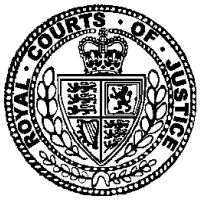

Neutral Citation Number: [2017] EWHC 534 (Admin)

Case No: CO/5521/2016

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

Leeds Combined Court Centre
1 Oxford Road, Leeds LS1 3BG

Date: 20/03/2017

Before:

MR JUSTICE JAY

- -

Between:

R (oao SKIPTON PROPERTIES LIMITED)	**Claimant**
- and –	
CRAVEN DISTRICT COUNCIL	**Defendant**

- -
- -

Gregory Jones QC and Caroline Daly (instructed by **Walton & Co**) for the **Claimant**
Michael Bedford QC (instructed by **Solicitor to the Council**) for the **Defendant**

Hearing dates: 7th and 8th March 2017

- -

Approved Judgment

MR JUSTICE JAY:

Introduction

1. By this application for judicial review, Skipton Properties Ltd ("the Claimant") challenges the decision of Craven District Council ("the Defendant") dated 2nd August 2016 to adopt a document entitled "Negotiating Affordable Housing Contributions August 2016" ("NAHC 2016").

2. It is the Claimant's case that, pursuant to the Town and Country Planning (Local Planning) (England) Regulations 2012 [SI 2012 No 767] ("the 2012 Regulations") the NAHC 2016 was required to be adopted as a development plan document, alternatively as a supplementary planning document; and that the failure to comply with antecedent statutory conditions renders the purported adoption unlawful. Further, it is contended that the NAHC 2016 was adopted in breach of Directive 2001/42/EC ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 [SI 2004 No 1633] ("the SEA Regulations").

3. Before I examine the issues joined in the pleadings, I propose to set out the Essential Factual Background to this dispute as well as the governing legal framework.

Essential Factual Background

4. The Claimant is described in the Statement of Facts and Grounds as a local landowner and residential property developer. There is disagreement between the parties as to the scale of its operations. According to the witness statement of the Defendant's planning officer, Ms Sian Watson, dated 2nd February 2017, "since … [2012] the Claimant's developments have (with one exception) involved sites of more than 10 dwellings". She draws my attention to planning applications made for 37 and 65 dwellings in May 2013 and July 2016 respectively. In December 2015 the Claimant sought planning permission for a development of 3 dwellings on a site in Cowling. Mr Brian Verity, the Claimant's managing director, does not contradict these basic facts, but states as follows:

> "The changes made to the NAHC 2016, as compared to previous Council policy documents in respect of affordable housing, are also of direct interest to [the Claimant]. The introduction of vacant building credit and the requirement that off-site affordable housing contributions be provided in schemes of 6-10 dwellings in rural areas are both of relevance to [the Claimant's] commercial position in the area. Firstly, we are acutely aware of the fact that these two important policy changes will have an impact on the decisions made by all local housing developers in respect of the number, nature and location of sites to bring forward, which could have a profound effect on the housing market in Craven District Council. Secondly, the off-site contributions for 6-10 dwellings may

> well cause [the Claimant] to consider bringing forward smaller sites in the future."

5. The Craven District (Outside the Yorkshire Dales National Park) Local Plan was adopted in July 1999. Under the objectives section of the Housing Chapter, one such objective was "to encourage and enable the development of affordable housing for rent and purchase in locations where it is required including rural areas". Policy H11 ("Affordable Housing on Large/Allocated Sites in District and Local Services Centres") was deleted in September 2007 (or, put another way, was not expressly saved by the Secretary of State), leaving the Defendant without a policy in its adopted development plan for the provision of affordable housing (save in one very specific respect). I am told by Ms Watson that the Defendant is preparing a new local plan, but that it will not be submitted for independent examination by the Secretary of State until later this year.

6. On 29th May 2012 the Defendant adopted the "Interim Approach to Negotiating Affordable Housing Requirements" ("IANAHR 2012"). It superseded the Affordable Housing Guide 2008 and stated, in so far as is material to this application:

> "The Interim approach is to require affordable housing at 40% provision on sites of 5 or more dwellings, subject to site specific financial viability. Strategic Housing will provide guidance to applicants on how this will be delivered, including type, size and tenure issues.
>
> …
>
> Applicants would … be advised that the failure to make provision for affordable housing may be a reason that is used to refuse planning permission."

7. The IANAHR 2012 was subsequently updated, altered and expanded. A series of supplements to the original document were published in July 2012, January 2013 and August 2014. The original document and the supplements were then amalgamated into a single document in January 2015. A new version of this document with improved format and content was published in October 2015, entitled "Negotiating Affordable Housing Contributions (October 2015)". This document was further updated following the publication of the 2015 Strategic Housing Market Assessment, and a new version entitled "Negotiating Affordable Housing Contributions (December 2015)" ("NAHC 2015") was promulgated on 5th January 2016. It should be noted that none of the post-IANAHR 2012 documents was separately adopted by the Defendant.

8. The NAHC 2015 contained the following statements:

> "This document sets out the council's interim approach to negotiating affordable housing contributions, in connection with planning applications for residential development. The approach (which is not a development plan policy) was adopted for development control purposes by the Council's Policy Committee on 29th May 2012. Guidance explaining the

> approach has been updated, improved and expanded over time. This latest version will be used as a stop-gap measure, by planning and housing officers, until an affordable housing policy has been prepared as part of the new local plan.
>
> …
>
> **Our approach**
>
> In view of the above, the Council will commence negotiations with developers on the basis that, in developments of 5 dwellings or more, 40% of the units to be built on-site shall be affordable housing. On occasion, it may be appropriate to negotiate the payment of a cash-sum contribution, by the developer, in lieu of on-site affordable housing provision. All contributions will be subject to site-specific financial viability …"

9. The Defendant's "Draft Text, Policies and Policies Map with Sustainability Appraisal, Interim Report and Sustainability Appraisal of Policies Consultation Document", dated 4th April 2016, forming part of the consultation process in respect of the new local plan, stated (in relation to proposed affordable housing guidance):

> "The council will publish additional practical guidance on the provision of affordable housing in the form of a supplementary planning document (SPD). This will include guidance on the limited circumstances in which off-site provision or financial contributions will be considered *in lieu* of on-site provision."

