demolition of 30-52 Goldhawk Road and the loss of those shops.
15. On 14<sup>th</sup> October 2010 the Defendant’s Cabinet held a meeting. One item on the agenda was the issue of the Shepherd’s Bush Market regeneration. The report to the Cabinet simply referred to the fact that further consultation had been carried out during September and October. The Cabinet resolved that the emerging proposals for the comprehensive regeneration approach for the Shepherd’s Bush Market area as set out in Section 2 of the report be endorsed. The Cabinet also resolved to seek compulsory purchase powers for the acquisition of all relevant property interests within the regeneration site which were not already owned by the Council and which would be necessary to acquire for the purposes of implementing the comprehensive scheme but subject to the Council’s approval of the development scheme. The scheme was described in that report as including the Goldhawk Road shops.
16. Paragraph 3.11 of the report to Council on 27<sup>th</sup> October states:

“representations received from the consultation, discussions with stakeholders and demographic data formed the evidence base for the Council’s Equalities Impact Assessment. The Council has concluded that the SPD will not have any negative impacts on equality. The EIA is attached at Appendix 4.” (It covers some 23 pages.)

#### **The 27<sup>th</sup> October Document**

17. It is said to be a supplementary planning document and is entitled “Shepherd’s Bush Market Area Planning Brief- Market and Theatre Regeneration”.

18. It begins with a note on its purpose and status. It describes the first public consultation exercise on the draft brief between December 2009 and January 2010. It states that the brief was updated to incorporate revisions as a result of comments received. The revised draft was subjected to further public consultation between the 10<sup>th</sup> September and 11<sup>th</sup> October 2010. The results were reported to the Council on 27<sup>th</sup> October 2010. The Council agreed a number of changes to the draft and proceeded to adopt the revised document. It is said that the SPD supplements and conforms with the policies within the development plan for the Borough, namely the Hammersmith and Fulham Unitary Development Plan, adopted in 2003 and amended in 2007. The document forms part of the framework for the Borough and will be a material planning consideration for development planning purposes.
19. Section 1 of the document is by way of an introduction and deals with background. It says amongst other things as follows:

1.1 Shepherd's Bush market is a well known attraction offering a wide range of goods and services drawing people from all over West London and beyond... Today however parts of the market are run down. There is evidence of falling footfall in recent years, a reduction in the variety of the retail offer and a lack of investment. The whole area needs upgrading and renovating if the market is to continue to perform its role in the future. There is an opportunity to do this now in conjunction with the development of adjacent land in a way that will regenerate and make a major difference to this part of the town centre.

1.2 The market is identified in the Council's Unitary Development Plan 2007 ... in Policy SBTC3 which says that the Council will support the retention and improvement of the market, acknowledging that it is an important feature of the town centre. In more recent emerging policy a wider market regeneration area is included within the White City Opportunity Area identified in the Borough's local development framework proposes submission core strategy (October 2010) ... *(there is then set out the proposed policy within that core strategy already referred to).*

1.3 The Shepherd's Bush Market planning brief detailed guidance on how the area should be regenerated and is adopted as a supplementary planning document to the Council's Unitary Development Plan policy SBTC3...

#### Vision

1.4 The Shepherd's Bush regeneration area will be a vibrant mixed use destination providing a new focus in the Western Part of the town centre bringing greater and longer economic vitality to the surrounding area attracting visitors to the area and upgrading the facilities for local residents. The unique character and diversity of the famous existing market should be at the core of regeneration along with the impetus that would come from a new cultural facility in the form of a theatre but be enhanced and complemented by new shops, residential and leisure and cultural activities where independent and specialist small businesses and the creative arts can thrive. There will be a high quality distinctive well managed and safe environment retaining the unique essence of the Market. The area will complement the town centre's long

standing role for public entertainment providing a new destination for small scale arts and cultural performance ...

#### Objectives

- To renovate and enhance the existing market in terms of the physical fabric of the trading units and stalls, the public realm and railway arches, servicing arrangements and safety ...
  - To complement and integrate the markets renovation with a retail and leisure led mixed use scheme that will provide a vibrant ground for a mix of small shops with an element of cafés and restaurants and opportunities for independent businesses and for the re re-provision businesses in the Goldhawk Road frontage within high quality new retail accommodation along the frontage accompanied by a mix of residential and offices on upper floors essential to the urban mix.
  - To ensure that there are new significant leisure public arts and cultural facilities to act as a focus and public attraction and that the former Shepherd's Bush library maintains a cultural role in the community as a publicly accessible theatre that will help anchor and compliment the overall market area regeneration...
  - To ensure that there is a comprehensive scheme for at least the area east of including the railway viaduct that is capable of integration with any scheme for the market west of and including the viaduct and to ensure that there is a phased approach so that the market can operate throughout the development period.
20. The remainder of the document sets out, in a number of sections, detailed provisions setting out guidance and policies in respect of - "site and surroundings; site constraints and opportunities ; and development guidelines and principles (within this last there are subsections dealing with "a comprehensive approach and phasing, the markets, new development east of the railway viaduct, public realm design and management, access, parking and servicing, the former Shepherd's Bush library, environmental issues, employment, training and business support and expectations of a developer"). In Appendix A the relevant planning policy guidance is identified as including the unitary development plan 2007, in particular SBTC3, as well as reference to the fact that the replacement plan for the UDP will be the local development framework, in connection with which the Council has published its proposed submission Core Strategy. Specific reference is made to the draft White City Opportunity Area planning framework. In particular, and extracted from that document, is the proposal for Strategic Site 3 in the WCOA namely Shepherd's Bush Market and adjacent land.

