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Case No: CO/7394/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st December 2011

Before :

MR JUSTICE OUSELEY

Between :

THE QUEEN on the application of STEVENAGE BOROUGH COUNCIL	<u>Claimant</u>
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	<u>Defendant</u>
-and-	
NORTH HERTFORDSHIRE DISTRICT COUNCIL	<u>Interested Party</u>

**(Transcript of the Handed Down Judgment of
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**Mr T Straker QC and Mr A Goodman (instructed by Solicitor to Stevenage Borough
Council) for the Claimant**
Mr C Banner (instructed by Treasury Solicitor) for the Defendant
**Mr S Bird QC (instructed by Solicitor to North Hertfordshire District Council) for the
Interested Party**

Hearing date: 2nd November 2011

Judgment
As Approved by the Court

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MR JUSTICE OUSELEY :

Introduction

1. This is another round in the battle which could go by the name of *R (Cala Homes (South) Limited)*. The Secretary of State for Communities and Local Government announced his intention to abolish Regional Strategies in a letter to all planning authorities dated 27 May 2010. He said that this letter was to be a material consideration in any “planning decisions” they were currently taking. In July 2010, he purported to revoke all Regional Strategies. But Sales J declared that the purported revocation was unlawful; *Cala Homes (South) Limited v Secretary of State for Communities and Local Government* [2010] EWHC 2866 (Admin). In response, the Chief Planner wrote to all planning authorities on 10 November 2010 reminding them of the Government’s continuing intention rapidly to revoke Regional Strategies, and expecting them still to have regard to that intention as a material consideration “in any decisions they are currently taking”.
2. In February 2011, Lindblom J rejected a challenge to the lawfulness of that second letter; *R (Cala Homes (South) Limited) v SSCLG* [2011] EWHC 97 (Admin). He held that the letter was a material consideration in decisions as to whether planning permission should be granted or refused; as a material consideration, it could indicate that the decision should be made otherwise than in accordance with the development plan, of which the Regional Strategy formed part. He also held that the letter did not compromise the statutory requirement that a development plan conform generally to the current Regional Strategy.
3. On 27 May 2011, the Court of Appeal dismissed an appeal from Lindblom J’s decision; [2011] EWCA Civ 639. Stevenage BC made written submissions in the appeal. The Court affirmed the distinction between the statutory obligation that local planning authority Development Plan Documents should generally conform to the relevant Regional Strategy, to which the Government’s intention to promote legislation to permit its revocation was irrelevant, and the statutory obligation in taking development control decisions to have regard to all material considerations, where that intention could be a material consideration. The Court also pointed out that giving significant weight to that intention in development control decisions could be irrational in many common circumstances, in view of the procedures through which the legislation and the individual revocation of any Regional Strategy had to pass.
4. In this case, on 26 May 2010, Stevenage BC submitted its Core Strategy and other Development Plan Documents, DPDs, for examination by an Inspector appointed by the Secretary of State. As required by statute, at that stage its DPDs had to conform generally to the relevant Regional Strategy, the East of England Plan, the EoEP. They did conform. The submission immediately preceded the first letter of the Secretary of State, announcing his intention to abolish Regional Strategies.
5. On 12 November 2010, after the decision by Sales J in *Cala Homes* and after the Chief Planner’s letter in response of 10 November 2010, the Inspector appointed to hear the examination advised that the Stevenage BC Core Strategy failed to meet the statutory requirement of soundness. It was unsound, albeit that it conformed generally to the EoEP, because the housing numbers, the crucial issue, were not justified by

local needs, since the EoEP was to be revoked. A large proportion of the housing planned for Stevenage in the Core Strategy was to be built in neighbouring North Hertfordshire DC's area, but NHDC was no longer willing to co-operate in achieving the EoEP strategy of growth for Stevenage beyond meeting Stevenage's own local needs. Following a variety of legal submissions, the examination was reconvened in March 2011, between the decisions of Lindblom J and the Court of Appeal in *Cala Homes*. The Inspector's recommendation to Stevenage BC emerged on 6 May 2011, before the Court of Appeal decision. He recommended that the Core Strategy was unsound because the cross border issues remained unresolved, and so it could not be delivered. That recommendation is binding on Stevenage BC.

