CO/5844/2008, CO/5911/2008

Neutral Citation Number: [2009] EWHC 1280 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 20th May 2009

B e f o r e:
MR JUSTICE MITTING
Between:
CITY AND DISTRICT COUNCIL OF ST ALBANS

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
Defendant

HERTFORDSHIRE COUNTY COUNCIL

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr D Elvin QC and **Mr Forsdick** (**Mr Forsdick** for judgment)(instructed by the Legal Department of Hertfordshire District Council) appeared on behalf of the **Claimant, Hertfordshire District Council**
Mr M Reed (instructed by the Legal Department of the City and District Council of St Albans) appeared on behalf of the **Claimant, St Albans**
Mr J Swift , Mr J Litton and **Mr D Blundell** (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved)

MR JUSTICE MITTING:

The issue

1. In simplified terms, Articles 3(1) and 4 of Directive 2001/42/EC of 27 June 2001 ("the Directive") require an environmental assessment to be carried out during the preparation of a framework plan for development and before it is adopted. Hertfordshire County Council and the City and District Council of St Albans ("the claimant") contend that no proper assessment was prepared before the Secretary of State for Communities and Local Government ("the Secretary of State") adopted a revision of "the East of England plan – The revision to the regional spatial strategy for the East of England" ("the plan") in May 2008 and that, in consequence, certain of its policies affecting Hemel Hempstead, Welwyn Garden City and Hatfield ("the three towns") and Harlow should be quashed.

The Law

2. The claimant's challenge is brought under section 113(2) of the Planning and Compulsory Purchase Act 2004, which applies to "a revision of the spatial strategy". It permits a challenge on two grounds, of which only the first is in issue: "the document is not within the appropriate power". The relevant power is Part 1 of the 2004 Act and secondary legislation affecting it. The challenge, therefore, raises a hard-edged question of law.

3. The 2004 Act introduced a new hierarchy of development plans. The framework for development control was set by regional planning guidance issued by the Secretary of State, a Structure Plan and a local development plan. Now the framework is contained in a regional spatial strategy and a local development framework. The regional spatial strategy must set out in the Secretary of State's policies in relation to the development and use of land within one of the regions of England: section 1(2).

With effect from 28 September 2004 the regional spatial strategy for a region was to be so much of the regional planning guidance relating to that region as the Secretary of State prescribed: section 1(5). Regional planning boards comprising representatives of local authorities within the region can be recognised by the Secretary of State: section 2(1). Their functions include the preparation of a draft revision of the regional spatial strategy and submitting it to the Secretary of State: section 5(1) and (8)(b). The Secretary of State can arrange for an examination in public to be held into the draft: section 7(3). The examiner must report to the Secretary of State: section 8(5). If she proposes to make any changes to the draft considered by the examiner, she must publish any changes she proposes to make with reasons: section 9(3). There is provision at each stage for the making of representations by interested parties.

4. Once adopted by the Secretary of State the regional spatial strategy sets the framework for the local plan. Internally, any policy in a regional spatial strategy prevails over any other statement or information within it: section 1(4). In preparing a local development document the Local Planning Authority must have regard to the regional spatial strategy for the region in which it is situated (if outside Greater London): section 19(2)(b). Such a document must be in general conformity with the regional spatial strategy: section 24(1)(a). The development plan for an area outside Greater London is the regional spatial strategy for the region and adopted or approved development plan documents for the area: section 38(3). If regard is to be had to the development plan

for the purpose of any planning determination, it must be made in accordance with the plan unless material considerations indicate otherwise: section 38(6).

5. The requirement for environmental assessments to be carried out before a regional spatial strategy is adopted is contained in the Directive and in the Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004 No 1633 ("the Regulations") which give effect to it. The purpose of the Directive is set out in recital (4).

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment of the Member States because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before adoption."

The means by which it is achieved are set out in recitals (14) and (17):

> "(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> ...
>
> (17 The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

Article 1 restates the objective of the Directive:

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

Article 2(a) defines "plans and programmes" as including plans and any modification to them which are subject to preparation and/adoption by an authority at national or regional level and which are required by legislative provision. Article 2(b) and (c) define "environmental assessment" and "environmental report":

> "(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into

account of the environmental report and the results of the consultations in decision–making and the provision of information on the decision in accordance with Articles 4 to 9;

(c) 'the environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;"

Article 3.1 and .2 defines the scope of the obligation: an environmental assessment must be carried out for plans prepared for town and country planning or land use which "set the framework for future development" and are listed in the Annexes to Directive 85/337/EC. Urban development projects are included in Annex II to that Directive. Article 4.1 requires that the environmental assessment shall be carried out "during the preparation of a plan ... and before its adoption". Where plans form part of a hierarchy, duplication may be avoided by taking into account the fact that the assessment will be carried out at different levels of the hierarchy: Article 4.3. Article 5 stipulates what must be contained in an environmental report:

"1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex 1.

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision–making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

Annex I specifies the information to be contained in the report. It includes:

"(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archeological heritage, landscape and interrelationship between the above factors;

...

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken..."

6. The regulations, which transpose the Directive into English law, do so without materially altering its effect. Subject to transitional provisions and exceptions, which are irrelevant for present purposes, the definition of plans which must be subject to an

environmental assessment contained in Regulations 2(1) and 5(1) and (2)is the same as that contained in Articles 2(a) and 3.2. Transitional provisions in Regulations 5(1) and 6(1) apply the requirement for an environmental assessment to plans of which either the first formal preparatory act is on or after 21 July 2004, or which have not been adopted before 22 July 2006. Regulation 12 deals with the preparation of environmental reports:

> "12(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2 The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> **(3 The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–**
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision–making process; and
>
> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

Schedule 2 mirrors Annex I to the Directive. Paragraph 6 and 8 are the equivalent of paragraphs (f) and (h) and set out similar requirements in slightly different language. Regulation 5(6)(b) exempts from the requirement to carry out an environmental assessment "a minor modification to a plan", unless it has been determined by a responsible authority that it is likely to have significant environmental effects or a direction to that effect is issued by the Secretary of State.

Submissions and planning history

7. The first formal preparatory act of the plan was before 21 July 2004, but it was not adopted until after 22 July 2006. It is therefore common ground that it is subject to the requirements of the Directive and the Regulations. It is also common ground that the modification for which the plan provides to the regional spatial strategy constituted by regional planning guidance is not a minor modification, so that the environmental assessment must have been carried out.