#### **The development of the Core Strategy**

21. In June 2009 the Defendant, as part of its local development framework, published Core Strategy Options. It identified a number of regeneration areas, one of which was the wider White City Opportunity Area which included Shepherd's Bush town centre.

The third option, in so far as it involved Shepherd's Bush town centre, was expressed as follows:

"The economic health of the historic Shepherd's Bush town centre will be revived and it will be a thriving destination in own right. The market and common will be reinvigorated as major attractions. The area will be a model of high quality urban design sustainable architecture and construction situated within a first class permeable and inclusive public realm".

Within that document and as part of its consideration of the White City Opportunity Area there appears the following:

Delivery

8.15 The preferred strategy for the wider White City Opportunity area will be promoted through the preparation of the Opportunity Area Planning Framework (OAPF) to ensure the co-ordination of development and the provision of the required infrastructure. ... . In addition, more detailed planning briefs will be prepared"

22. The document identified a number of areas within the wider White City Opportunity Area which were key to achieving the overall vision. They included Shepherd Bush Market.

23. Within this document there was consideration of "Shepherd's Bush Market and adjacent land". The preferred option for Shepherd's Bush Market and the adjacent land was expressed in the following terms:

"There should be a scheme to regenerate and provide an enhanced focus and destination inn the western part of the town centre by refurbishing the market and other land as a vibrant mixed use town centre development, small shops market stalls leisure uses residential and offices ... The core site should be the TfL market former Pennard Road laundry site, Peabody Housing Trust land and Broadway centre.

Shop properties on Goldhawk Road could be considered for inclusion provided there are opportunities for relocation of the shopkeepers to new premises within the scheme ..."

24. As part of the attendant commentary the document stated:

"8.39. The land is fronted by shop premises on Goldhawk Road which provide accommodation for small retail businesses some of which complement the market. Inclusion of these properties in a development scheme would be beneficial because a development would be opened up to Goldhawk Road but any developer will be expected to negotiate to relocate traders within a scheme."

25. In October 2010 the Defendant produced its "proposed submission Core Strategy" for independent assessment by the Secretary of State. The document identified the White City Opportunity Area within its "regeneration areas strategies". As with the June

2009 draft, 3 strategic sites were identified as key, including Shepherd's Bush market. In relation to that strategic site the following appears:

"Shepherd's Bush market and adjacent land ...

Regeneration of the market and other adjacent land to create a vibrant mixed scheme town centre development of small shops, market stalls, leisure uses residential and possibly offices; in accordance with the Shepherd's Bush market entry planning document... ... The core site should be the TfL market former Pennard Road laundry site, Peabody Housing Trust land and Broadway centre.

Shop properties on Goldhawk Road should be considered for inclusion provided there are opportunities for relocation of the shopkeepers to new premises within the scheme. ..."

26. The Core Strategy was published in October 2011 having been independently assessed by the Secretary of State and having undergone the relevant SA and SEA.
27. Part 7 of that document is entitled "Regeneration Area Strategies" and includes reference to the White City opportunity area. In respect of strategic site WCOA3 entitled "Shepherd's Bush Market and adjacent land" the following appears:

"Regeneration of the market and other adjacent land to create a vibrant mixed use town centre development of small shops, market stalls, leisure uses, residential and possibly offices in accordance with the Shepherd's Bush Market supplementary planning document ... The core site will be the TfL Market, former Pennard Road laundry site, Peabody Trust Housing land and Broadway Centre. Shop properties on Goldhawk Road should be included provided there are opportunities for relocation of the shop keepers to new premises within the scheme ... Any development should take place within the guidance set out in the Shepherd's Bush market supplementary planning document ..."

28. Under the heading "Justification" at paragraph 7.47 it states:

"The land is fronted by shop premises on Goldhawk Road which provide accommodation for small retail businesses some of which complement the market. The inclusion of these properties in a development scheme would be beneficial because a development would be opened to Goldhawk Road but any developer will be expected to negotiate to relocate traders within the scheme" and

"8.50 A mixed use scheme providing modern small shops and leisure use together with a revamped market will not only be a destination in its own right. It will also help to regenerate and bring more trade to the surrounding commercial frontages. A cultural leisure activity would provide a good focus for a scheme"

29. The Claimants responded to consultation in respect of the Core Strategy by letter of the 7<sup>th</sup> October 2010, attached to which was a round robin document signed by all the Claimants. In the covering letter Ms Meghani indicated that they had met Mr Miah, a council officer. This appears to have been a reference to what is then contained in the document in the following terms:

“About a year ago you came into our shops and asked whether we would like to take our properties for your benefit. You really had no clue on the history of Shepherd’s Bush. You thought we would lie down and take what you throw at us. I don’t think so ... Can you do the following for the shops between 30-52 Goldhawk Road ...”