6. It is that recommendation which Stevenage BC seeks to quash, on the grounds that the Inspector had wrongly taken into account the Government's intention to revoke Regional Strategies, and had misdirected himself about the obligations of NHDC in preparing its DPD timetable and the plans themselves. Stevenage BC said these had to conform at all stages to the still extant Regional Strategy, and the Inspector ought to assume that NHDC would comply with that legal obligation at all stages, including producing in due course a plan providing for Stevenage growth in NHDC's area. This meant that the soundness of Stevenage BC's Core Strategy should have been judged on the assumption that it would be matched by the NHDC Plans, and could not therefore be regarded now as "unsound".
7. NHDC and the Secretary of State pointed out that no challenge had been brought to NHDC's timetable for the production of its DPDs, nor to its intention to produce ones which would not conform to the EoEP, unless at the time of submission for examination, the EoEP remained in force. Those decisions, they said, were the true point of challenge, and unless challenged had to be taken to be lawful. Those were set out in the NHDC's local development scheme which was adopted on 10th February 2011 and not challenged thereafter. The obligation on NHDC to produce a plan which conformed generally to the EoEP did not apply at all stages but only at the point of submission for examination, and NHDC's unchallenged decision no longer to co-operate in providing housing for Stevenage's growth, could not be ignored in judging the soundness of the Stevenage Core Strategy, including its deliverability.

The legal framework

8. S70 of the Local Democracy, Economic Development and Construction Act 2009 requires a Regional Strategy for every region other than London. These Regional Strategies are the successors to the Regional Spatial Strategies required under the Planning and Compulsory Purchase Act 2004. The Act provides for their creation, examination, their review, and even for their revocation but only where that is to be followed by a replacement strategy. As Sales J said in *Cala Homes*, the statutory provisions as a whole showed the importance which Regional Strategies were intended to have in the operation of the planning system and for the guidance of the public.
9. Their role in the making of development plans stems from the provisions of the 2004 Act. S13 requires a local planning authority to keep under review a variety of matters which may affect the planning of the development of its area, including what may happen in neighbouring areas. S15 requires it to prepare and maintain a local development scheme, which must specify what local development documents are to

be DPDs, including any which are to be prepared jointly with another authority. The scheme must also specify the timetable for the preparation of the DPDs. S28 permits local authorities to prepare a joint DPD, where they agree to do so. S15 (4) gives the Secretary of State power to direct a local authority to make such amendments to its local development scheme as he thinks appropriate. That is not a power which has been exercised here.

10. By s19(1), DPDs must be prepared “in accordance with the local development scheme”. S19 (2) lists the matters to which the local authority “must have regard” in “preparing” a DPD; these include national policies and advice contained in guidance issued by the Secretary of State, and the relevant Regional Strategy. The Secretary of State has not exercised his power to prescribe other matters beyond those many which are listed.
11. I also note that s21 gives the Secretary of State various powers to intervene where he thinks that the DPD is unsatisfactory; that is not a power he has exercised here. The DPDs must be kept under review; s17. By s26 the local authority may prepare a revision of a DPD at any time, and can be directed to do so by the Secretary of State.
12. S20 requires every DPD, when the authority thinks that it is ready and has complied with the requirements of any relevant regulations, to be submitted to the Secretary of State for independent examination by a person appointed by him. The purpose of the examination is set out in subsection (5): it is to determine whether the DPD (a) satisfies the requirements of ss19 and 24 (1), and various regulations, and “(b) whether it is sound”. S24 (1) provides: “The local development documents must be in general conformity with (a) the regional strategy....”
13. The appointed person has to make reasoned recommendations to the local authority which it must publish. S23 deals with the adoption of the plan after the examination. In effect it can only be adopted in the form, original or modified, recommended by the Inspector.
14. The Regional Strategy is part of the development plan, as are DPDs which have been adopted or approved for any particular area; s38. The importance of the development plan for development control is explained by s38(6), after amendment, and read with the obligation in s70(2) of the Town and Country Planning Act 1990 to “have regard” to the material provisions of the development plan when making development control decisions. S38(6) provides: “If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.”
15. The differing roles for Regional Strategy in development control decisions and in development plan-making were discussed by the Court of Appeal in *Cala Homes*. After pointing out that the wording of s70(2) of the 1990 Act, and s38(6) of the 2004 Act did not require applications for planning permission to be determined in accordance with the development plan without more ado, Sullivan LJ continued in paragraph 23-24:

“The decision-maker must consider not only the development plan, but also other material considerations. Those

considerations may include the fact that the policies in the development plan have become outdated, or are no longer relevant because of a change of circumstances; and those considerations may indicate that the decision should not be in accord with the development plan.