10. On 19th July 2016 the Defendant's Policy Committee received a report from the Strategic Manager for Planning and Regeneration which recommended a "revised approach" to negotiating affordable housing contributions in connection with planning applications for residential development. In November 2014 the Government had sought by Ministerial Statement to introduce changes to national policy on requiring affordable housing contributions from small sites. These changes were successfully challenged in judicial review proceedings, but the Government's position prevailed on appeal: see SSCLG v West Berkshire Council [2016] EWCA Civ 441, 11th May 2016. According to the Defendant's draft NAHC 2016 (appended to the July 2016 report):

> "3.2 The main effects of national affordable housing policy and guidance are as follows:
>
> - A new national site-size threshold has been introduced. Local Planning Authorities should no longer seek affordable housing contributions from developments of 10 dwellings with a maximum combined floor space of 1,000 sqm or less.
>
> - In designated rural areas … authorities may choose to implement a lower threshold of 5 dwellings or less, but only

> cash contributions (as opposed to on-site provision) should be sought from developments of 6-10 dwellings.
>
> - Vacant building credit has been introduced. Authorities should apply the credit where developments include the re-use or re-development of empty buildings, so that affordable housing contributions relate only to net increases in floor space.
>
> 3.6 Paragraph 3.2 above, explains that changes to national policy and guidance are intended to lift the burden on small developers. It should be noted, therefore, that replacing the 5 dwelling threshold, adopted in 2012, with a 6 dwelling threshold will represent an improvement for landowners for landowners and developers in designated rural areas … It is therefore considered that the recommendations of paragraphs 2.1 to 2.3 above, are likely to support the appropriate development of new homes, by small developers, in rural areas."

I should add that the Defendant has not yet amended its draft local plan (see paragraph 9 above) to reflect the Court of Appeal's decision. The position adopted in the draft NAHC 2016 (and, indeed, the final version) may not necessarily be reflected in the next draft of the local plan.

11. The principal change between the NAHC 2015 and the NAHC 2016 was explained at paragraph 3.3 of the July 2016 report:

> "The revised approach and guidance, contained in the appendix to this report, is based on the December 2015 version, but incorporates new site-size thresholds (page 2), cash-sum contributions (page 7) and vacant building credit (page 8). A contributions flow chart has also been added to help explain how affordable housing contributions are now determined (page 14). The following table appears on page 2 of the appendix and sets out a general approach to affordable housing negotiations.

<table>
<tr><th>Proposed development</th><th>Affordable housing contribution</th></tr>
<tr><td>More than 10 dwellings</td><td rowspan="2">40% of the units to be built on-site should be affordable housing</td></tr>
<tr><td>More than 1,000 sqm</td></tr>
<tr><td>6-10 dwellings in designated</td><td>A cash contribution should be paid,</td></tr>
</table>

rural area	once a reasonable proportion of the units is occupied, in lieu of on-site affordable housing provision
Less than 6 dwellings, but more than 1,000 sqm, in designated rural area	
All contributions will be subject to vacant building credit and site-specific financial viability	

"

12. The rationale for the change was explained at paragraph 3.5 of the July 2016 report:

> "Under the council's current approach, which was adopted on 29th May 2012, on-site provision has been sought from all developments of 5 dwellings or more, with cash contributions only accepted in exceptional circumstances. This approach has worked well and the council has secured on-site provision from six developments of 6-10 dwellings in designated rural areas, delivering approximately four affordable homes per year on average. Though relatively small in number, these homes will have a significant impact on sparsely populated rural areas, helping local people stay living and working in the communities in which they have been brought up. Whilst changes in national policy and PPG mean that the council can no longer require affordable homes to be built on sites of 6-10 dwellings, cash contributions can be required in designated rural areas, which could avoid a disproportionate effect on rural communities …"

13. On 29th July 2016 the Defendant's Policy Committee resolved to recommend to Full Council that, owing to significant changes in national planning policy "which necessitated the Council to determine whether affordable housing commuted sums should be sought for developments of 6-10 dwellings (or less than 6 dwellings with a combined floor space of more than 1,000 sqm) in designated rural areas before such sums can be secured from developers", it was recommended:

> "(1) That, the lower threshold for affordable housing contributions in designated rural areas and, in those areas, seek cash contributions from developments of 6-10 dwellings is implemented.
>
> (2) That, there is a requirement that affordable housing contributions are paid in respect of developments of less than 6 dwellings with a combined floor space of more than 1,000 sqm.

> (3) That, the approach and guidance set out in the document entitled 'NAHC (draft July 2016)' … is approved."

14. This recommendation was confirmed, and adopted, by Full Council at its meeting on 2nd August 2016; and published on the Defendant's website two days later.

The Legal Framework

Primary Legislation

15. The Planning and Compulsory Purchase Act 2004 ("PCPA 2004") differentiates between "development plan documents" ("DPDs") and "local development documents" ("LDDs"). The scheme of the PCPA 2004 is that DPDs are a sub-set of LDDs. The latter comprises all the local planning authority's policies relating to the development and use of land in its area (section 17(3)), but these do not acquire that status until adopted as such (section 17(8)). By section 38(3)(b), "the development plan consists of the DPDs (taken as a whole) which have been adopted or approved in relation to the area in question". The effect of section 38(6) is that applications for planning permission must be "made in accordance with the [development] plan unless material considerations indicate otherwise".