8. The claimant's challenge to the plan can be simply summarised. Article 5.1 of the Directive and Regulation 12(1) and 2(b) of the regulations require that alternatives to certain policies affecting the three towns and Harlow contained in the plan should have been identified, described and evaluated in the environmental reports produced during the preparation of the plan before its adoption, but were not. In consequence the plan was adopted without an environmental assessment which fulfilled statutory requirements having been made. The relevant policies were, therefore, out with the appropriate power.

It is not submitted by Mr Elvin QC and Mr Reed for the claimants, that the whole plan falls, or by Mr Swift for the Secretary of State that an environmental assessment conducted without the required report would satisfy the statutory requirements. Subject to one further submission by Mr Reed, that deficiencies in the environmental report so vitiated it that it does not fulfil its statutory purpose, the issue is narrow and can be precisely stated: do the three environmental reports produced during the preparation of the plan identify, describe and evaluate the alternatives to the challenged policies? If the answer is yes, the plan is unchallengeable, if no the part containing the challenged policies is, in principle, outwith the appropriate power and should, subject to the exercise of judicial discretion, be quashed.

9. The three towns and Harlow are situated within the "London Arc", a planning term signifying a belt of land to the north and east of London running from Rickmansworth in the west to Brentwood in the east, all within the Metropolitan Green Belt. The challenged policies all relate to developments within the London Arc. They are

LA[the London Arc](1) and (2):

> "(1)Within the London Arc the emphasis will be on:
>
> (a) retention of long–standing green belt restraint ...
>
> (b) urban regeneration ...
>
> (2) Exceptions to the approach in (1)(a) are made at Hemel Hempstead, Welwyn Garden City and Hatfield where strategic green belt reviews will be undertaken to permit these new towns to develop further as expanded key centres for development and change."

LA2:

> **"The strategy for Hemel Hempstead couples growth in housing and employment with transformational, physical, social and economic regeneration of the original new town to create an expanded sustainable and balanced community. The main elements of this strategy are:**
>
> (1) Overall housing growth of 12,000 in Dacorum by 2021, concentrated mainly in Hemel Hempstead. Brownfield redevelopment opportunities will be maximised but sustainable urban extensions will also be required to be focused on the

edge of the built–up area of Hemel Hempstead. Extension of Hemel Hempstead into St Albans District will probably be required, taking account of constraints and any opportunities arising from decisions on Buncefield and involving preparation of joint or coordinated Development Plan Documents with St Albans DC. Identification of the urban extensions will require a strategic review of the green belt that allows scope for continued growth of Hemel Hempstead until at least 2031."

LA3:

"Welwyn Garden City and Hatfield are a joint key centre for development and change within the London Arc. The strategy of the towns involves:

(1) Overall housing growth of 10,000 by 2021, focused mainly at these towns. Identification of urban extensions will require a strategic review of the green belt that allows scope for continued growth until at least 2031. Part of the 10,000 may be in St Albans District if extension of Hatfield to the west emerges as a preferred option involving preparation of joint or coordinated development plan documents with St Albans DC.

Brownfield redevelopment opportunities will be maximised but sustainable urban extensions will also be required."

HA1:

"The strategy for Harlow is:

(1) To promote the renaissance of the new town through developing its role as a major regional housing growth point, major town centre and strategic employment location to 2021 and beyond ...

(2) Development Plan Documents should provide for a total of 16,000 additional dwellings between 2001 and 2021, including urban extensions in Epping Forest and East Hertfordshire districts. Additional housing should be provided:

...

· through urban extensions to the north, east, and on a smaller scale the south and west."

SS7:

"The broad extent of green belts in the East of England is appropriate, and should be maintained. However, strategic reviews of green belt

boundaries are needed in the following areas to meet regional development needs at the most sustainable locations:

...

- Hemel Hempstead, involving land in Dacorum and probably St Albans District;

- Harlow, involving land in Harlow, East Hertfordshire ... and

- Welwyn/Hatfield, involving land in Welwyn Hatfield District and potentially at St Albans District.

...

These reviews will have to satisfy national criteria for green belt releases ...".

The policies read alone do not expressly require encroachment into the Metropolitan green belt or qualification of the purposes for which it exists, but the accompanying information makes the position clear:

"3.28 Extensive areas of the region are designated as green belt to constrain the growth of large urban areas, prevent coalescence, safeguard the countryside, preserve the setting of historic towns and assist urban regeneration. However the following exceptional circumstances justify strategic green belt reviews at the general locations in Policy SS71:

(i) Policy SS2 directs strategically significant development to major urban areas for sustainability reasons that apply equally to urban areas within as well as beyond the green belts. Tightly drawn green belt boundaries, while assisting urban concentration, have made it increasingly difficult to meet development needs, particularly for housing, resulting in greater dispersal of development and thereby contributed to unsustainable travel patterns;

(2) The scale of the region's housing needs and the aim to achieve a better balance between supply and demand in all areas, including the London Arc where demand is particularly strong, affordability problems particularly acute, and pressures are likely to intensify further because of the proximity to London and scale of employment growth;

(3) In providing sustainable locations for growth, the former new towns to the north of London have:

- a good record of balancing new housing with employment growth and are well-placed on strategic communications

routes, making them both attractive for business investment and accessible to the London jobs market;

- relatively good existing infrastructure compared with smaller and older settlements, which further expansion can make efficient use of; and

- complex regeneration challenges, which the additional investment in infrastructure and services related to growth will help to address."

The introduction to the LA and HA policies make it clear that they are intended "to amplify the spatial strategy and resolve matters that cannot be left to the local level." A principal purpose is to achieve the increase in housing specified in Policy H1 by 2021: 22,000 in the three towns and 16,000 in Harlow.

The combined effect of the charged policies, the accompanying information and the statutory requirement that the local development and documents must be in conformity with the plan, is that a significant encroachment into the metropolitan green belt in Hertfordshire must be made to accommodate a significant proportion of the houses which must be built in the three towns and in Harlow. (The encroachment in Hertfordshire from the expansion of Harlow in Essex arises because it is proposed that at least 10,000 houses will be built to the north of Harlow across the Stort Valley in East Hertfordshire.)