## The Law

### Consultation

30. Section 19 of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) concerns the preparation of local development documents. It is clear from Regulation 13 of the Town and Country Planning (Local Development) (England) Regulations 2004 (The 2004 Regulations) that a supplementary planning document (SPD) is a local development document.
31. Section 19(3) of the 2004 Act provides that, in preparing local development documents, the local authority must comply with their statement of community involvement (SCI).
32. It is common ground that in September 2006 the Defendant adopted an SCI. The Claimants claim that certain requirements of the SCI were not satisfied.
33. Regulation 17 of the 2004 Regulations provides for public participation. Amongst other provisions Regulation 17(1) states that before a local planning authority adopt an SPD they must ... (b) prepare a statement setting out;
  - (i) the names of any persons whom the authority consulted in connection with the preparation of the SPD,
  - (ii) how those persons were consulted,
  - (iii) a summary of the main issues raised in those consultations,
  - (iv) how those issues have been addressed in the SPD.
34. Regulation 18 also applies to SPDs and provides for any person to make representations about an SPD within a specific period which, by Regulation 18(3), is defined as “a period of not less than 4 weeks or more than 6 weeks starting on the day on which the local planning authority complies with regulation 17(1)” (i.e. making copies of the SPD documents available for inspection at their principal office and such other places as it considers appropriate.)
35. On the issue of what amounts to appropriate consultation reliance is placed by both parties on the statement of general principle identified by Lord Woolf MR (as he then was) in *R v North and East Devon Health Authority ex p Coughlan [2001] QB 213* at paragraph 108 where he said as follows:

“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage. It must include sufficient reasons for particular

proposals to allow those consulted to give intelligent consideration and an intelligent response. Adequate time must be given for this purpose and the produce of consultation must be conscientiously taken into account when the ultimate decision is taken ...”

**The statutory requirements for adopting an SPD**

36. A crucial distinction in this case is between an SPD and a DPD. The Claimants assert that the document adopted by the Defendant on 27<sup>th</sup> October was a DPD whereas the Defendant asserts it was an SPD.
37. If the document were a DPD, Section 20 of the 2004 Act requires it to be submitted to the Secretary of State for independent examination. Subsequent sections make detailed provision in respect of that examination and its consequences.
38. The 2004 Regulations provide for the descriptions of various documents and how they are to be characterised. Regulation 7 says as follows:

“Documents which must be DPDs are;

- a) Core Strategies
- b) Area Action Plans ...”

Regulation 6(3) provides that a document of the description set out in paragraph 6(1)(a) is referred to in the Regulations as “a Core Strategy”. Regulation 6(4) provides that a document of the description set out in paragraph 6(2)(a) is referred to as “an Area Action Plan”.

39. Regulation 6(2) sets out the description of documents which are referred to in the regulations as Area Action Plans. It provides as follows:

“(a) Any document which –

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

40. The Claimants’ contention is that, if a document is, by virtue of Regulation 6(2)(a) and 6(4), an Area Action Plan then, pursuant to Regulation 7, such a document must be a DPD. It follows from that, say the Claimants, that such a document may only be adopted by a local planning authority once it has been subject to independent examination by the Secretary of State. The Defendant does not demur from this analysis. Thus one of the key issues is whether the 27<sup>th</sup> October document was correctly characterised by the Defendant as an SPD, or whether, in substance, it is an area action plan, and so a DPD.

41. The 2004 Regulations also provide, in Regulation 13, for the form and content of local development documents. Subparagraph (3) provides that an LDD must contain a title which must indicate whether the document is a DPD or a SPD.
42. Regulation 13(4)-(7) makes specific provisions in respect of the form and content of DPDs. Regulation 13(8) provides:

“The policies in an SPD must be in conformity with–

- (a) the policies in the core strategy,
- (b) the policies in any other DPD, or
- (c) if neither paragraph (a) nor (b) applies, an old policy”

43. In the present case it is common ground that the relevant category of policy identified in 13(8) is “an old policy” namely policy SBTC3 of the Hammersmith and Fulham Unitary Development Plan which provides:

“The Council will support the retention and improvement of the existing market in Shepherd’s Bush”

#### **The validity of documents.**

44. Section 113 of the 2004 Act applies, amongst other things, to a DPD. Subsection (2) provides that such a document must not be questioned in any legal proceedings except in accordance with the provisions of the section. Subsection (7) empowers the High Court to quash the relevant document either in whole, or in part, or generally, as it affects the property of the applicant. That subsection, by virtue of subsection (6), applies only if the High Court is satisfied that ... “the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement”.

#### **The requirement for a Statutory Environment Assessment**

45. The provisions for this in domestic law are contained in the Environmental Assessment of Plans and Programmes Regulations 2004 (2004 EA Regulations).
46. The 2004 EA Regulations apply to a plan or programme relating to the whole or any part of England (Regulation 3(2)). Regulation 2(1) provides that:

“plans and programmes means plans and programmes ... which

- (a) are subject to preparation or adoption by an authority at ... a local level,
- (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case,
- (c) are required by legislative, regulatory or administrative provisions”

47. Regulation 5 provides for environmental assessment for plans and programmes prepared on or after 21<sup>st</sup> July 2004. Sub regulation 1 imposes an obligation on the authority to carry out an Environmental Assessment before the adoption, or

submission, of any such plan or programme provided the plan or programme is of the description set out in either paragraph (2) or paragraph (3) of Regulation 5.

48. Regulation 5 paragraph (2) describes the document as a plan or programme which:

(a) is prepared for ... town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex .. II to Council Directive ...

49. Regulation 5 paragraph (4) provides that where:

“.....

(b) the plan or programme sets the framework for future development consent of projects; and

(c) the plan or programme is the subject of a determination under regulation 9(1) ... that it is likely to have significant environmental effects,

the responsible authority shall carry out... an environmental assessment...”

50. Regulation 5 paragraph (6) provides that an Environmental Assessment need not be carried out:

(a) for a plan or programme of the description set out in paragraph

(2) ... which determines the use of a small area at local level...unless it has been determined under regulation 9

(1) that the plan, programme ...is likely to have significant environmental effects ...

51. Regulation 9 provides:

“(1) The responsible authority shall determine whether or not a plan, programme ... of a description referred to in

(a) paragraph (4)(a) and (b) of regulation 5;

(b) paragraph (6)(a) of that regulation... is likely to have significant environmental effects...