16. The PCPA 2004 does not provide the touchstone for discriminating between DPDs and LDDs. The applicable criteria are determined by secondary legislation. Section 17(7) provides:

> "Regulations under this section may prescribe –
>
> (za) which descriptions of documents are, or if prepared are, to be prepared as LDDs;
>
> (a) which descriptions of LDDs are DPDs;
>
> (b) the form and content of the LDDs;
>
> (c) the time at which any step in the preparation of any such document must be taken."

Even so, I do not overlook section 37(3) which defines a DPD as a "[LDD] which is specified as a [DPD] in the local development scheme". An issue arises as to whether a document which may fall within the prescribed description of an LDD (but is not prescribed as a DPD within regulations made under section 17(7)(a)) may still be treated by a local planning authority as a DPD.

17. Under the PCPA 2004, DPDs must be subject to independent examination by the Secretary of State (section 20). LDDs are not so subject. The combined effect of section 17(3) of the PCPA 2004 and section 70(2)(c) of the Town and Country Planning Act 1990 ("the 1990 Act") is that LDDs are (if they are not also DPDs) material considerations in the determination of planning applications, although they do not carry the weight of the statutory development plan (c.f. section 38(6)).

Secondary Legislation

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

19. By regulation 5:

> "**Local Development Documents**
>
> (1) For the purposes of section 17(7)(a) of the Act the documents which are to be prepared as [LDDs] are –
>
> (a) any document prepared by a local planning authority individually or in co-operation with one or more local planning authorities which contains statements regarding one or more of the following -
>
> (i) the development and use of land which the local planning authority wish to encourage during any specified period;
>
> (ii) the allocation of sites for a particular development or use;
>
> (iii) any environmental, social design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
>
> (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission.
>
> …
>
> (2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are –
>
> (a) any document which -
>
> …
>
> (iii) contains the local planning authority's policies in relation to the area; …"

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

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

22. SPDs, which are not a creature of the PCPA 2004, are defined negatively (see regulation 2(1)) as regulation 5 documents which do not form part of the local plan, i.e. are not DPDs. By the decision of this court in R (RWE Npower Renewables Ltd) v Milton Keynes Borough Council [2013] EWHC 751 (Admin) (Mr John Howell QC sitting as a DHCJ), not all documents which are not DPDs are SPDs. As I have said, SPDs are only those documents which fall within regulation 5(1)(a)(iii) or (1)(b) of the 2012 Regulations. Documents which are neither DPDs nor fall within any of the provisions of regulation 5(1) are capable of being LDDs but – in order to differentiate them from DPDs and SPDs - are "residual LDDs". At paragraphs 57-59 of this judgment in RWE, Mr Howell QC made clear that it is not the location of a document within the prescribed categories which is critical; what matters is that the document fulfils the separate criteria of section 17(3) and (8) of the 2004 Act.

23. Thus, there are three discrete categories, namely:

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

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

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

National Policy

24. The National Policy Planning Framework ("NPPF") provides:

> "17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:
>
> ● be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area …
>
> …
>
> ● proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities;
>
> …
>
> 50. To deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable, inclusive and mixed communities, local planning policies should:
>
> • plan for a mix of housing based on current and future demographic trends …
>
> • identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand; and
>
> • where they have identified that affordable housing is needed, set policies for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified …
>
> …
>
> 156. Local planning authorities should set out the **strategic priorities** for the area in the Local Plan. These should include strategic policies to deliver:
>
> * the homes and jobs in the area.
>
> …

> 174. Local planning authorities should set out the policy on local standards in the Local Plan, including requirements for affordable housing …
>
> …
>
> Glossary
>
> [I note the definitions of "affordable housing", "development plan", "local plan" and "supplementary planning documents", but in my view these do not merit direct citation]"

25. At paragraph 9 above, I mentioned the Defendant's draft local plan which will go out to consultation in due course. The precise terms on which it will be consulted are unclear. By paragraph 216 of the NPPF, decision-makers may give weight to emerging plans, with the degree of weight dependent on the stage of preparation, the extent to which there are unresolved objections to relevant policies, and the degree of consistency between such plans and the NPPF itself.

Strategic Environmental Assessment

26. Regulation 2(1) of the SEA Regulations defines the "plans or programmes" to which this regime applies as:

> "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 …"

27. By regulation 5:

> "(1) Subject to paragraphs (5) and (6) and regulation 7, where –
>
> (a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and
>
> (b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3)
>
> the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of

that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which -

(a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.

…

(4) Subject to paragraph (5) and regulation 7 -

(a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;

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

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

the responsible authority shall carry out, or secure the carrying out, of an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

…

(6) An environmental assessment need not be carried out –

(a) for a plan or programme of the description set out in paragraph (2) or (3) which determines the use of a small area at local level; or

…

unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, …"

28. By regulation 9:

> "(1) The responsible authority shall determine whether or not a plan, programme … referred to in –
>
> (a) paragraph (4)(a) and (b) of regulation 5;
>
> (b) paragraph (6)(a) of that regulation;
>
> (c) paragraph (6)(b) of that regulation,
>
> is likely to have environmental effects.
>
> (2) Before making a determination under paragraph (1) the responsible authority shall -
>
> (a) take into account the criteria specified in Schedule 1 to these regulations; and
>
> (b) consult the consultation bodies.
>
> (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."

The NAHC 2016

29. The NAHC 2016 makes clear that it contains the Defendant's "interim approach" to negotiating affordable housing contributions, which approach was first adopted on 29th May 2012. According to its drafters, it is not in the nature of a development plan policy (the "not" is italicised). Further:

> "This current version incorporates a ministerial statement issued in 2014 and related to changes to planning practice guidance. It will be used as a stop-gap measure, by planning and housing officers, whilst an affordable housing policy is being prepared as part of the new local plan."