10. The environmental report, produced by ERM in December 2006, during the preparation of the plan did appraise the environmental effects of then proposed policies in terms not criticised by Mr Elvin. It also contained a paragraph headed "Appraisal of Alternatives," which is in somewhat obscure terms, which I will read out first as it is written and then translate the acronyms:

> "The SA has appraised alternatives based on recommendations of the Panel and on the Secretary of State's Decisions. In practice this means that the SA has taken account of EiP submissions in considering alternatives for those KCDCs where new or more specific locations for development have been identified in the Proposed Changes (see *section 6* of this report) and appraised two alternative approaches to the management of the region's wastes and imports of waste (see section 5 of this report). Further option appraisal will be integral to the appraisal of LDDs".

Explaining the acronyms the paragraph reads as follows:

> "The sustainability appraisal of the environmental report has appraised alternatives based on recommendations of the Panel, which conducted a public examination of the draft regional spatial strategy, and on the Secretary of State's proposals to make changes to that draft. In practice this means that the sustainability appraisal/environmental report has taken account of examination in public submissions in considering alternatives for those key centres for development and change where new or more specific locations for development have been identified in the Secretary

of State's proposal for changes to the draft regional spatial strategy (see *section 6* of this report) and appraised two alternative approaches to the management of the region's waste and imports of waste (see section 5 of this report). Further option appraisal will be integral to the appraisal of local development documents."

No problem arises in relation to the appraisal of alternative proposals for waste management. The author considered and appraised the two alternatives in straightforward terms. Even with the acronyms explained the meaning of the remainder is unclear. Mr Elvin submits that a natural interpretation is that the reader is directed to section 6 of the report to find an appraisal of the alternatives to the challenged policies. An alternative interpretation is that the author was directing the reader to section 6 for an appraisal of the alternatives proposed by the Secretary of State for the three towns and Harlow to the proposals made in the draft regional spatial strategy ("draft plan") and/or by the panel which examined it in public.

The reader of section 6 would only find the latter. It in terms appraises the changes proposed. Accordingly, the only alternatives considered are those proposed in the draft plan and by the panel which conducted the examination in public. (It is unnecessary to burden an already long judgment by citation of section 6, but it can be found at 13/430–435 in the bundle.)

11. Mr Swift submits, correctly, that the Directive (Article 5.2) and the Regulations (Regulation 12(3)) seek to avoid duplication in the making of environmental assessments and in the text of environmental reports. When the whole process, from deemed adoption of the regional planning guidance as the regional spatial strategy to final adoption of the plan, is considered, a proper environmental assessment has been made based on environmental reports which do address the alternatives to the challenged policies appropriately.

It is therefore necessary to examine the history of the evolution of the plan. Regional planning guidance 6 of November 2000 and part of regional planning guidance 9 of March 2001 became the regional spatial strategy for the East of England on 28 September 2004. Meanwhile consultation was invited by the East of England local government conference on proposals to change that guidance in September 2002 with a view to the issuing of new guidance in what was intended to be regional planning guidance 14. The proposal was overtaken by the changes brought by the 2004 Act. What were proposals for a new regional planning guidance became proposals for revisions to the regional spatial strategy.

The consultation document set out four "spatial scenarios":

"· scenario 1 – continuation of the existing regional policies;

· scenario 2 – building on the strengths of key regional centres;

· scenarios 3 – building on regional strengths;

· scenario 4 – new settlement (or settlements) as a prime location of growth."

Scenarios 1 and 4 speak for themselves: as before, or a new town. Scenario 2 envisaged the expansion of towns and cities way from London, for example, Colchester and Norwich

and the maintenance and strengthening of the Metropolitan Green Belt "to resist development pressures". Scenario 3 accepted some at least of the pressure for development closer to London to make:

> "adequate provision to allow the dynamic economies of the Hertfordshire towns ... to reach their full potential."

A sustainability appraisal of the four scenarios was made by Levett–Therivel, which it is accepted would serve as an adequate environmental report on the four alternatives.

12. These proposals were assessed by the East of England Regional Assembly, a gathering of representatives of the councils of the counties and districts within the East of England region, recognised by the Secretary of State as the regional planning body for the region under section 2 of the 2004 Act. It issued the Draft Plan in December 2004, which opted for a combination of scenarios 2 and 3 and rejected scenario 4. It acknowledged that policies for the London Arc posed the strongest dilemma for regional strategy. It proposed selected green belt reviews (by necessary inference leading to some encroachment into the existing green belt) around "key towns" identified in policy SS7 – the precursor of the challenged Policy SS7.

> "The broad extent of Green Belts in the east of England is considered to be appropriate and will be maintained. Around some urban areas however, reviews of Green Belt boundaries are needed as part of an appraisal to identify the most sustainable locations for new development and the sub–regional strategies ... and to respond to the government's sustainable communities plan. Reviews will therefore be undertaken in the following general locations ... Harlow..."

Harlow and Hemel Hempstead, but not Welwyn Garden City/ Hatfield were identified as "key towns" but a green belt review would only be required in the area around Harlow. Provision was made for 478,000 new houses in the period 2001 to 2021 of which 20,700 would be built in around Harlow. Of that total at least 10,000 were to be built to the north of Harlow over the Stort Valley in green belt land in East Hertfordshire.

Policy LA1 provided:

> "In the arc around London the particular development pressures generated by the areas proximity to London, specifically the proposals for growth set out elsewhere in this RSS, will be managed to secure more sustainable forms of development to deliver:
>
> continued urban renaissance of existing settlements and their built form, and the protection of open land between settlements through green belt policy and other policies of restraint,
>
> promotion of the economic prosperity of settlements through town centre improvements, urban regeneration schemes, and making more efficient use of existing employment land where appropriate, and more generally through the efficient use of previously developed land and existing buildings

...

Where any substantial new development is proposed within the Arc in accordance with the above considerations, it will be based on an appraisal of the relative sustainability of the location. In addition there will be.

...

- release of land from the green belt only where exceptional circumstances can be demonstrated and the proposed release achieves a sustainable form of development."

Within those constraints 12,100 houses were to be built within the three towns.

13. A second sustainability appraisal of November 2004 was prepared by Levett–Therivel to accompany and inform consideration of those proposals. It expressly incorporated an environmental report. Its stated aim was to describe the "sustainability effects" of the proposals, to put forward recommendations for reducing adverse effects and to enhance positive effects and to "provide an account" of how the two appraisals conducted by Levett–Therivel had influenced the preparation of the draft "including the consideration of alternative spatial strategies".