24. This “valuable element of flexibility” (see Lord Clyde’s speech in the City of Edinburgh case cited in para. 6 above), given to the local planning authority when determining planning applications, is to be contrasted with the lack of flexibility when the authority is preparing its development plan documents. It must have regard to the relevant regional strategy (among other specified matters), and whether or not it is precluded from having regard to other matters which are not listed in paragraphs (a)-(j) of section 19(2) of the 2004 Act, the end-product, the local development documents, “must be in general conformity” with the regional strategy: see section 24(1) of the 2004 Act. Development plan documents must be submitted for independent examination by a person (in practice a Planning Inspector) appointed by the Respondent, and one of the purposes of that examination is to determine whether the development plan document satisfied the requirement of general conformity in section 24(1). It would be unlawful for a local planning authority preparing, or a Planning Inspector examining, development plan documents to have regard to the proposal to abolish regional strategies. For so long as the regional strategies continue to exist, any development plan documents must be in general conformity with the relevant regional strategy. ”

16. The Secretary of State accepted in argument that the reference in the Chief Planner’s letter, above, to “any decisions they are currently taking” could only be a reference to development control decisions. It could not alter the statutory obligation in s24, which bound Stevenage BC and the Inspector examining its Core Strategy, to ensure that it conformed generally to the Regional Strategy; see paragraph 28 of the judgment.
17. Sullivan LJ, with whose judgment Rix and Rimer LJJ agreed, concluded that in taking development control decisions the intended but uncertain abolition of any particular Regional Strategy could be a material consideration. However, the weight to be given to it, while a matter for the decision-maker, still had to be rational, and their prospective revocation could only exceptionally be given any real weight. His comments cannot but be seen as in part a response to the submissions made by Stevenage BC about its particular circumstances. He said at paragraph 33:

“Mr. Mould fairly acknowledged that even within the minority of cases in which the proposed abolition of regional strategies will be relevant, there may well be very few cases in which it would be appropriate at this stage of the Parliamentary and SEA process to give any significant weight to the proposal. But the Chief Planner’s letter is concerned with the whole of the period prior to the enactment of the Localism Bill (if it is

enacted), and the position will change as it progresses, or fails to progress. Even now there might be finely balanced cases where the very slight prospect of a very substantial policy change might just tip the balance in favour of granting or refusing planning permission. Mr. Mould gave the hypothetical example of a large-scale residential proposal (which he referred to as a “new town”, but the point would equally apply to a proposed extension of an existing settlement), which is proposed to be developed over the next 15-20 years, to which there are very strong site-specific objections, and where the sole justification for granting planning permission is the need to meet the requirement for residential development over the next 20 years in the regional strategy. In such a case it would not be irrational for the decision maker to give some weight to the prospect, however uncertain, that the regional policy justification for granting permission for such a long-term proposal may cease to exist within the short term. In such a case, to give even very little weight to the prospect of a change in policy might be to give that factor “significant” weight, significant in the sense that it might tip the balance in favour of refusing permission. This hypothetical example may well be an extreme case, but it does illustrate why it would not be safe for the Court to assume that at this stage there are no circumstances in which any decision-maker could rationally give some weight to the proposed abolition of regional strategies.”

The Inspector’s decision letter

18. This is the decision under challenge. The Inspector introduced his analysis by referring to Government guidance on what constitutes “soundness” for the purposes of s20 (5) of the 2004 Act. This was in Planning Policy Statement, PPS, 12: it involved a plan being “justified, effective and consistent with national policy”. This includes “deliverability”.
19. The Inspector examined soundness by reference to what he described as two fundamental issues:

“firstly, whether, in the context of the East of England Regional Strategy, there is sufficient justification for the level of growth proposed; and secondly, whether cross boundary issues have been, or are likely to be, resolved so that the plan can be effective in delivering the strategy.”
20. On the first issue, he concluded, and it is not disputed, that the Stevenage BC Core Strategy was in general conformity with the Regional Strategy in the EoEP. He ignored any prospects of it being revoked. The EoEP had identified Stevenage as a “Key Centre for Development and Change”; Policy SV1 required overall housing growth within and on the edge of the built up area of Stevenage of 16000 dwellings between 2001 and 2021. Policy H1 required a minimum of 6400 to be provided within Stevenage BC’s area and at least 9600 on land within North Hertfordshire DC’s area. The EoEP assumed that in the period 2021-2026, the previous implied

growth rate would continue. Accordingly, Core Strategy Policy CS02 proposed 28000 new homes in the period 2001 -2026, of which at least 12500 were to be on land within North Hertfordshire.

21. He identified the second issue more precisely and then dealt with it. I quote at length since it sets out conveniently how the problem has arisen and the stance of North Hertfordshire DC at the examination:

“Issue 2 – How does the plan relate to those of neighbouring authorities; are cross boundary issues adequately addressed or very likely to be addressed in the near future; and is there the necessary commitment from relevant bodies to ensure the plan can be implemented in a realistic timescale?”

7. The first matter to consider is the nature of the dependency of the Core Strategy on land outside the Borough boundary. The Core Strategy’s spatial planning strategy is critically, not marginally, dependent upon land outside Stevenage’s boundary. This dependency is twofold: firstly in terms of sufficient land to the north and west of the town but within North Hertfordshire being identified and made available to accommodate at least 12,500 homes. This figure is some 60% of the housing growth being proposed in the plan. In my experience this is an unusually high degree of dependence on a neighbouring authority to fulfil the housing requirements of another authority’s plan.

8. Secondly, substantial housing and employment growth is seen as the driver for physical, economic and social change and regeneration within the Borough. Clearly then, likeness of mind, co-operation and joint working between Stevenage and NHDC is not merely a useful option but an absolute necessity for Stevenage’s Core Strategy to be able to be implemented in its current form. This critical dependency and the need for a partnership approach with other authorities and relevant bodies, including the preparation of joint or co-ordinated DPDs by Stevenage and NHDC, is acknowledged in the EoEP. Policy SV1 of the EoEP requires the strategy for Stevenage to “be delivered through a strong partnership approach, including the preparation of joint co-ordinated development plan documents by Stevenage and North Hertfordshire District Councils to establish the planning framework for the green belt review and urban extensions.

9. As far as the history of co-operation in plan making is concerned, joint working between Stevenage and NHDC was taking place in the form of the preparation of the Stevenage and North Hertfordshire AAP (SNAP). This plan would have identified land to accommodate the housing requirements of the EoEP. Then, following the Secretary of State’s announcement on 6 July 2010, NHDC resolved to suspend work on the SNAP.

NHDC did not resume its involvement with the SNAP following the first Cala Homes judgement. Further, NHDC has not given any date for any resumption of joint working with Stevenage.

10. NHDC adopted a Local Development Scheme (LDS) in February of this year that indicates that NHDC will produce a preferred options version of its Core Strategy in July 2011. NHDC confirmed at the Hearing that this will contain a range of options that will take account of the housing and other needs of its District, and it will also take account of the Government's intention to revoke Regional Strategies as featured in the Localism Bill now before Parliament. NHDC's intention is to produce a pre submission version of its Core Strategy in July 2012, with submission to the Secretary of State in April 2013 and adoption in mid 2014.

11. As for further work on SNAP, the LDS states on page 20 that "the preparation of the Stevenage and North Herts Area Action Plan was suspended by North Hertfordshire District Council in June 2010 pending further clarity on housing targets for the District following the proposed revocation of the East of England Plan. This document will only be prepared if technical working on housing targets for North Hertfordshire proves that it is necessary for a substantial amount of land around Stevenage to be developed to meet those revised targets. If prepared, this document will be prepared with Stevenage Borough Council as the development will need to be integrated into the existing town of Stevenage but no timetable is shown here".