30. The NAHC 2016 recognised the conclusion of the Defendant's Strategic Housing Market Assessment ("the 2015 SHMA") that there was a high need for affordable housing in Craven. It also recognised that the 2014 Ministerial Statement, upheld by the Court of Appeal in May 2016, allowed local planning authorities in designated rural areas the option of lowering the threshold from 10 dwellings to 5 dwellings/1,000 sqm, with any affordable housing contributions being taken as cash payments.

31. The following provisions of the NAHC 2016 are relevant to the issues which arise:

(i) Paragraph 3: this sets out the general approach, and reflects the table I have included at paragraph 11 above.

(ii) Paragraph 4: this defines "affordable housing" with reference to the definition in the glossary section of the NPPF.

(iii) Paragraph 6: as regards the "size and tenure of affordable housing units", the general approach to securing the local housing needs as set out in the 2015 SHMA is to prioritise small affordable homes for "forming and growing households". There should also be an affordable housing mix of about 75% affordable rented and 25% intermediate housing for sale.

(iv) Paragraph 7: affordable housing units should, as a general rule, be spread through developments rather than concentrated in particular areas.

(v) Paragraph 8: the design requirements should be as laid down by the HCA and in the Defendant's own document, "Design Guidance for Affordable Housing Providers". Paragraph 8 also specifies minimum space standards.

(vi) Paragraphs 10-12 deal with the detail of housing transfer prices, cash-sum contributions and vacant building credit.

32. I set out the salient parts of paragraph 16 of the NAHC 2016 separately:

> "**Planning Applications**
>
> Anyone proposing a development of 6 or more dwellings, or more than 1,000 sqm, should discuss affordable housing requirements with the council's housing development team at a pre-application meeting.
>
> …
>
> If an applicant believes that affordable housing requirements are not financially viable, he/she should submit a financial viability appraisal before submitting a planning application …
>
> …
>
> Applicants are urged to take the opportunities offered to engage in pre-application discussions, as insufficient attention to affordable housing requirements is likely to result in a refusal of planning permission."

The Issues

33. The parties are agreed that the following five issues arise for my consideration:

(1) Did the Defendant act unlawfully in failing to adopt the NAHC 2016 as a DPD in accordance with regulation 5(1)(a)(i) or (iv) of the 2012 Regulations? (Ground 1)

(2) Did the Defendant act unlawfully in failing to adopt the NAHC 2016 as an SPD in accordance with Regulation 5(1)(a)(iii) of the Town and Country Planning (Local Planning) (England) Regulations 2012? (Ground 2)
(3) If the answer to (1) or (2) is yes, did the Defendant breach the SEA Directive and Regulations in failing to carry out an environmental assessment? (Ground 3)
(4) What is the proper scope of this claim?
(5) Does s. 31(2A) of the Senior Courts Act 1981 apply to this Claim?

The Rival Contentions

The Claimant's Case

Issue 1

34. Mr Gregory Jones QC for the Claimant submitted that the NAHC 2016 contains statements which fulfil all the requirements of regulation 5(1)(a)(i). The NAHC 2016 is intended to be the Defendant's interim policy in relation to affordable housing, implemented in direct response to paragraph 50 of the NPPF, and to the option accorded to local planning authorities in the Ministerial Statement of 2014, pending the preparation and finalisation of the new local plan. Specifically, the NAHC 2016 was promulgated in response to a clearly perceived need for affordable housing, and, accordingly, encourages it. The various components of the policy document, including references to size and tenure, distribution of housing units, and design, relate to or are regarding "development and use of land": the link between the statements on the one hand and their target on the other ("the development and use of land") need not be particularly tight. Further, these are matters which the Defendant wishes to encourage "during any specified period", being an admittedly indeterminate period of time which will end once the new local plan has been adopted.

35. In his skeleton argument, Mr Jones encapsulated his submission in this manner:

> "The logical implication of this … viewed in the round, it is clear that the NAHC does contain statements that seek to encourage residential development in a form that accords with the requirements of the NAHC 2016 until such time as a new local plan is adopted."

When, during oral argument, I pointed out that this formulation rather tended to circularity, Mr Jones recast his headline submission slightly. His principal submission was that the NAHC 2016, properly construed and seen in context, encourages residential development of a particular type: namely, affordable housing. In the alternative, Mr Jones submitted that the NAHC 2016 encourages residential development more generally, because the fixing of the percentage allocation of affordable housing to market housing has a direct impact on the latter, and on the commercial attractiveness of residential development generally.

36. In the alternative, Mr Jones submitted that the NAHC 2016 contains statements that regulate the development or use of land more generally, and that it therefore falls within regulation 5(1)(a)(iv). The document sets forth the conditions which must be satisfied in order for planning permission to be granted: if these are not fulfilled, it is probable that permission will be refused. The NAHC 2016 applies in respect of all residential development in the Defendant's administrative area and can therefore be envisaged as a general development management policy.

37. Mr Jones accepted that the NAHC 2016 contains no statements regarding site allocation policies, but he submitted that the conjunction "and" in regulation 5(1)(a)(iv) is disjunctive rather than conjunctive – in the sense that, in order to be caught by the provision, it is unnecessary for both elements to be satisfied.

38. If the NAHC 2016 falls within either regulation 5(1)(a)(i) or (iv), Mr Jones submitted that it is a DPD which ought to have been made the subject of consultation under regulation 18 of the 2012 Regulations, and have been submitted to the Secretary of State for independent examination of its soundness under regulation 20.

Issue 2

39. Mr Jones' primary case is that the NAHC 2016 is a DPD, but he submitted in the alternative that it is an SPD because is clearly contains objectives which the Defendant seeks to attain in relation to the provision of affordable housing: these are the financial conditions, and the size and tenure, design, and spatial objectives I have previously mentioned.