(3) Where the responsible authority determines that the plan, programme ...is unlikely to have significant environmental effects (and accordingly does not require an environmental assessment) it shall prepare a statement of its reasons for the determination.”

EU Directive 2001/42/EC

52. The domestic scheme contained in the 2004 EA Regulations gives effect to EU Directive 2001/42 and replicates its language.

53. Article 2 set out the objective of the Directive in the following terms:

“To provide for a high level of protection of the environment ... with a view to promoting sustainable development by ensuring that in accordance with the directive an Environmental assessment is carried out with certain plans and programmes which are likely to have significant effects on the environment”

54. The scope of the directive is governed by Article 2 which provides:

(a) plans and programmes shall mean plans and programmes ...

which are subject to preparation and or adoption by an authority at national, regional or local level ... and,

which are required by a legislative regulatory or administrative provisions.”

55. This directive is the subject of guidance issued by the European Commission on a date, as best I can judge, earlier than 2005. In respect of Article 2 the guidance contains amongst other things the following:

3.5 The kind of document which in some member states is thought of as “**a plan**” ... could include for example land use plans setting out how land is to be developed or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas or giving criteria which should be taken into account in designing new development

3.6 In some member states “**programme**” is usually thought of as the plan covering a set of projects in a given area. For example a scheme for regeneration for an urban area comprising a number of separate construction projects might be classed as a programme... but these distinctions are not clear cut and must be considered case by case ...

56. The provision that the plan or programme must be “**required**” by a legislative, regulatory or administrative provision has been the subject of recent litigation. In the case of *Inter Environment Brussels ASBL and others v Region of Brussels EU Case C-567/10*, decided on the 22<sup>nd</sup> March 2012, the ECJ had to consider an argument that Article 2 did not apply wherever a plan or programme was not compulsory pursuant to legislative regulatory administrative provisions such that, in the present context, a DPD or an SPD, which are not compulsory to be adopted by a local planning authority, would never require an environmental assessment pursuant to the directive. The ECJ rejected that as the proper interpretation of Article 2 saying:

“28. It must be stated that an interpretation which would result in excluding from the scope of Directive 2001/42 all plans and programmes ... whose adoption is in the various national legal systems regulated by rules of law solely because their adoption is not compulsory in all circumstances cannot be upheld...”

31. It follows that plans and programmes whose adoption is regulated by national legislative or regulatory provisions which determines the competent authority adopting them and the procedure for preparing them must be regarded as “required” within the meaning and for the application of Directive 2001/42 and accordingly subject to an assessment on their environmental effects in the circumstances which it lays down.”

57. Article 3(2) provides a template for certain of the provisions of Regulation 5 including the following:

“... an environmental assessment shall be carried out for all plans and programmes,

- a. which are prepared for ...town and country planning land use and which set the framework for future development consent of projects listed at annex ... ii to Directive 85/337/EEC ..”

The EC guidance document in relation to this particular provision says, amongst other things:

3.23 The meaning of “**set the framework for future development consent**” is crucial to the interpretation of the Directive although there is no definition in the text. The words would normally mean that the plan or programme contains criteria or conditions which guide the way in which the consenting authority decides an application for development consent. Such activity could place limits on the type of activity or development which is to be permitted in a given area or they could contain conditions which must be met by the applicant if permission is to be granted or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area).”

### Sustainability Appraisals (SA's)

58. Section 19(5)(a) of the 2004 Act provides that:

“...the local planning authority must also (a) carry out an appraisal of the sustainability of the proposals in each development plan document”.

There is no such requirement in respect of an SPD. This provision was amended by Section 180(5)(d) of the Planning Act 2008 so as to exclude that requirement in respect of SPDs.

59. It is common ground, therefore, that it was not compulsory for the Defendant to carry out an SA were it to be correct in its contention that the document adopted on the 27<sup>th</sup> October was an SPD.
60. Reference is made, however, to a departmental guidance document from the Department of Communities and Local Government as part of its “plan making manual” in which, in the part dealing with SPDs, it provides as follows:

“...the 2004 Act and Regulations made all local development documents subject to Sustainability Appraisal which met the requirement of the EU Directive on

Strategic Environmental Assessment. However, the 2008 Act removed the requirement for Sustainability Appraisal of supplementary planning documents. In principle, supplementary planning documents should not be subject to the SEA directive or require sustainability appraisal because they do not normally introduce new policies or proposals or modify planning documents which have already been subject to sustainability appraisal.

However, a supplementary planning document may occasionally be found likely to give rise to significant effect which had not been formally assessed in the context of a higher level planning document. This may happen for example where the relevant higher level document containing a saved policy within a saved local plan or unitary development plan predates the 2004 Act or the 2001 SEA Directive.

### **When is a Sustainability Appraisal likely to be required?**

Most public based supplementary planning documents, for example shop front design guides, are unlikely to require sustainability appraisal as they are unlikely to have significant environmental effects. However, it is conceivable that an area based supplementary planning document may have significant environmental effects. If this is the case you will need to ask your self whether these effects have been appraised in a higher level (local) planning document such as a Core Strategy or saved local plan and assess whether or not the higher level appraisal adequately appraises the significant effect. If the answer is “no” it is likely you would need to undertake a new sustainability appraisal. This could be informed by the higher level appraisal. For these reasons if the supplementary planning document expands upon a saved policy which predates the requirement for sustainability appraisal you should consider whether a new sustainability appraisal is needed.”

61. In the present case the Council’s unitary development plan which contained the site specific policy SBTC3 was dated 2007.