The report explained in uncontroversial terms why its scenario 4 had been rejected (along with dispersed development on green belt sites) and why a combination of scenarios 1 to 3 had been selected. It also contained an itemised summary of the environmental consequences of development of each of the possible areas for development including Harlow and the London Arc. The summary was informed by detailed studies of each area which the authors identified and considered. Its recommendation was that development should be concentrated in Harlow and Stevenage, a recommendation which was accepted and spelt out in Policy SS7 of the draft.

14. Mr Elvin QC accepts, and I find, that the two Levett–Therivel reports did identify, describe and evaluate the effects on the environment of implementing the selected option (scenarios 1 to 3) and the alternatives to it. This has an important consequence. The Directive and Regulations envisage a process of decision making in which options can be progressively narrowed and clarified. Article 5.2 and Regulation 12(3) permit options to be considered and discarded so that they do not need thereafter to be re–visited or appraised, or taken into account again as alternatives to more detailed proposals made within a selected option. This is what is commonly referred to in planning circles as an "iterative" process. The effect of the selection of the combination of scenarios 1 to 3 was therefore to exclude from the need for further appraisal or comparison the two discarded options, a new town or unplanned dispersed development.

15. Mr Elvin QC also submits that the requirement to identify, describe and evaluate alternatives to the development of Harlow was not fulfilled at this stage. I do not agree. Read as a whole the second Levett–Therivel report does exactly that. The consequence was that any subsequent decision to adopt a plan for development in or around Harlow, including development into adjoining green belt, did not need to be

accompanied or supported by a further environmental report which analysed the alternatives to development there.

16. The Secretary of State did direct that an examination in public of the draft plan should be conducted. It was, between November 2005 and March 2006. No further environmental report was prepared for that purpose. The panel accepted the proposal in the draft plan for reviewing and altering the green belt around Harlow, but also concluded that "strategic reviews are also justified around Hemel Hempstead and in Welwyn–Hatfield District." It identified the three towns and Harlow as "key regional centres for development and change". It proposed a significant amendment to Policy SS7:

> "The broad extent of Green Belts in the East of England is appropriate, and will be maintained. However, strategic reviews of Green Belt boundaries are needed at the areas identified below to meet regional needs for development at the most sustainable locations:
>
> ...
>
> Hemel Hempstead involving land in Dacorum and St Albans;
>
> Harlow, involving land in Harlow and in Epping Forest District;
>
> Welwyn/Hatfield."

It also proposed an increase in the number of houses to be built in and around the three towns to 22,000 (in part to accommodate an increase from 478,000 to 505,500 in the total for the region). To accommodate this increase it proposed three new LA policies.

LA1:

> "Within this area [the London Arc] the emphasis will be on:
>
> retention of long–standing green belt restraint, supported by more positive 'green' use of neglected areas in accordance with green belt policies; and
>
> urban regeneration ...
>
> (2) Exceptions to this approach are made at Hemel Hempstead and at Welwyn Garden City and Hatfield where strategic Green Belt reviews will be undertaken to permit these new towns to develop further as expanded Key Centres for Development and Change ..."

LA2:

> "(1) Overall housing growth of 12,000 within and on the edge of the built–up area of Hemel Hempstead by 2021. A programme will be adopted for maximising opportunities for brownfield development and redevelopment within the town but sustainable urban extensions will also

be required. Identification of the urban extensions will require preparation of a joint LDD(s) with St Albans DC, including strategic review of the Green Belt to allow scope for continued growth of Hemel Hempstead in the longer term."

LA3 :

"1. Overall housing growth of 10,000 within and on the edge of the built–up areas of the towns by 2021 [Welwyn Garden City and Hatfield]. A programme will be adopted for maximising opportunities for brownfield and redevelopment within the towns but sustainable urban extensions will also be required, to be planned through the LDF process."

17. Unlike the regional assembly it concluded that the development of Harlow should be directed to the east, south and west and not northwards into East Hertfordshire.

18. In December 2006 the Secretary of State responded to the draft plan accepting the panel's proposals for the three towns, but reinstating the regional assembly's proposal for an extension of Harlow to the north into the green belt in East Hertfordshire. The Secretary of State's decisions were, as I have already noted, incorporated into the adopted plan.

Analysis and Conclusions

19. For the reasons already explained, the obligation to identify, describe and evaluate reasonable alternatives to the challenged policies was limited by the decision–making already made after assessment informed by compliant environmental reports. This had the following consequences. Development was to be permitted which accommodated economic pressures on the outskirts of London. It would not include the building of a new town. It would involve extensive house building in and around Harlow and the three towns and some encroachment into the metropolitan green belt, in particular, around Harlow.

20. The challenge to policy HA1 is effectively determined by those considerations. The environmental effects of the expansion in all directions of Harlow had already been exhaustively considered in the Levett–Therivel reports and alternatives addressed. The Secretary of State was entitled to decide, without obtaining a further environmental report, that expansion should occur into the green belt to the north and that, to that end, a green belt review should determine new green belt boundaries around Harlow.

21. The challenge to policies LA1(2), 2 and 3 and SS7 (in part) is not similarly determined. The policies decide that house building should occur on such a scale in and around the three towns as to require the erosion of the metropolitan green belt around them. Although acceptance of the need to accommodate economic pressures on the outskirts of London necessarily involves extensive house building and some erosion into the green belt in the London Arc, it may not be inevitable that that must occur in around the three towns.

Article 5 .1 and Regulation 12(2) required that reasonable alternatives to the challenged

policies be identified, described and evaluated before the choice was made. The environmental report produced by ERM did not attempt that task. It should have done so and the Secretary of State should not have decided to adopt the challenged policies until that had been done. The consequence of omitting to comply with the statutory requirement is demonstrated by the outcome. A decision has been made to erode the metropolitan green belt in a sensitive area without alternatives to that erosion being considered. It is no answer to point to the requirement in the policies for green belt reviews to be undertaken at the local development framework stage. All that will do is to determine where within the district of the three towns erosion will occur, not whether it should occur there at all.