40. Mr Jones observes that the Defendant's skeleton argument raises for the first time the objection that there is no or insufficient nexus between any statements in the NAHC 2016 which might *prima facie* fall within regulation 5(1)(a)(iii) and any saved policies in the 1999 Local Plan. His riposte to this objection was two-fold: first, that the NAHC 2016 contains statements which pertain to saved policy H12; secondly, that it contains statements which qualify one or more of the more general aspects of the Housing Chapter of the 1999 Local Plan.

41. If the NAHC 2016 falls within regulation 5(1)(a)(iii), Mr Jones submitted that it is an SPD which ought to have been made the subject of consultation under regulations 12 and 13 of the 2012 Regulations.

Issue 3

42. It is common ground that, if the Claimant succeeds on Ground/Issue 1, the Defendant should have undertaken an SEA.

43. In the event that the Claimant succeeds on Ground/Issue 2 (having, by definition, failed on Ground/Issue 1), Mr Jones submitted that the NAHC 2016 *qua* SPD falls within the ambit of regulation 5(2) of the SEA Regulations because it is a "plan or programme" that is "prepared for town and country planning or land use", and it "sets the framework for future development consent of [urban development projects]". That being the case, it was incumbent on the Defendant to carry out, or secure the carrying out, of an environmental assessment under regulation 5(1).

44. The rubric "plan or programme" applies only to documents "required by legislative, regulatory or administrative provisions" (see article 2(a) of the SEA Directive). Mr Jones relied on the decision of the CJEU in Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale [2012] Env L.R. 30 in support of the proposition that

the statutory preconditions for the adoption of an SPD satisfied the criterion of "required" notwithstanding that the SPD itself was not a mandatory document. In the alternative, Mr Jones submitted that the NAHC 2016 is a plan required by "administrative provisions", namely provisions in the NPPF.

45. As for the separate rubric, "sets the framework for future development consent of [urban development projects]", Mr Jones submitted, in reliance on the decision of the Supreme Court in R (Buckinghamshire County Council) v Transport Secretary [2014] UKSC 3, that the NAHC 2016 satisfies this test because it constrains subsequent consideration of applications for planning permission within the terms of Lord Carnwath JSC's analysis.

Issue 4

46. As I have pointed out at paragraph 11 above, when a comparison is made between the NAHC 2015 and the NAHC 2016, it is clear that the main substantive difference relates to paragraph 3 and the approach to cash-sum contributions *in lieu* of on-site provision in certain specified circumstances. There are also minor consequential changes. Whereas the NAHC 2015 was published, but not adopted, by the Defendant, the NAHC 2016 was adopted and then published two days later.

47. Mr Jones submitted that in these circumstances it is open to the Claimant to seek to challenge the entirety of the NAHC 2016, and not just those portions which were new. Given the procedures adopted by the Defendant in August 2016, and that the NAHC 2015 was impliedly abrogated the instant after the NAHC 2016 came into effect, there was nothing to preclude a challenge to the entirety of the later document. The fact, which is not accepted, that the Claimant's real grievance might relate not to the new parts is nothing to the point.

Issue 5

48. Mr Jones submitted that, had the Defendant not acted unlawfully, it was not "highly likely" that the outcome would not have been substantially different (see the familiar wording of section 31(2A) of the Senior Courts Act 1981). If I were to find in his favour on Ground 1 (and, therefore, on Ground 3 too), it would follow that the Defendant was in breach of the various regulatory requirements by failing to consult on the NAHC 2016, in failing to carry out an SEA, and in failing to submit the document for independent assessment by the Secretary of State. In such circumstances, the court simply cannot speculate as what the outcome would or might have been had these omissions not occurred. Mr Jones submitted that the analysis should be the same were he to succeed only on Ground 2, with or without Ground 3; although he would have to accept that the point would not be as powerful.

49. In terms of the comparative exercise predicated by section 31(2A), Mr Jones submitted that I should examine the outcome with reference to what would have obtained had the unlawfulness not occurred rather than on the basis of any comparison between the NAHC 2016 and the NAHC 2015.

The Defendant's Case

Issue 1

50. Mr Michael Bedford QC for the Defendant submitted, by way of introductory observation, that the distinction between DPDs, SPDs and residual LDDs "is, at times, opaque". He also submitted that Mr Jones' approach to regulation 5(1)(a)(i) was so broad that it left little space for SPDs (within (iii)) and for residual LDDs, which are outside the frame of these regulations altogether.

51. His first submission was that regulation 5(1)(a) is concerned, in essence, with *policies*, and that the NAHC 2016 is not intended to be such a document: it lays down an interim approach, and must therefore be treated as no more than a material consideration for planning purposes, rather than as generating a statutory presumption pursuant to section 38(6) of the 2004 Act. Given that the Defendant is not intending to circumvent the statutory scheme, and is developing its local plan in line with the substantive and procedural requirements which the 2004 Act and national policy has prescribed, there can be no sound reason in principle why, pending this plan coming to fruition, the Defendant cannot adopt, promulgate and adhere to guidance of this nature as a form of stop-gap measure. On my understanding, Mr Bedford deployed this submission in relation to both Grounds 1 and 2; but, as it features as a preliminary point, I raise it at this stage.

52. Secondly, Mr Bedford submitted that the NAHC 2016, as its introductory section makes clear, addresses the Defendant's "interim approach to negotiating affordable housing contributions, in connection with planning applications for residential development". The focus is on the contributions rather than on residential development. For the purposes of regulation 5(1)(a)(i), residential development is not being encouraged. The premise upon which the NAHC 2016 proceeds is that a developer may propose a particular development (this is treated as a given), and then the Defendant will address the issue of affordable housing, in particular cash-sum contributions. Thus, in no relevant sense is residential development being encouraged or promoted: the developer has already decided to apply for permission to undertake such development. Although the "development and use of land" within this part of the regulation covers residential development (see Use Class C3, for individual dwellings), it does not embrace affordable housing. This is not the development and use of land; rather, it is concerned only with the terms and tenure for the occupation of residential development.