### **Race Relations Act 1976**

62. Section 71 of the 1976 Act, which was in force at the time, provides that a body, such as the defendant, in carrying out its functions shall have due regard to the need to eliminate unlawful discrimination and to promote the equality of opportunity and good relations between persons of different racial groups.
63. The duty to “have due regard” has been interpreted as requiring the decision maker to have a conscious directing of the mind to the obligations and the court must analyse the material before the council in the context of that duty.

### **Arguments and conclusions**

#### **Ground 1: Consultation**

64. It is convenient to consider this issue on two bases. The first concerns the consultation which took place between December 2009 and January 2010. The second concerns the consultation which took place during the “statutory consultation period” running until the 11<sup>th</sup> October 2010 and thereafter to the 18<sup>th</sup> October 2010.

65. In respect of the first period there is an issue of fact which I have to determine. The evidence of the Claimants seems to be to the effect that they did not read, or were not aware of, the letter of the 4<sup>th</sup> December 2010. The grounds of defence assert, under a Statement of Truth, that the letter of the 4<sup>th</sup> December 2010 was delivered to the Claimants. In my judgment, on the balance of probabilities, that letter was delivered to the Claimants. It is clear from the evidence and from the documentation, in particular concerning the consultation on the Core Strategy submission, that Mr Miah visited each of the claimants in order to discuss the regeneration of the Shepherd's Bush Market, to invite them to a meeting and to enquire whether they were interested in being relocated as part of that regeneration. In my judgment, it is highly unlikely that, having visited each of them for that purpose, he did not leave with them the letter which had been prepared specifically for that purpose. Accordingly, in my judgment the Claimants were all in receipt of that letter which, in my judgment, clearly identifies the possibility of their businesses being relocated in the context of the provision of a new frontage on Goldhawk Road.
66. On the other hand, the Claimants' evidence is that at no time did they receive any visit from M & N Communications which was stated, in that letter, would occur for the purpose of conducting a survey to gauge local opinion. In my judgment, on the balance of probabilities, I find that M & N Communications did not visit the claimants and, accordingly, they were not given the opportunity to participate in that survey.
67. I come to this conclusion because the detailed report of M & N Communications identifies the work that they did in conducting the survey and identifies the groups whom they contacted for that purpose. There is no reference whatever to the businesses in Goldhawk Road being contacted or having participated in the survey. In my judgment, had M & N Communications done so then that would have appeared in their report. It seems, therefore, that, for some reason or another, M & N Communications did not conduct the survey so as to involve the Claimants. It follows that they have been deprived of the opportunity of making their views known at that stage and in that format.
68. In respect of the second phase, the Claimants' complaint is that the written comments which were produced during the extension of the consultation period from 11<sup>th</sup> October to the 18<sup>th</sup> October were not recorded as part of the report to the Council for its meeting on the 27<sup>th</sup> October, nor were they analysed in the same way as the other products of that consultation, by identifying the response of the officers to the particular points made in the consultation. Furthermore, they contend that the Cabinet meeting on the 14<sup>th</sup> October, which proceeded without any information about the outcome of the consultation between 10<sup>th</sup> September and 11<sup>th</sup> October, or the further consultation which had been agreed should take place up to the 18<sup>th</sup> October, is evidence of a closing of minds such that, it is contended, the full Council on the 27<sup>th</sup> October did not properly have regard to the outcome of the consultation. The Claimants, though highly suspicious about the fact of the Cabinet meeting on the 14<sup>th</sup> October, have stopped short of asserting that the outcome had been predetermined as a result of that meeting.
69. In my judgment, the consultation which took place between 10<sup>th</sup> September and 11<sup>th</sup> October was properly conducted and its outcome was properly recorded in Appendix 2 to the report which was placed before the councillors in advance of their meeting on

the 27<sup>th</sup> October. In truth no criticism has been made of Appendix 2. Further, in my judgment, having looked at the comments which were made subsequently to the 11<sup>th</sup> October and which were recorded in the Addendum handed out at the meeting, I am satisfied that the analysis of the officers in Appendix 2 remained sufficient to satisfy the statutory obligation under Section 17 of the 2004 Act. Mr Jones QC, counsel for the Claimants, has not been able to point to any particular comment made and recorded in the Addendum which added so significantly to the points which had already been analysed that it rendered the previous analysis insufficient so as to call for a fresh analysis in order to make the consultation fair, effective and lawful.

70. In my judgment, although the Cabinet decisions of the 14<sup>th</sup> October were linked to the regeneration scheme, it is clear that they were preparatory only and depended for their efficacy on the decision which was yet to be made on the 27<sup>th</sup> October. The Cabinet comprises eight councillors only. The full Council considered the planning brief on the 27<sup>th</sup> October. Some thirty seven Council members were present and participated in that meeting. In my judgment there is no evidence to suggest that what happened at the Cabinet was in any way indicative of closed, or closing, minds, nor is there any evidence to support any contention that Cabinet decisions of 14 October rendered the decision on the 27<sup>th</sup> October a foregone conclusion. Accordingly, in my judgment, there is nothing in respect of the second phase of the consultation which was in any way improper, or unfair, or unlawful.
71. The grounds take objection to the way in which the consultation documentation was expressed and in particular at the early stage. It is said that it was not made clear to the businesses on Goldhawk Road that their businesses were going to be demolished, particularly at the early stage. In my judgment the letter of the 4<sup>th</sup> December makes it clear that the future of their businesses and the premises within which they are located were at risk. Though the word “demolition” is not used, it should be clear to anyone reading that letter what the import of what was being considered might be for their businesses. Accordingly, I reject that criticism of the consultation process.
72. I have concluded, however, that there was a failing in respect of that early stage of the consultation in that the businesses on Goldhawk Road were omitted from participating in the survey conducted by M & N Communications. In my judgment, that was a failing, albeit an inadvertent one, which does not appear to have been picked up at any stage. The question for me is whether that failure, at the preliminary stage, so infects the consultation process that, applying the principles identified in *Coughlan*, the decision made following it falls to be quashed.
73. In my judgment, by the time the Council came to take its decision on the 27<sup>th</sup> October 2010, the Claimants had ample opportunity to make known their views on the issues which were particularly important to them and they had done so. The fact that those views had been communicated to the Council and had been subject to the kind of analysis which the statutory scheme requires, means that their accidental exclusion from participating in the earlier opinion survey had diminished to the point of insignificance. **Accordingly, in my judgment this ground of challenge to the decision of the 27<sup>th</sup> October fails.**