12. At the time of writing this report, the law requires that local "development documents must be prepared in accordance with a LDS," and they must also be in general conformity with the regional strategy. Therefore, there can be no dispute that as long as the EoEP remains as the Regional Strategy and part of the Development Plan, NHDC could not adopt a Core Strategy that is not in general conformity with it. However, the point where positions diverge, especially those of Stevenage and NHDC, is whether the Government's intention to remove Regional Strategies justifies NHDC's refusal to set a date for a resumption of co-operative working. All agree that resumption is necessary to enable the Stevenage Core Strategy to be successfully implemented.

13. NHDC is at liberty to pursue its own LDS, which includes a timetable for the preparation and adoption of a Core Strategy and other plans. That timetable needs to take account of the preparatory work and consultations that NHDC deems appropriate and necessary for its District. NHDC is clearly entitled to consider all options for the development of its District but as long as the EoEP

remains in force, those options must include accommodating the growth of Stevenage as required by that plan. However, as the judgement in the second Cala Home case points out: “*that regional strategies are at present central to the planning system does not render irrelevant and unlawful, for the purposes of a planning decision, the Government’s intention to reform the system by removing them*”. Accordingly, NHDC is entitled to take into account as a material consideration in its plan making function the Secretary of State’s intention to revoke Regional Strategies. The weight to be attached to that intention; the implications for which options for the future development of its District the Council decides to pursue to adoption; and the legal and any other implications of so doing; are all matters for NHDC alone to determine.”

22. The last two sentences of paragraph 13 contain one of the errors of law asserted by the Claimant, but according to the Secretary of State and North Hertfordshire DC the interested party, that is not a material error.

23. The Inspector then turned to the guidance on soundness in PPS12.

“14. My role is to determine the soundness of the Stevenage Core Strategy, and in doing this I must have regard, in addition to other matters, to the guidance in PPS12. This emphasises that Core Strategies must be, amongst other attributes, deliverable, with delivery partners signed up to it. Core Strategies must also be coherent with the strategies of neighbouring authorities; and they must be flexible. This guidance is elaborated in further guidance from the Planning Inspectorate that informs the assessment of soundness. One key question posed, which is crucial in this case, is “whether it is clear who is intended to implement each part of the strategy/DPD; where the actions required are outside the direct control of the local planning authority, is there evidence that there is the necessary commitment from the relevant organisation to the implementation of the policies?”

24. The Inspector answered the question in this way:

“15. Seeking to answer this question, the balance of evidence persuades me that there is considerable uncertainty as to when, if at all, NHDC will resume joint working with Stevenage. This uncertainty arises from firstly, the progress of the Localism Bill and its provisions that are eventually enacted; the statutory framework and context within which NHDC will prepare its Core Strategy; the options for development that NHDC will consult residents of the District upon; and the timetable for its eventual adoption. Based on the evidence submitted at the Hearings, I cannot but conclude that the necessary commitment on the part of NHDC to assist Stevenage to implement its Core Strategy is simply not there at the time of writing my report. Furthermore, it is not clear if such a commitment will ever be made. To simply endorse this Core Strategy so as to provide a basis for negotiations between Stevenage and adjoining authorities, as the Borough Council urges, might be a worthy

aspiration on Stevenage's part but would achieve little and would not be a credible basis for a conclusion of soundness."

This too is said to involve an error of law.

25. He considered whether the provisions for revocation and revisions would suffice to overcome the problem but concluded:

"16...However, knowing that there is so much uncertainty and knowing the position of NHDC at the time of my Examination, it would not be rational for me to conclude that the Core Strategy has addressed cross boundary issues and is therefore sound in this respect. I have also considered whether this crucial aspect of the Core Strategy could be found sound on the basis that some of its housing growth, if only a minor part, could be achieved without the co-operation of NHDC, a "two pronged approach" as some described it.

17. However, such flexibility is not a feature of this Core Strategy. The dependencies between the local authorities and other bodies, in terms of Stevenage seeking high and expansive housing growth to drive regeneration; and in terms of ensuring that infrastructure providers had enough certainty to commit to essential projects, is such as to make a "two pronged approach" unworkable. I heard on 5 October that major developers are unlikely to commit to investment in Stevenage without the certainty of an adopted Core Strategy that satisfactorily addresses cross boundary issues. I agree with that view. The opposite view was expressed on 3 March by a housebuilders' representative but I was not swayed in that direction. Housing growth to the north and west of Stevenage requires a Green Belt boundary review; and substantial highway works in the form of a northern relief road. The latter is neither costed nor phased in the Delivery chapter of the Core Strategy, which only states that it is to be funded entirely by developer contributions. Furthermore, other essential work involving the A1 (M) has no funding provision in the plan until at least 2017. This situation does not convey the certainty that developers and other stakeholders rightly seek from the development plan.