53. In answer to Mr Jones' alternative argument on regulation 5(1)(a)(iv), Mr Bedford's submissions passed along the following tracks:

    (1) on the assumptions that (a) the "and" in this sub-paragraph should be read disjunctively, and (b) paragraphs 75-76 of the judgment of Mr Howell QC in RWE are correct, it cannot be said that the NAHC 2016 is a policy guiding applications for planning permission *generally*. It is concerned only with the issue of affordable housing provision, which amounts to a specific policy not dissimilar from the sort of policy under scrutiny in RWE itself.

(2) In the alternative, the "and" in this paragraph should be read conjunctively, which is its more natural and ordinary meaning. This chimes with the more sensible, purposive construction of the provision inasmuch as a disjunctive interpretation lends no separate life to the second limb of regulation 5(1)(a)(iv): this is because all site allocation policies will already be DPDs on account of the wording of paragraph 5(1)(a)(ii), there being no material difference in the regulatory language. Recognising that this alternative analysis is inconsistent with paragraphs 193-197 of RWE (on the basis that development management policies *simpliciter* would be outside the regulatory scheme, because they could not be DPDs), Mr Bedford did not shrink from submitting that Mr Howell QC was wrong, and should not be followed. This is the issue I mentioned at paragraph 16 above. Regulation 5(1)(a) does not establish an exhaustive code. Not merely are there residual LDDs, local planning authorities may decide that particular documents should form part of the local plan, and be processed as such. Section 37(3) is wide enough to enable this to happen.

Issue 2

54. Mr Bedford accepted in principle that the NAHC 2016 contained statements regarding social, design and economic objectives (see the wording of regulation 5(1)(a)(iii)). Indeed, he deployed this in support of his construction of paragraph (i): a case which is apt, at least in principle, to be accommodated within one provision must (at the very least) be less apt to be accommodated within another (it being impossible for the case to fall within both provisions). His submission, however, was that these various objectives are not relevant to "the attainment of the development and use of land mentioned in paragraph (i)", which must be a reference to a specific DPD to which the putative SPD is subordinate. Given that there is no saved affordable housing policy in the 1999 Local Plan, it must follow that there is nothing to which this putative SPD can be supplementary. The very general statements in the saved local plan cannot be recruited for this purpose, nor can policy H12 which relates very specifically to rural exception sites and 100% affordable housing.

Issue 3

55. On the footing that the NHC 2016 is an SPD, Mr Bedford remarked that it was not readily apparent how and why the provision of affordable housing could have likely environmental effects; it was neutral in this regard.

56. Mr Bedford advanced two submissions on the language of regulation 5(2) of the SEA Regulations, as interpreted by relevant European and domestic jurisprudence. First, he submitted that the NAHC 2016 was a voluntary plan which was not "required by legislative, regulatory or administrative provisions". Secondly, he submitted that it did not "set the framework for future development consent". All environmental effects would be fully and properly considered under the rubric of separate assessment under the EIA Regulations, where appropriate.

Issue 4

57. Mr Bedford submitted that those parts of the NAHC 2016 which differed from the NAHC 2015, and could properly be regarded as "new", were limited in scope (see paragraph 11 above). The Claimant did not challenge the NAHC 2015, and is now far too late to do so. The NAHC 2015 must therefore be regarded as a valid document. In substance, albeit perhaps not in form, the majority of the NAHC 2015 has been carried through into the NAHC 2016; and should be seen as immune from challenge.

Issue 5

58. Mr Bedford submitted that the "outcome" for the Claimant "if the conduct complained of had not occurred" would have been substantially the same. This is because: (i) the correct comparison for these purposes is between the NAHC 2016 and the NAHC 2015 (had the former not been adopted, the latter would have remained in place), (ii) the Claimant has no interest in the smaller sites covered by the changes to paragraph 3 of the NAHC 2016, and/or (iii) any knock-on effects on the housing market brought about by the policy under current scrutiny are wholly contingent on the 2014 Ministerial Statement, which has not been challenged. Further, and in relation only to Ground 3, Mr Bedford submitted that, even were an SEA to be required, no likely environmental effects could stem from the provision of affordable housing.

59. Both Counsel referred me to authority in support of the submissions they made. I will address relevant authority during the course of the next section of this judgment.

Analysis and Conclusions

Introduction

60. Although he formulated the point slightly differently, I agree with Mr Bedford that the quest for the true construction and meaning of regulation 5(1)(a) is unnecessarily challenging. Frankly, those responsible for these regulations should consider redrafting them.

61. Were the 2012 Regulations primary legislation, the interpretative exercise would have to proceed on the assumption that Parliament is all-knowing and infallible, and that they can only be viewed as an entirely coherent entity without any internal inconsistencies. No doubt secondary legislation aspires to like standards, but in my view the same assumption does not have to be made. Inconsistencies and anomalies may exist. It is often a question of the lesser of two evils.

62. Regulation 5(1)(a) has been subjected to close analysis by Mr Howell QC in RWE, but interpretative problems remain. Despite all the difficulties, and the weight and breadth of submission brought to bear on the issues, I have been able to come to the clear conclusion that the NAHC 2016 is a DPD because it falls within regulation

5(1)(a)(i). The robustness of this conclusion may not relieve me entirely of the need to touch on other provisions, but the pressure is less great.