22. I therefore conclude that in the respects identified the challenged policies were outwith the appropriate power. Should they be quashed? I acknowledge the highly inconvenient consequences of quashing the policies identified by Mr Hargreaves, head of regional planning at the Government Office for the East of England, in paragraph 105 of his witness statement, but I am either bound by, or prefer to follow, Lord Hoffmann's observations in Berkeley v Secretary of State for the Environment (2001) 2 AC 603 at 616D to E:

> "Although section 288(5)(b), in providing that the court "may" quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell L.J. in Bolton Metropolitan Borough Council v. Secretary of State for the Environment (1990) 61 P. & C.R. 343, 353. Mr. Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

Although those observations apply to an environmental impact assessment, not an environmental assessment, they apply, in my view, with equal force to an environmental assessment. I therefore in principle propose to quash the challenged policies. The precise order required to achieve that end will be discussed with counsel.

23. In the light of that decision, it is not necessary for me to deal with Mr Reed's alternative submission for

St Albans. If it had been I would have held that it was amply covered by the observations of Sullivan J in

R v (on the application of Blewitt) v Derbyshire County Council [2003] EWHC 2775 (Admin) at paragraph 68, and would have rejected it. The analogy between the environmental impact assessment that he was considering, and the environmental assessment that I am considering, is, in my view, secure.

24. MR FORSDICK: I appear instead of Mr Elvin. I think in the circumstances there are four matters that we need to deal with: first, any quick corrections to my Lord's judgment; second, how we are going to go about proceeding with the orders; third, costs; and fourth any applications for permission to appeal. Just for when my Lord is checking the transcript there were a couple of references to the Annex I of the Directive. I think the letters my Lord referred to were not the correct letters in the annex. Also when my Lord was--

25. MR JUSTICE MITTING: What were they?

26. MR FORSDICK: I think my Lord referred to (f) and (g) at one point. I think they are (f) and (h). At one point I think my Lord said Appraisal Options 1 and 3, rather than Options 1 to 3.

27. MR JUSTICE MITTING: Yes, scenarios 1 to 3. Quite right.

28. MR FORSDICK: They are the only corrections that I noticed.

29. MR JUSTICE MITTING: If that is all that needs to be corrected I shall be very pleased.

30. MR FORSDICK: If I can then go on to how we might address the orders that have been made. This has been discussed out of court. The suggestion is that counsel for the parties try to agree a schedule and submit it to the court with a draft order by next Friday.

31. MR JUSTICE MITTING: Do you mean in two days time?

32. MR FORSDICK: A week. It is quite a technical exercise. We will have to think about what your judgment means.

33. MR JUSTICE MITTING: There is no point in submitting a draft before Monday week because on Friday we are still enjoying the short vacation.

34. MR FORSDICK: If we say Monday week. What will happen is that either there will be an agreed schedule, or alternative schedules with an explanation as to the extent of the dispute. Either my Lord can decide how to deal with it or call us back in for a debate.

35. MR JUSTICE MITTING: That seems a sensible proposal. Is that agreed to by everybody?

36. MR FORSDICK: It is, yes. The next issue is the question of costs. In the light of the judgment my Lord has just given on behalf of the County Council, I would ask for an

order for costs. I would ask that we come first in the pecking order, if there is only going to be one order, or if there is going to be any cut down to the totality of the costs because, first all, we took the lead in terms of the submissions, and secondly it was always plain that we were going to do so. We invited St Albans to come on board with our case and they resisted that invitation. I would ask that we come first in the pecking order, if there is going to be a debate about that. If there is going to be a debate as to whether there is going to be any reduction in the costs by reasons of losing on the Harlow North point, I would ask to come back on that aspect.

37. MR SWIFT: Perhaps I can make the Secretary of State's position on costs clear. As between the Secretary of State and St Albans the Secretary of State accepts that St Albans should have their costs of preparing and lodging their claim form with the accompanying documents. Thereafter the Secretary of State says that there should be no order as to costs as between her and St Albans. In short, the specific points that St Albans pursued separately were lost by St Albans. In relation to the main points (the three towns) St Albans were only ever going to be indirectly affected by what happened through policies LA1 to LA3 and the consequential matters. Once Hertfordshire had made the direct challenge to those three policies, there was really no need for St Albans to continue their involvement with the matter.

38. Mr Forsdick has just indicated that there were steps taken as between Hertfordshire and St Albans to see if they could be singularly represented and they were rebuffed. Mr Reed gave me copies of a couple of letters. I can just hand them to you. (same–handed). My instructing solicitors wrote to both the claimants shortly after it was apparent that there were two claims. Firstly saying that the two claims should be heard together and suggesting in relation to representation, at that stage, that the claimant should be represented by common counsel perhaps with (inaudible). I have the other letter. That is the response of St Albans which was simply to reiterate that they intended to be represented by Mr Reed. It may be said that that was simply a suggestion as to representation by counsel, but the reality is that although St Albans' challenge was the one lodged first in time, once Hertfordshire were on board everything that St Albans were arguing was subsued by Hertfordshire. At least the Secretary of State should only pay one set of costs. We say that it is appropriate that the party that loses out is St Albans, accepting their claim form and the accompanying documentation.

39. In relation to Hertfordshire, the Secretary of State accepts that there will be a costs order in favour of Hertfordshire and against her. As to what that should be, we say that this is a situation where it is appropriate to make some percentage reduction. I do not know whether you has the White Book available.

40. MR JUSTICE MITTING: It is Volume 1 2008.

41. MR SWIFT: Could I hand you the 2009 volume? (same handed) There is one point in the rules themselves and just two points in the notes. It is page 1163, which is the second page about halfway down. If you just turn the page to 44.3(6) which deals with the options that a court has when making a split order, but (7) says that really one should prefer a percentage and proportion of the costs.

42. MR JUSTICE MITTING: Having cross orders is hopeless.

43. MR SWIFT: That point is made. The second case refers to Jackson J's judgment in Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd et al [2008] EWHC 2280 and sets out a number of principles. My Lord, I think they speak for themselves. For present purposes it is the first five that are relevant. So, my Lord, the costs order should reflect the broad outcome of the case.

44. There is one other point I should show you in fairness. It is on the next page. It could be taken as a point against me over the page on 1166. The third paragraph starts: "Where a claimant succeeded...". This is referring to Gloucester J's judgment in Kidsons v London Underwriters [2007] EWHC (2699):

> "Where a claimant succeeded on one issue at trial, but in reality the defendant was the winner, an order that the claimant should pay the defendant's costs reflected the overall justice of the case. The court accepted that there was no automatic rule requiring reduction of a successful party's costs if he lost on one or more issues. In any litigation, particularly complex litigation, a winning party was likely to fail on one or more issue in the case."