**Ground 2.**

**Were the policies in the SPD in conformity with the Unitary Development Plan Policy SBTC3?**

74. In my judgment, there is nothing in this ground of challenge. It is right to say that the existing unitary development plan policy was limited to the statement that the Council would support the retention and improvement of the existing market in Shepherd's Bush. In that plan, the justification for that policy was that the market was an important feature of the town centre and its continuation as a vibrant facility was very important for the sustainability of the town centre, in particular to help balance the impact of the White City Centre scheme.
75. The whole thrust and purpose of the 27<sup>th</sup> October document was to retain and improve the market in the context of its role as part of the town centre. The fact that the planning brief went beyond the confines of the market, into the adjoining area, so as to regenerate the town centre in the way described, cannot, in my judgment, sensibly be said to render that document not "in conformity" with the existing UDP policy. To the extent that it concerned the market itself, it was wholly consistent with the policy. To the extent that it envisaged matters beyond the confines of the market, it was certainly not in conflict with the policy. **In my judgment, this ground of challenge does not succeed.**

**Ground 3:**

**Was the 22<sup>nd</sup> October document wrongly characterised by the Defendant as an SPD, whereas it is an Area Action Plan and so a DPD?**

76. There are two aspects to this part of the argument. The first concerns the role of the Court, the second concerns the substantive issue.
77. The Claimants say that if, under Regulation 6(2)(a), the three conditions, there set out, are satisfied, then the document is an Area Action Plan and, as such, must be a development plan document. The Claimants argue that the question whether, as a matter of substance, a document satisfies those three conditions, so as to be an Area Action Plan, is a matter for the Court to determine being essentially a question of mixed fact and law. The Defendant, on the other hand, says that the judgment whether the document satisfies those three conditions is essentially a planning judgment for the local planning authority to make and that the Court's role is to intervene to overturn that judgment only on the basis of "*Wednesbury*" principles.
78. There is no direct authority in respect of this issue. The Claimants rely on the analogous authority of *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 and in particular paragraphs 18 – 22 of the leading speech of Lord Reed.
79. In that case the planning authority was required by the statute to consider whether the proposed development was in accordance with the development plan and, if not, whether a material consideration justified departing from the plan. The submission on behalf of the local planning authority in that case was that the meaning of the development plan was a matter to be determined by the planning authority in which the Court had no role save in the case of perversity or irrationality. The Supreme Court considered that various considerations pointed away from the view that the

meaning of the plan is, in principle, a matter which each planning authority is entitled to determine from time to time as it pleases within the limits of rationality.

80. Their Lordships concluded that policy statements should not be construed as if they were statutory or contractual provisions. Many of the provisions of development plans are framed in language whose application, given a set of facts, requires the exercise of judgment which falls within the jurisdiction of planning authorities and whose exercise of judgment could only be challenged on the grounds of irrationality or perversity. Nonetheless, they concluded, planning authorities “do not live in the world of Humpty Dumpty. They cannot make the development plan mean whatever they would like it to mean” (para 19). In paragraph 21 of Lord Reed’s speech, he said:

“21. A provision in the development plan which requires an assessment of whether a site is “suitable” for a particular purpose calls for judgment in its application, but the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment, it is a question of textual interpretation which can only be answered by construing the language used in its context ..... [The question in the case] ..... is not a question which can be answered by the exercise of planning judgment. It is a logically prior question as to the issue to which planning judgment requires to be directed.”

The question in the present case is whether the 27<sup>th</sup> October document:

1. Relates to part of the area of the local planning authority
2. Identifies that area as an area of significant change or special conservation
3. Contains the authority’s policies relevant to areas of significant change or special conservation.

If it does, then it is an Area Action Plan and, as such, has to be a DPD, if it does not, then it is an SPD.

81. In my judgment, and by way of analogy with the *Tesco* case where, as here, the question is whether a document satisfies or does not satisfy all of the conditions identified in a statutory document, that is an application of fact to legal requirements and, as such, is a matter where the Court has to make the judgment. It is not limited to reviewing a decision made by the local planning authority, subject only to intervention only on *Wednesbury* grounds.
82. I accept that in making that judgment, the Court must bear in mind that a local planning authority has, as I find, in good faith, characterised the document as not satisfying those three conditions. I have, therefore, to be cautious in concluding that the local planning authority has got that judgment wrong. That, however, is not the same as saying that I can only come to a different view only if I think that it was perverse for the Defendant to have come to a different view. What I have to do is to consider the document as a whole and then conclude whether, in my judgment, it satisfies each of the three conditions.