18. PPS12 points to the importance of Core Strategies being underpinned by realistic infrastructure provision. I find that there is a need for this Core Strategy to embrace a more detailed infrastructure delivery plan that would include phasing for the delivery of homes linked to infrastructure provision. However, I doubt whether this can be done when the plan is so heavily reliant on the actions of other authorities and bodies, and key decisions have yet to be taken by them."

26. The Inspector recognised the problems, appreciating the difficulties which Stevenage faced because it could not control what North Hertfordshire DC decided to do:

“19. ...However I have given very serious consideration to the implications of a conclusion that the current Core Strategy is unsound. I am acutely aware of the very extensive work that has gone into the preparation of the plan, and the expectation that the plan would be a sound basis to deliver the long hoped for regeneration of the town. I am also mindful of Stevenage’s housing needs and the ability of a sound Core Strategy to help remedy those needs. I note that there is still capacity within the Borough boundary for a five year housing land supply, based on adopted Local Plan rates, but this alone would not generate the wider benefits the Council and other stakeholders are seeking and would be unlikely to attract the level of inward investment the Council hopes for. I have therefore considered whether the Core Strategy could be made sound by changes that I could propose. However, I am in no doubt that the extent of the changes needed would require public consultation on options, a new sustainability appraisal, with the result that a new plan would be a fundamentally different one to that submitted.”

21. In summary, cross boundary issues, which are so important to the soundness of this Core Strategy, have not been satisfactorily resolved. There is so much uncertainty surrounding this plan that it does not provide a realistic and achievable spatial planning strategy for the future development of the town. Taken with my conclusion on the first issue, I find that this Core Strategy is unsound.

Conclusions

27. The starting point for considering this challenge to the lawfulness of the Inspector’s recommendation is that it is not a challenge to the lawfulness of the decisions by North Hertfordshire DC in July 2010 no longer to co-operate with Stevenage BC in the implementation of the Stevenage Core Strategy, and in February 2011 to adopt a Local Development Scheme which envisages that the submission of its own Core Strategy to the Secretary of State will not be until April 2013. It is not directly alleged in these proceedings, or in any judicial review in which NHDC has been joined as a Defendant, that either of those decisions is unlawful on the grounds that NHDC has taken into account the potential prospective revocation of the EoEP. It has been quite clear for some time that North Hertfordshire DC does not support the Regional Strategy which would see a policy for the growth of Stevenage leading to extensive housing development in North Hertfordshire.
28. In my judgment, the lawfulness of those decisions cannot be attacked by the indirect method of challenging such conclusions as the Inspector reached about them, when NHDC has not been joined as a Defendant and no direct challenge, promptness aside, has been made to them with all the implications which that has for the evidence which it might submit and arguments it might present. It was not for the Inspector to be invited to or to act as a judicial review Court in respect of the decisions taken by NHDC. He had to take the NHDC decision of July 2010 no longer to co-operate in the Strategy and to suspend work on SNAP as a lawful decision; time for challenging

it had expired anyway. He had to take the NHDC timetable for the LDS as lawful, as he did.

29. He was therefore obliged to reach his decision on the soundness of the Stevenage Strategy on the basis that NHDC had acted lawfully in deciding to end co-operation with Stevenage BC and in setting a LDS timetable which could lead to DPDs being submitted which did not have to conform to any Regional Strategy.
30. Mr Straker QC for Stevenage BC contends that the Inspector should have found that at all future stages of the preparation of its DPDs, NHDC was under a statutory duty to ensure that the emerging and draft DPDs conformed generally to the presently current Regional Strategy. This was despite the timetable lawfully adopted for the production of its DPDs, and its lawful decision no longer actively to co-operate in the SNAP. The Stevenage Core Strategy could not therefore be unsound, because NHDC's plans would have to provide at all stages for the necessary housing land in its area, thereby giving developers the confidence necessary to invest in the requisite infrastructure. Stevenage BC contends that the Inspector erred in law in concluding otherwise, in paragraphs 13 and 15 of the Inspector's report.
31. This still turns the Inspector into a judicial review Court delivering an opinion on the legal duties of an authority whose plans were not before him for examination. This point, if of any substance, should have been raised by way of a claim for a declaration against NHDC that its plans had to be in general conformity with the Regional Strategy at all stages and not just when submitted for examination.
32. Be that as it may, I shall deal with the submissions. Mr Straker submitted that the Inspector erred in paragraph 13 in saying that NHDC was entitled to take into account, in preparing its plans, the potential revocation of the EoEP. This was contrary to the penultimate sentence of paragraph 24 of Sullivan LJ's judgment in *Cala Homes*. For ease, I repeat it and the final sentence:

“It would be unlawful for a local planning authority preparing, or a Planning Inspector examining, development plan documents to have regard to the proposal to abolish regional strategies. For so long as the regional strategies continue to exist, any development plan documents must be in general conformity with the relevant regional strategy.”
33. I reject that submission. The statutory obligation is quite clear. The DPD must be in general conformity with the Regional Strategy at the stage when it is submitted for examination; S20(2)(b) requires the local authority to submit it when it is ready and when it thinks that the plan generally conforms to the Regional Strategy. There is no earlier obligation in relation to general conformity. S20(5) requires the DPD to be submitted for examination for such conformity, and for soundness. S24 does not bite at any earlier stage in the preparation of the DPD.
34. Importantly, s19 by contrast does not contain a requirement for general conformity. The statute requires the DPD to be prepared in accordance with the Local Development Scheme. The statutory duty at that stage in relation to the Regional Strategy is “to have regard” to it. This is the flexible language with which, in *Cala Homes*, Sullivan LJ contrasted the inflexible requirement under s24 that the DPD

conform generally to the Regional Strategy. In my judgment, and consistently with *Cala Homes* in the Court of Appeal, the local authority in developing its DPD is entitled to take a view on the ways in which a Regional Strategy may be evolving away from the immediately current version, and by the same reasoning is entitled to take a view on its prospective revocation, in deciding how to have regard to it.

35. The statutory scheme gives a flexibility at earlier stages in the plan-making process, which it removes at the stage of submission for examination. I can see no justification for importing that lack of flexibility into the earlier stage, as a matter of statutory construction. Indeed it would conflict with the clear contrast between the language of s38 (6) of the 2004 Act (with s70 (2) TCPA 1990), and that of s24, so important to the reasoning of the Court of Appeal in *Cala Homes*.
36. No doubt it would be possible to imagine an authority purblindly preparing a plan which was bound to fail, at the stage of submission for examination, for want of general conformity. But that is an unlikely picture. There is practical sense in a system which provides for the degree of flexibility which I interpret the statute as affording. It is not unusual for a Regional Strategy itself to be in a state of flux, and a wise authority can legitimately foresee and plan for expected changes. This is illustrated by the way in which Stevenage's own Core Strategy conformed to the draft Regional Strategy as it evolved, so that at submission it was in general conformity with what during the process had become the Regional Strategy. It was not generally in conformity with RPG6, the predecessor to the EoEP, which was current at earlier stages in the development of its Core Strategy. Some such flexibility is sensible in a hierarchy of constantly changing plans.
37. The Inspector reflects a sensible approach to this in paragraph 13 of his report when he points out that NHDC is proposing to include an option, conforming generally to the Regional Strategy, among those to be considered. NHDC accepted that at the point of submission for examination, its DPD would have to conform generally to the EoEP, if it remained in force. No doubt its plan-making, would be adjusted before that, as the way the wind was blowing became clearer. It cannot be said that NHDC is using the permissible scope of the statutory judgments in s19 to thwart the purpose of the Act.
38. I do not accept Mr Straker's submission that Sullivan LJ decided to the contrary in the penultimate sentence of paragraph 24 of his judgment in *Cala Homes*. This particular issue was not directly before him. His point is directed to s24 and general conformity. He is making the point that the test for general conformity does not permit the examining Inspector, nor the local planning authority at the submission stage, simply to have regard to the Regional Strategy: the DPD must conform to it. He cannot be taken as reading s19 as equivalent to s24.
39. In any event, the Inspector here, unlike Sullivan LJ, was concerned in quite unusual circumstances with the soundness of a plan, not with general conformity. The relevance to soundness of the prospects of one authority co-operating with another whose plan was being tested for soundness, or the factors which it could lawfully consider in deciding whether or not to co-operate or how it could advance its DPD in its early stages to reflect potential future changes to the Regional Strategy, were not issues before the Court of Appeal.