That is guarding against an automatic reduction. I fully accept this is something to have in mind.

45. MR JUSTICE MITTING: It is easier in commercial cases where there is money involved and you can resolve it by paying money into court. It is rare to deprive a successful claimant of costs if he beats the claimant, even if he loses on individual issues.

46. MR SWIFT: Simply one has to appreciate the individual issues will either be of a greater or lesser importance. If it is something which is strictly not of central importance, it would be unfair to reduce the costs payable.

47. MR JUSTICE MITTING:: The issue on which you have won is not unimportant. It was discretely argued and did take some time and no doubt preparation costs.

48. MR SWIFT: We say that the appropriate order would be that Hertfordshire have 80 per cent of their assessed costs. We say that is a conservative reduction, but nevertheless one that is in overall terms fair.

49. MR JUSTICE MITTING: Mr Forsdick, can I hear you coming back on that and Mr Reed I will give you a chance in a moment.

50. MR FORSDICK: Of course it is a matter for the court's discretion. I would just ask my Lord to bear in mind that we would have been here any way on the point of principle: the core issue point. All the law was the same and Harlow in reality took up a very small proportion of time before my Lord.

51. MR JUSTICE MITTING: It took me a fair amount of reading. I had to look at the environmental report in greater detail than I had been referred to.

52. MR FORSDICK: I am not suggesting for one moment, my Lord, that it is not a difficult factual case. In terms of the overall nature of this case it was always going to be at least a two-day nature case no matter how many points it had in it. I say if there is going to be any reduction it should be a minor reduction to the overall costs.

53. MR JUSTICE MITTING: Mr Reed.

54. MR REED: My Lord, I am grateful. I do ask for my costs in whole from the Secretary of State. I understand the way that Mr Swift puts it is that the costs that St Albans may obtain are those limited to commencement of the proceedings effectively, which would involve the production of the witness statement and the claim form itself and grounds, and not, therefore, anything thereafter, which essentially is the attendance of myself with legal representation.

55. The general position, however, a point that of course Mr Swift did not refer you to, is that the general rule is that a successful party should obtain their costs, unless there is some reason as to why the successful party should not obtain their costs.

56. MR JUSTICE MITTING: There is also a pretty close analogy between these types of proceedings and judicial review proceedings where the principle is that the unsuccessful party should only ordinarily be asked to pay one set of costs.

57. MR REED: It is certainly right, particularly in section 288 proceedings, quashing the decision of the Secretary of State, that if a developer attends to also defend they generally will not be able to benefit from a defendant's costs order in the event of success. That case of course, or that approach, has been determined by the House of Lords in the Bolton Metropolitan Borough Council case. One of the issues that had to be considered is whether or not there was a particular interest that the defendant developer in that case may have had separate from the Secretary of State's position. That is precisely the situation that St Albans finds itself in this case.

58. MR JUSTICE MITTING: Suppose that St Albans, Welwyn Garden City, Hatfield and Hemel Hempstead had all turned up supporting the County Council, would the Secretary of State have to pay four sets of costs?

59. MR REED: Probably not.

60. MR JUSTICE MITTING: Why not?

61. MR REED: There has to be some element of reasonableness, I accept that, but I do not lay my claim for costs solely on the basis of us having some separate interest. There is also the correspondence that Mr Swift referred you to, that I gave to him, which I say indicates entirely that we were reasonable in our attendance. As I say, the starting point must be that as a general rule we should get our costs. Subsequent to that, the question must be: did we act unreasonably in having attendance by way of counsel over these last two days. If I can ask your Lordship to take up that correspondence.

62. MR JUSTICE MITTING: It is implicit you should have counsel here in the correspondence, albeit not making oral submissions.

63. MR REED: Quite but two junior counsel should be here led by leading counsel. The threat was by Treasury set out in the last paragraph and I quote it: "If the two authorities do decide to instruct separate leading counsel" my client reserves the right to draw the attention of the court to this letter, in particular, in relation to the subject of costs.

64. As your Lordship has rightly noticed, the position of the Treasury was not that we should not attend by way of separate counsel, it is that we should not have leading counsel here. The second letter in that clip that I provided to Mr Swift indicated that clearly we were being represented by myself and not by leading counsel. We did precisely what we were asked to do and thus met the threat that was being put to us by the Treasury.

65. My Lord, the way that Mr Swift then seeks to put it is that there was an offer by Hertfordshire that there be some joint representation. It does not lie in Mr Swift's hands to seek to look to various discussions that were had between Hertfordshire and St Albans in order to justify some different position that he now takes from his instructing solicitors.

66. MR JUSTICE MITTING: Thank you.

67. MR REED: My Lord, I say that in respect of my general position that we should have our costs as a whole, but my Lord, if only one set of costs is to be awarded, then my second submission is that the costs of appearance should be 50 per cent to St Albans and 50 per cent to Hertfordshire. Effectively a split order for the attendance today. We are entitled to be here. It was reasonable for us to be here. We had a particular interest in being here. One aspect that I ask your Lordship to take into account--

68. MR JUSTICE MITTING: May I enquire without indelicacy what the comparative costs of being represented by junior counsel with Mr Elvin leading would be by comparison with the cost of you appearing by yourself?

69. MR REED: I certainly do not find that to be an indelicate question. I would not be able to answer what Mr Elvin's costs would be. Mr Forsdick will, I have no doubt, be able to assist you on that. I do simply say this: Mr Elvin's costs would be significantly above my costs.

70. MR JUSTICE MITTING: Mr Elvin's plainly would be. I suspect that there would be some considerable accommodation to reflect the fact that he was, although representing two parties, doing so on identical grounds and with interest not conflicting.

71. MR REED: I unfortunately cannot take the matter further in terms of my knowledge of what that position would be.

72. MR JUSTICE MITTING: I am sympathetic to what you draw my attention to: the Treasury Solicitor's letter with the suggestion that may have led you into the belief

some costs would be payable in the event you succeeded, but I do not want to make a complicated order which will create difficulties for the costs judge. If I follow the thrust of the letter. Any suggestion?

73. MR REED: I would simply say that it was clear that my attendance today was something that was anticipated by the Secretary of State in that letter. Can I also ask your Lordship to bear in mind that the Treasury is represented today by three counsel.