83. It is not in dispute that the document relates to part of the area of the local planning authority, namely the Shepherd's Bush Market area, nor is it in dispute that the document contains the authority's policies in relation to the area. The dispute is whether the document "identifies that area as an area of significant change ....".
84. Mr Harris QC, for the Defendant, argues that it is not sufficient that the document identifies significant developments or changes within the area. He says that, before this condition can be satisfied, the document itself must identify that area as an area of significant change. He argues that, by way of analogy, it is limited to situations where, in respect of a whole area, there is a stark or significant change, for example, where different uses are being envisaged to be predominant in the area. What he says is that where, as here, the document envisages "more and better of the same" by way of restoration and/or regeneration then it cannot properly be described as a document which identifies the area as an area of significant change. At the end of the process envisaged in the document, the area will contain the same mixture of uses as presently but in a better and enhanced form.
85. Mr Jones QC, for the Claimants, contends that one need go no further in examining the document than to the sections setting out the background, vision and objectives, in order to see that the document identifies the area as an area of significant change by providing guidance on how the area should be regenerated. He says that the point of the document is that it addresses the area as a whole and that the area itself will be subject to such a level of regeneration on so many fronts that it can only properly be described as identifying the area as an area of significant change.
86. Mr Harris points out that, the fundamental consequence of the distinction between the document being a DPD or a SPD, is provided by Section 38(6) of the 2004 Act. That section provides that "the development plan" comprises the DPDs, taken as a whole, which have been adopted or approved in relation to the area. It provides that once a document is characterised as forming part of the development plan then, for the purpose of any determination to be made under the planning acts, there is a presumption that the determination must be made in accordance with the plan unless material considerations indicate otherwise. Where, however, the document is a SPD there is no presumption attached to it, it is merely a matter to be had regard to. He contends that if one has that consequence in mind then the characterisation of this document as an SPD and not a DPD becomes apparent.
87. Whilst that is an important conceptual difference between the two categories of document, it does not replace the provisions of the statute which require me to consider whether, looking at the document as a whole and as a matter of substance, it satisfies all of the requirements of an area action plan so as to be a DPD not an SPD.
88. In considering whether this document does amount to a DPD I have had particular regard to those passages in the introduction concerning: background, vision and objectives to which I have referred above. I have also had regard to the range of policy statements set out in the remainder of the document under the various headings to which I have referred.
89. In my judgment, Mr Jones is right when he says that the whole point of the document is to identify the Shepherd's Bush Market area as an area of significant change. In my

judgment, the whole thrust, tenor and organisation of the document is about the fact that the area is to be transformed and identifies it as an area of significant change.

90. Accordingly, and conscious of the fact that in making this judgment I am disagreeing with the view taken by the local planning authority, in my judgment they have, erroneously, failed to characterise this document as an area action plan. That being so the statutory scheme requires that it should have been subject to the procedure required for a DPD. It is not in dispute that it was not subject to that procedure. **It follows that, for that reason, the adoption of the document by the Council on the 27<sup>th</sup> October was procedurally flawed and, on that ground, the decision was unlawful.**

#### **Ground 4**

#### **Sustainability Appraisal and Strategic Environmental Assessment.**

91. **On the basis that I am correct in characterising the document as a DPD it necessarily follows that the omission to undertake a Sustainability Appraisal constitutes a breach of Section 19(5)(a) of the 2004 Act.**
92. The obligation to undertake a Strategic Environmental Assessment is not directly linked to the characterisation of the document as a DPD as opposed to an SPD. The question is whether the document falls within the description in Regulation 5 of the 2004 EA Regulations as being a plan or a programme prepared for Town & Country Planning or land use and sets the framework for future development consent of projects listed in Annexe II of the relevant Council directive.
93. In my judgment, looking at the document as a whole, it does set the framework for future development consent of projects. Its specific purpose is to set out comprehensive guidance for those who would wish to obtain planning consent for development within the area. Indeed, at the beginning of the document in the note on its purpose and status, it describes itself as forming “part of the planning framework for the Borough” and, at Paragraph 1.3 of the introduction, it says “provides detailed guidance on how the area should be regenerated”.
94. In addition, I have had regard to the guidance issued by the European Commission in respect of the Directive, which the domestic regulations are intended to implement. I have had particular regard to the breadth of documents to which the Directive is said to apply as identified at Paragraph 3.5 and 3.6 and 3.23 of the guidance (see above).
95. In my judgment, therefore, having regard both to the overall content of the document, the way it describes itself and the guidance given by the European Commission, this document does fall within the description of a document under Regulation 5(2) of the EA Regulations.
96. That does not necessarily mean that an Environmental Assessment must be carried out. Before determining whether it does or does not, the Defendant would have to have made a determination under Regulation 9(1) on whether or not it was likely to have significant environmental effects. In the present case, although the document itself does address environmental issues at paragraphs 4.38-42, it was adopted without any consideration being given to the Council making a determination under

Regulation 9(1). That matter is not referred to at all in the report to the 27<sup>th</sup> October meeting.