63. It is common ground, and in any event correct, that the allocation of the NAHC 2016 to its correct legal category raises a question of law rather than of planning judgment: see R (oao Wakil) v Hammersmith and Fulham LBC [2012] EWHC 1411 (QB), paragraphs 81 and 82. The NAHC states in terms that it is not a DPD, possibly protesting too much; but, in any event, the decision is for me, not for the Defendant.

64. I reject Mr Bedford's submission that the NAHC 2016 is an "interim approach" and not a policy. It obviously is a policy, as it was in the 1999 Local Plan (H11, now deleted), and will be in the Defendant's new local plan. It goes without saying that the content of the policy has changed, and will change, over time; but in terms of category or concept we are talking about policies and not about anything else.

65. Mr Bedford did not submit in the alternative that, if the NAHC 2016 is a policy, it is a residual LDD. However, that must be the logic of his case, and I proceed on that basis.

Issue 4

66. I note the ordering of the issues as agreed by the parties, but it is convenient to begin with Issue 4, the scope of the claim. If Mr Bedford's submission were correct, the Claimant may only seek to challenge that which is "new" or different in the NAHC 2016, when it is placed against the NAHC 2015. However, his submission is incorrect. The Defendant decided to adopt the NAHC 2016 as a fresh document. It was probably right to do so, but that is neither here nor there. I asked Mr Bedford for assistance as to the status of the NAHC 2015 once the NAHC 2016 had been adopted. He accepted that the earlier document had been impliedly abrogated. In my view, the position could not be otherwise.

67. Mr Bedford relied on the following passage in paragraph 67 of Mr Howell QC's judgment in RWE:

> " … But in my judgment regulation 5(1) is not concerned with documents containing statements that merely repeat the policies already contained in the adopted local plan or in another [LDD] by way of background or for the sake of clarity."

I entirely agree. However, in the instant case the NAHC 2016 did not merely repeat earlier statements of policy by way of background or for the sake of clarity. In RWE, the earlier statements retained their legal vigour; in the instant case, they no longer exist. Mr Bedford's riposte that this is to elevate form over substance would have appeal were it not for the fact that his clients decided to take this particular course.

68. The Claimant is therefore entitled to challenge the whole of the NAHC 2016. The Defendant does not dispute its standing to do so. The fact that the Claimant may not be particularly interested in the so-called "new" elements of the Defendant's policy is irrelevant because (a) the whole document falls under scrutiny, (b) an ordinary

member of the public within the Defendant's area would have sufficient interest to bring this challenge, and the Claimant has commercial corporate interests of a general nature, and (c) the Claimant may have an indirect commercial interest in so far as the NAHC impacts on residential development generally. This last point will be developed below.

Issue 1

69. Regulation 5(1)(a) has been addressed in two decisions of this court.

70. In RWE, the challenge was to the Defendant's "Wind Turbines Supplementary Planning Document and Emerging Policy" ("Wind SPD"). RWE's main arguments were that this document was not an SPD, but a DPD; and that it conflicted with Milton Keynes' adopted DPD.

71. The following paragraphs in Mr Howell QC's judgment are relevant to Issue 1:

(1) A putative LDD which does not fall within the descriptions of documents referred to in regulation 5 may still be an LDD, because of the combined effect of section 17(3) and (8) of the 2004 Act. These are the "residual LDDs" discussed at paragraph 22 above (paragraphs 59-60).

(2) By contrast, the class of possible DPDs is limited to those prescribed in regulation 5 (paragraphs 193-197).

(3) "what all [LDDs] … contain are "policies" relating to the use and development of land. What regulation 5(1)(a) is thus concerned with are statements that contain policies, which are described in sub-paragraphs (i) to (iv)" (paragraph 67).

(4) In order to ascertain whether a document encourages the development and use of land, regard must be had to the type of statements a document contains, not on what the effect of such statements may be in practice (paragraph 70).

(5) The Wind SPD was not a DPD within regulation 5(1)(a)(i) because, on the facts of that case, any statements of encouragement merely repeated the statements in Milton Keynes' adopted DPD (paragraph 69).

(6) The Wind SPD was not a DPD within regulation 5(1)(a)(iv) because the new parts of the Emerging Policy were all connected with a particular form of development that Milton Keynes' adopted DPD already sought to encourage, namely proposals to develop wind turbines; they were not connected with regulating the development or use of land generally (paragraph 76). Specifically (at paragraph 75):

> "In my judgment the difference, between (a) documents containing statements regarding matters referred to in sub-paragraphs (i) to (iii) of regulation 5(1)(a) of the 2012 Regulations and (b) a document containing statements regarding a development management policy which is intended to guide the determination of applications for planning

> permission, is that the former are all connected with particular developments or uses of land which a local planning authority is promoting whereas the latter is concerned with regulating the development or use of land generally."

Mr Howell QC's reason for this conclusion was that any different construction of regulation 5(1)(a)(iv) would render (i), (ii) and (iii) effectively otiose (paragraph 74).

(7) Mr Howell QC endorsed what was common ground before him, namely that the "and" in regulation 5(1)(a)(iv) should be read disjunctively – "were it otherwise a document containing a simple development control policy … could not form part of the local plan for the purpose of the 2012 Regulations and become part of the development plan" (paragraph 72).

72. In Miller, the challenge was to an interim policy which constituted a departure from Leeds City Council's adopted Policy N34, which served to safeguard some non-Green Belt land. Miller contended that the interim policy was a DPD, alternatively an SPD, relying on all the various categories in regulation 5(1)(a) and (2)(b).

73. The following paragraphs in Stewart J's judgment are relevant to Issue 1:

(1) "regarding" (in the stem of regulation 5(1)(a)) signifies a relatively loose relationship between the "document" and the matters contained in (i)-(iv) (paragraph 23).