74. MR JUSTICE MITTING: I have noticed that.

75. MR REED: Again for them to suggest that because I attend here on my own and spoke for some short amount of time therefore we should have none of our costs of attendance simply cannot be right. I say as a result of that we ought to have the entirety of our costs.

76. MR JUSTICE MITTING: You did not win on the one issue that you argued separately.

77. MR REED: That is true enough. I, did however, make some further submissions in respect of the question of the significance issue, ie, if there was a significant change what was meant by significance and what did the guidance have to say on the question of significance. I did also raise points in respect of the matters that Mr Elvin raised. I simply say that we should have the entirety of our costs and at the least there should be the costs of my attendance if not my solicitor's attendance.

78. MR JUSTICE MITTING: Mr Swift, do you want to respond?

79. MR SWIFT: Nothing specific in response to Mr Forsdick's submissions. As regards Mr Reed's suggestion, that does rather impact on the position of both the claimants as to costs. The Secretary of State's primary position remains that, as I explained a few moments ago, as against St Albans. I appreciate the suggestion (which was referred to as a threat) by my instructing solicitor that was not taken up by St Albans. In the end St Albans are a public authority. They remain responsible for their own decisions as to how they conduct litigation. They need to do it reasonably and in the end the court will decide one way or the other whether they have or have not. The Secretary of State says that granting them their costs of making the application, as they were first in time, is fair, but their costs beyond that, in all the circumstances, is not fair. If contrary to that you are minded to make some wider costs order in favour of St Albans, the Secretary of State's second position is that, in any event, she should not be in a position where she pays more than one set of costs in total. However it is split between the claimants.

80. That would mean in practice that each of the claimants would receive a significantly lower percentage of their costs. In particular, Hertfordshire the Secretary of State's primary position is of course Hertfordshire should receive 80 per cent of their costs. If in fact a greater analysis is to be made to St Albans, and if my Lord accepts that the overall cap should be for the Secretary of State to pay something approaching one set of costs, it would mean that the percentage of costs at Hertfordshire should be significantly reduced, say broad-brushed to 40 per cent, so that St Albans can also get 40 per cent of their own costs. If my Lord wishes to go down that route, I would

suggest, I think as my Lord has in mind, as simple an order as possible simply for the benefit of the costs judge.

81. MR JUSTICE MITTING: St Albans who have won are clearly entitled as you have conceded, and I think you have conceded unconditionally, of having their costs of preparing the claim form. I have no idea what preparation costs St Albans have incurred from that date until the hearing. If I were to make an order that there should be one set of costs, but that it should include leading counsel and two junior counsel for the two authorities, would that create difficulties of assessment? I am following the suggestion made in the Treasury Solicitor's letter, which seems to me a very sensible one. I do not think the Treasury Solicitor should be in a worst position than had that suggestion been adopted, nor do I think they should be in a better position.

82. MR SWIFT: I think in practice we are talking about the costs of skeleton arguments, counsel preparation costs, no doubt, and also counsel attendance costs. I think Hertfordshire may have had some further and more recent costs arising from Mr Donovan's witness statement. I have to say that standing in front of you I am not sure how that order based, as it is, simply on numbers of counsel would help a costs judge trying to work out what he should allow and disallow. I would suggest that something--

83. MR JUSTICE MITTING: Let me explain my thinking and see if it can be put into an order that does not cause difficulties. I accept your argument that the Secretary of State should only pay 80 per cent of Hertfordshire's costs. I accept your argument that the Secretary of State should only be required to pay one set of costs, but those costs should include the attendance by counsel and solicitors at the hearing on behalf of St Albans. In other words, it would be a somewhat enhanced one set of costs. I think that 80 per cent should apply across the Board to reflect the fact that Mr Reed lost his one discrete argument.

84. MR FORSDICK: Could I suggest an order that might work to achieve that? There will be an order for costs in favour of Hertfordshire and St Albans. In Hertfordshire's case they will be entitled to leading and junior counsel costs and the costs of preparation at 80 per cent and in addition St Albans will be entitled to 80 per cent of their costs.

85. MR JUSTICE MITTING: First of all, the costs of bringing the claim, and then 80 per cent of the costs of their attendance.

86. MR FORSDICK: If my Lord is indicating you will only make one order as to costs, then the costs will be the difference between what the exposure would have been: the total exposure to Hertfordshire's costs, that there be some apportionment between the parties in respect to that difference.

87. MR JUSTICE MITTING: The last thing I want to do is to create a three-way squabble.

88. MR REED: So far as I am able to understand Mr Forsdick's submission, that is equivalent to asking the Secretary of State to pay two sets of costs at the rate of 80 per

cent. Hertfordshire have effectively the order I suggested my Lord make. In relation to St Albans in addition to the order I suggested my Lord should make, which was the costs of preparing and lodging the claim form and accompanying documents, they get 80 per cent of everything that has happened since. It seems to me that is entirely unfair.

89. MR JUSTICE MITTING: I am not intending that should be the outcome.

90. MR SWIFT: If there is to be a percentage for St Albans I would suggest that rather than splitting out the costs relating to the claim form and accompanying documents, one simply picks a figure for St Albans, which is a significantly lower figure than 80 per cent. That of course represents the concession I made in the claim form, but also I would suggest reflects the fact that thereafter their involvement in the proceedings really has been either to duplicate Hertfordshire's points, or on matters which they have in fact lost.

91. I think on my feet that an appropriate percentage for St Albans would be somewhere in the region of 30 to 40 per cent, so the order would be the Secretary of State pays 80 per cent of Hertfordshire's assessed costs. The Secretary of State pays, I would say, 30 per cent of St Alban's assessed costs. That 30 per cent would certainly include the costs of the claim form and associated documents and would include something else as well.

92. MR JUSTICE MITTING: Thirty per cent of their costs is costs across the Board. You are giving them something in representation of the part of the preparation that I would not be minded to allow in return for losing a bit on the attendance of the hearing.

93. MR SWIFT: It is rough and ready, but I would suggest that is fair.

94. MR REED: Your Lordship indicated you were minded to give us our costs of attendance by way of counsel and solicitor today, in order that the Secretary of State should not be in any better position than the Secretary of State indicated by way of that letter. The level of 30 per cent on that basis, given that the primary costs were attendance at this hearing and preparation costs, and your Lordship has already indicated Mr Swift has conceded that we should have the full amount of our issue of costs——

95. MR JUSTICE MITTING: This is very much a rough and ready exercise. He suggests 30 per cent with an upper limit base line negotiating point of 40 per cent. What is your proposal?