40. Mr Straker rightly points out that the Inspector in paragraph 13 of his report, applies to plan-making decisions a phrase directed at development control decisions. He may have been misled by the general language of the Chief Planner's letter. But in my judgment the Inspector does not err in substance since the NHDC DPDs were at the stage when s19 not s24 applied to them, thus before the inflexible s24 duty applied. I do not consider that the Inspector should have found that the only lawful DPD which NHDC could produce in 2011 or 2012, and which the Inspector should therefore assume would be in existence throughout NHDC's plan-making process, was one which conformed generally to the current EoEP.
41. There is no legal error in paragraph 15 of the Inspector's report either. He is considering NHDC's announced stance and its reasons. He is then judging the significance of the uncertainty which that creates and the timescale over which it will endure. In reaching a conclusion on soundness, he cannot lawfully ignore that uncertainty and hold a plan to be sound on the basis of a fiction. The Inspector cannot ignore the uncertainties he lists, nor NHDC's firmly stated stance. It is undeniable that there is uncertainty as a matter of fact over whether the Regional Strategy will survive in such a way as to impel co-operation in a NHDC DPD which conforms generally to it. The last sentence of paragraph 15 is an unavoidable conclusion. I see nothing in Sullivan LJ's judgment on the legal implications of the potential revocation of Regional Strategies for the requirement that submitted DPDs conform generally to them, which touches upon the relevance of their potential revocation on their soundness especially where the co-operation of now unwilling neighbours is at the heart of the implementation of the plan.
42. I do not consider that the statutory structure, and the separate test of soundness, require or even permit the Inspector to ignore the realities with which Stevenage BC were faced. Nor could he overcome realities by imposing a duty not required by the Act. Nor could the assumption of a NHDC DPD in general conformity with the EoEP dispose of the reality of its opposition to Stevenage BC's growth plans, to which opposition there was no legal or even political counter.
43. There is something of an air of unreality about the submissions of Stevenage BC. The statutory requirement to test a plan for its soundness involves, obviously, consideration of its practical implementation. The Stevenage Core Strategy is critically dependant for its practical implementation on a local authority which is opposed to that strategy and intends not to co-operate in its achievement. The Secretary of State has indicated no intention to bring pressure to bear on it to do otherwise nor to exercise any default powers he may have to that same end. The law does not require NHDC to pretend it holds views which it does not hold and to refrain from letting housing developers know that it is hostile to large scale housing development in its area to meet the ambitions of Stevenage BC, and will be looking to take advantage of the prospective revocation of the EoEP whenever it can. Even were a plan submitted by NHDC which conformed to the EoEP, an NHDC development control decision on a planning application for a large extension to an existing town based on the Regional Strategy, could take into account its prospective revocation by Parliament and the Secretary of State, such a situation would be one of those contemplated by Sullivan LJ in *Cala Homes*.
44. The soundness of the Core Strategy in reality, in the Inspector's judgment, foundered on a lawful lack of co-operation. As the inspector recognised, notably in paragraph

15, there is no longer any reality to the necessary co-operation between NHDC and Stevenage BC on which the latter's Core Strategy, and indeed implementation of the Regional Strategy depended. If that decision was based on a lawful approach by him, as in my judgment it was, there is no possible argument that it was an unreasonable conclusion. What he says in paragraph 16 of his report is undeniably correct as a judgment on the current impracticability or unsoundness of Stevenage BC's Core Strategy. That cannot be overcome by an assumed but in truth absent co-operation, nor by an assumed plan which NHDC does not intend to submit unless the Regional Strategy remains in force as submission advances much closer.

45. I appreciate that, as Mr Straker puts it, Stevenage BC cannot now produce a plan that conforms generally to the Regional Strategy and is sound. But these are very unusual circumstances, which cannot be used to give a different meaning to the statutory provisions from that which they bear, or to require a test of practicability to be met by demonstrably false assumptions.