(2) The Interim Policy did not encourage the development and use of land. Specifically (at paragraph 26):

> "… The court must look at the substance as to whether the LPA wishes to encourage the development and use of land; the court must also have regard to the subjective element in the verb 'wish'. There will be situations where an LPA wishes to encourage the development and use of land, for example to regenerate an area. The Interim Policy is very different. It sets out criteria which are an attempt by the LPA to comply with the NPPF. These criteria encourage and discourage development, albeit that the overall net effect is to release further land. Nor does the fact that there is reference in subparagraph (v)(a) of the Interim Policy to regeneration change the character of the document as a whole."

(3) The Interim Policy did not fall within regulation 5(1)(a)(iv) because Policy N34 was not a development management policy: it was a safeguarding policy, rather than a policy which *regulated* the development or use of land. Thus, statements in the Interim Policy were not regulating a development management policy (paragraphs 36-37).

(4) It was unnecessary to decide whether the "and" in regulation 5(1)(a)(iv) was conjunctive or disjunctive. Even if disjunctive, Miller's case could not succeed (paragraph 38).

(5) It was common ground that Policy N34 was not restricted to a particular land use (paragraph 36). By implication, therefore, Stewart J was proceeding on the basis of Mr Howell QC's distinction between particular and general policies.

(6) "The material word [in regulation 5(1)(a)(iv)] is "regulating". Regulating land may include a number of features for example density of housing, housing mix etc." (paragraph 37). I agree with Mr Bedford that this was *obiter*.

74. Having set out relevant authority on this topic, I begin with a number of observations of a general nature.

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

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

77. Thirdly, I agree with Mr Howell QC that there may be a degree of overlap between one or more of the (i)-(iv) categories, although (as I have already said) a document which must be a DPD (because it falls within any of (i), (ii) and/or (iv)) cannot simultaneously be an SPD. This last conclusion may well flow as a matter of language from the true construction of regulation 5(1)(a)(iii), but it certainly flows from the straightforward application of regulations 2(1) and 6.

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

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

80. Sixthly, the difference in wording between regulation 5(1)(a)(i) and (iv) featured in the argument in Miller but not on my understanding in the argument in RWE. For the purposes of (i), the statements regarding the development and use of land etc. *are* the policies, or at the very least include the policies. On a strict reading of (iv), the statements at issue are "regarding … development management and site management

policies". In other words, the statements are not the policies: they pertain to policies which exist in some other place. I will need to examine whether this strict reading is correct.

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

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

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

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

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

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

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

88. Fourthly, it is incorrect to proceed on the basis that (in accordance with Mr Bedford's primary submission) residential development should be taken as a given, with the affordable housing elements envisaged as a series of restrictions and constraints. Arguably, some support for this approach may be drawn from paragraph 26 of Miller, although that case turned on its own facts. This approach ignores the commercial realities as well as what the NAHC 2016 specifically says about the need for pre-application discussions, with insufficient attention to affordable housing requirements likely leading to the refusal of an application. In my judgment, all elements of a housing package which includes affordable housing are inextricably bound.

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

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

91. In any event, on the particular facts of this case it is clear that the NAHC 2016 could not be an SPD even if I am wrong about it being a DPD. This is because there is

nothing in the saved policies of the 1999 Local Plan to which the NAHC is supplementary, despite Mr Jones' attempts to persuade me otherwise. This is hardly surprising, because the whole point of the NAHC 2016 is to fill a gap; it cannot logically supplement a black hole. That it fills a gap is, of course, one of the reasons I have already identified in support of the analysis that the NAHC 2016 is a DPD.

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

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

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

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

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

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

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

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

94. There is force in Mr Bedford's objection that a disjunctive reading of regulation 5(1)(a)(iv) leaves little or no space for (ii) and site allocation policies, given the definition of the latter in regulation 2(1). However, this is an anomaly which, with respect, is the fault of the draftsperson; it cannot affect the correct approach to regulation 5(1)(a)(iv). There is more limited force in paragraph 74 of the judgment of Mr Howell QC in RWE, but I would make the same point. Regulation 5(1)(a)(i) and (iv) do not precisely overlap (see paragraph 93(5) above); (iii) is in any event separate because it only applies in relation to statements of policy objectives which are supplemental to a specific DPD. Further, anomalies pop up, like the heads of Hydra, however these regulations are construed. These, amongst others, are good reasons why the 2012 Regulations should be revised.

Issue 3

95. It is unnecessary for me to address Issue 3 on the alternative premise that the NAHC 2016 is an SPD rather than a DPD. I am satisfied that it is not.

Issue 5

96. Mr Bedford submitted that I should refuse relief in this case because, if the NAHC 2016 quashed, the Defendant will revert to the NAHC 2015. On his submission, the correct approach to section 31(2A) of the Senior Courts Act 1981 is that I should proceed on the premise that the NAHC 2016 was never adopted.

97. In my judgment, this submission cannot be accepted. I am required to refuse relief, namely a quashing order, if "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". This is a backward-looking provision. However, and contrary to Mr Bedford's argument, the "conduct complained of" here is the various omissions I have listed (the failure to consult, assess and submit for examination), not the decision to adopt. "The conduct complained of" can only be a reference to the legal errors (in the Anisminic sense) which have given rise to the claim.

98. Had the Defendant not perpetrated these errors, by omission, I simply could not say what the outcome would have been, still less that it would highly likely have been the same.

Disposal

99. I grant an order under section 31(1)(a) of the Senior Courts Act 1981 quashing the NAHC 2016.

Coda

100. Like Stewart J, I am not oblivious to the practical difficulties facing local planning authorities assailed by constant changes in the legislative regime and national policy. However, a local planning authority is required to keep its local plans under review. The correct course is to press on with the timeous preparation of up-to-date local plans, and in the interregnum between draft and adoption, deploy these as material considerations for the purpose of the rights and duties conferred by the 2004 Act.