97. In my judgment, therefore, regardless of whether the document was a DPD or SPD, it was procedurally necessary for the Defendant to have made a determination under Regulation 9(1) and to act upon the outcome of that determination: either by carrying out or securing the carrying out of an Environmental Assessment, or not being required to do so.
98. I note that in the departmental guidance on supplementary planning documents the issue of Sustainability Appraisal is said also to encompass the requirements of the directive on Strategic Environmental Assessment and deals explicitly with the potential for an SPD to give rise to a need for an Environmental Assessment. I note that it focuses on the fact that an SPD may occasionally be found to be likely to give rise to significant effects which have not been formally assessed in the context of the higher level planning document and that it is conceivable that an area based supplementary planning document may have significant environmental effects. If that were the case the guidance is that the LPA should ask itself whether these effects have been appraised in a higher level planning document, such as the Core Strategy or saved local plan, and assess whether or not the higher level appraisal adequately appraises the significant effects. If the answer were no it would be likely to be necessary for a new Sustainability Appraisal to be undertaken which could be informed by the higher level appraisal. Unfortunately, in the present case this issue was not averted to at all in the report to the Council.
99. Accordingly, and regardless of whether the status of the document is a DPD or a SPD, the decision of the Council on the 27<sup>th</sup> October was flawed in that it was necessary for the Council to consider whether a Strategic Environmental Assessment was called for, on the basis that it fell within Regulation 5(2) and so it was necessary for the Council to make a determination under Regulation 9(1) on whether the plan or programme was likely to have significant environmental effects.
100. Accordingly, on this ground as well as the decision of the 27<sup>th</sup> October the decision was procedurally flawed and unlawfully made.

**Ground 5: failure to make an adequate Equality Impact Assessment**

101. The report to the Council on 27<sup>th</sup> October contained, at paragraph 3.11, a reference to the officers' advice in respect of this issue and referred to the Equalities Impact Assessment at Appendix 4.
102. In my judgment, there is nothing in this ground. It is clear that there was a full, comprehensive, objective and conscientious Equalities Impact Assessment conducted by the officers and placed before the Council as part of the report to the meeting on the 27<sup>th</sup> October. No specific criticism has been made of that document. At its best this point has been advanced on the basis that I should be encouraged to go behind the document and regard it as a "box ticking exercise". In my judgment that is not a proper basis for a challenge to such a document. **Accordingly this ground fails.**

## Remedy

103. The Defendant contends that I should refuse a remedy on the grounds of delay. Reliance is placed on the assertion that the claim had not been filed promptly, even though it was lodged within 3 months after the grounds to make the claim first arose (CPR 54.5(1)(a)). Permission was given by Mr Justice Lindblom for this Judicial Review to be sought. In so doing he concluded that delay was not a basis for refusing permission. Nonetheless, it is contended, the question of delay may be relevant on the question of remedy. Section 31(6) of the Senior Courts Act 1981 provides:

“Where the High Court considers that there has been undue delay in making an application for Judicial Review the Court may refuse to grant ... (b) any relief sought on the application if it considers that the granting of the relief sought would be likely to cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration.”

104. The Defendant contends that there was a gap between the 27<sup>th</sup> October and the 24<sup>th</sup> December 2010 when no action was taken at all. There was a further period of inaction between the 24<sup>th</sup> December and 26<sup>th</sup> January despite the grounds having been formulated and communicated under the pre action protocol. Further during the period between the 13<sup>th</sup> January and 26<sup>th</sup> January there was inaction despite the fact that by that time the Claimants had received a substantive response to their pre action letter.
105. I have found against the Defendant in respect of the SEA point. The Defendant accepts that I am not empowered to withhold relief under that ground on the basis of delay because that ground is based on European Union law (*R (Berky) v Newport City Council [2012] EWCA Civ 378*). Accordingly, on that ground, I need not consider further the question of withholding a remedy.
106. I have found against the Defendant on the domestic ground concerning the characterisation of the document as an SPD rather than a DPD. It is open to me to consider withholding a remedy in respect of that ground on the grounds of delay.
107. The Defendant says that it would be detrimental to the good of administration for me to quash the 27<sup>th</sup> October document as it would still leave in place the Core Strategy. That has not been challenged and is currently unchallengeable. It is said by the Defendant that there would be inconsistency and confusion having the Core Strategy in place but the 27<sup>th</sup> October document quashed and subject to the uncertainty of going through the various necessary procedures. This is said to be the more so where the Core Strategy has already been subject to independent consideration by the Inspector and has been subject to both Sustainability and an Environmental Impact Assessment.
108. The Claimants contend, however, that any such detriment does not arise from any delay in commencing these proceedings. The Core Strategy was adopted in October 2011, long after these proceedings had been commenced, and therefore the delay, if there was one, between the 27<sup>th</sup> October and the commencement of the proceedings on the 26<sup>th</sup> January 2011 all predated the adoption of the Core Strategy. Accordingly, any such dislocation there may be between the Core Strategy having been adopted on the one hand, and the 27<sup>th</sup> October document having been quashed and its future being uncertain on the other, is not due to that delay.

109. In my judgment, the delay, if there was any, would not cause any such detriment as is asserted by the Defendant. In any event, although the Core Strategy is in place, it is open to the Defendant to decide to adopt a document to replace the 27<sup>th</sup> October 2010 document, either in its current form, as a DPD, or in some different form as an SPD. In my judgment, therefore, the fact that, for a time, the core strategy will be unsupported by the 27<sup>th</sup> October 2010 document cannot be said to amount to a detriment to good administration. On the contrary, requiring the Defendant, before adopting such a document, to go through the proper statutory procedures before its adoption cannot be other than conducive to good administration. Therefore, I refuse to deny the Claimants the remedy sought on this ground.

### **Summary**

110. **I quash the decision of the Defendant to adopt the 27<sup>th</sup> October 2010 document on the grounds:**
- i) **that its decision was procedurally flawed in that it failed to follow the proper procedure for adopting a DPD,**
  - ii) **it was procedurally flawed in that, adopting a document that was a DPD, it failed to conduct a sustainability assessment and**
  - iii) **whether or not the document was a DPD or an SPD, the decision to adopt it on the 27<sup>th</sup> October 2010 was procedurally flawed because it failed to apply its mind to whether an Environmental Impact Assessment was required before adopting it, pursuant to the 2004 Environmental Assessment Regulations.**