96. MR REED: If that is to apply there is to be some further reduction. It should not be as high as 80 per cent, a figure in the region of 60 per cent is an appropriate figure.

97. MR JUSTICE MITTING: I can see a difference being split here. What I want to give you, and if you can give me a straightforward answer to it I would be grateful, if you cannot, for reasons that I quite understand it is more than I can ask, is your issuing costs, plus 80 per cent of your costs of attending the hearing on the basis that you and your instructing solicitors are playing a secondary part in the hearing and not the primary role.

98. MR REED: I am grateful for that indication. What I think I can give you is a specific figure, as opposed to a specific monetary figure, which would mean not going into detailed assessment of our costs. If I can just take some instructions from behind.

99. MR JUSTICE MITTING: Mr Swift, is this an acceptable approach or not?

100. MR SWIFT: I suggest not because we have two different bases between the claimant and the risk is that the Secretary of State again pays significantly more than one set of costs. If Mr Reed wants his percentage to go up Mr Forsdick's has to go down.

101. MR JUSTICE MITTING: I can see that argument, but I am balancing a lot of irreconcilable differences here. It is a bit like conducting a planning enquiry.

102. MR SWIFT: In the end it is a question of justice. If St Albans had a figure you could effectively do a summary assessment of those costs now and award a percentage of them, and then there will be a detailed assessment of Hartfordshire's costs and award a percentage of those costs.

103. MR REED: I can assist on that. We do have a summary assessment form. For obvious reasons we did not give it--

104. MR JUSTICE MITTING: It is not a case in which a summary assessment would ordinarily be done.

105. MR REED: Your Lordship will see that the total sum is £28,000 incorporating in the majority of my fees £23,000 and the legal executive's costs of £5,000.

106. MR JUSTICE MITTING: Yes.

107. MR REED: The consequence of a 60 per cent split would take it to about £20,000.

108. MR JUSTICE MITTING: Your arithmetic is worse than mine: £17,000.

109. MR REED: Your Lordship is right. If I can also say that in respect, aside from this 60 per cent, if your Lordship added up the costs of advice and drafting proceedings, my fees plus the brief fee and refreshers, and then took 20 per cent of the legal executive's costs in terms of issuing, that is to say the preparation costs and also attendance of this hearing, and takes a very rough and ready estimate at 20 per cent, that comes to £16,500. So it is equivalent to the 60 per cent that I indicated.

110. MR SWIFT: Broadbrush ahead, my Lord, looking at the list at the bottom, could I suggest that the sums for advice, drafting proceedings, advising and conference and witness statement, which come together as £5,450, be allowed and that in relation to attendance effectively let us call it £15,000. In relation to that a third of that £5,000 be allowed so a total of £10,450.

111. MR JUSTICE MITTING: I have £16,500 on one side and £10,500 on the other. Does anyone else want to say anything more about costs before I announce what my decision is and the briefest of reasons?

112. MR FORSDICK: Very briefly, my Lord, in my respectful submission it would be unfair on Hertfordshire to suffer any reduction below the 80 per cent my Lord has already indicated.

Ruling on costs

113. MR JUSTICE MITTING: The order for costs I make is as follows: the Secretary of State will pay 80 per cent of Hertfordshire's costs to be the subject of a detailed assessment if not agreed. The Secretary of State will pay £15,000 towards St Albans' costs, a sum which I assess.

114. Those orders are intended to encompass the following propositions: first, Hertfordshire have borne the main brunt of this case and have substantially, but not entirely, won. They lost on a discrete, but significant, issue which involved a certain amount of preparation, reading and hearing time. To avoid making offsetting orders for costs, and thereby increasing the costs judge's difficulty, I have accepted Mr Swift's proposal of an 80 per cent assessment.

115. As far as St Albans is concerned, in principal this is a case in which the Secretary of State should only pay one set of costs. The issues raised by Hertfordshire and St Albans overlap. Those raised by St Albans are subsumed in the issues raised by Hertfordshire, and St Albans have not won on the one issue discretely pursued by them. However, the Treasury Solicitor did suggest in a letter of 15 September 2008 that Hertfordshire should be represented by the same leading counsel, but by different junior counsel at a joint hearing. I agree that that was a sensible proposition and hold the Treasury Solicitor to it.

116. Consequently, doing the best that I can, bearing in mind those competing considerations, I have arrived at a round sum figure that represents not much over 50 per cent of St Albans' costs to be paid by the Secretary of State. I believe that I have thereby, in a very rough and ready or broadbrush way, achieved rough equity.

117. I have decided against all three parties on some issues.

118. MR JUSTICE MITTING: Do any of you want to take the matter further?

119. MR SWIFT: Can I simply say this for the Secretary of State? We would ask that you make an order extending time to seek permission to appeal, so that it runs 28 days from receipt of the approved version of the judgment. The Secretary of State does not intend to make any application for permission to appeal today, or with respect to you, simply because she wishes to have the opportunity to think about the judgment and to decide how this may impact on other exercises elsewhere. Then, if necessary, an appropriate application will be made to the Court of Appeal.

120. MR JUSTICE MITTING: I am perfectly content to extend your time for applying to me if you want to. If you want to leave out the middle man and go straight to the Court of Appeal, I am equally content for that.

121. MR SWIFT: If I could have the option of applying to you, I would be grateful. I put it the other way simply as I did not want to leave you with something possibly hovering

over your desk. It would be a shorter application if I could make it to you simply because you have the benefit of the hearing and giving judgment.

122. MR JUSTICE MITTING: Very well. Anybody else?

123. MR FORSDICK: Could I be so bold to stand and make an application for permission to appeal in respect of Harlow North? My Lord has reached the conclusion that the assessment of the alternatives at the draft are assessed and the (inaudible) was adequate and met the statutory test. All I would ask my Lord to do is have regard to the note that we handed up yesterday on the proposed changes where we submit that the effect was to introduce a step change over and above the draft RSS in respect of Harlow North, and that that step change constituted effectively a new town and therefore alternatives to a new town had to be grappled with.

124. I say that that raises in stark form the questions as to when one changes the assumptions, or what we are planning for during an RSS process, to what extent you do have to then go back to earlier stages. I would say, in my respectful submission, that both issues (?) for permission to appeal are met in respect of that discrete point under Ord 52, r 6.

125. MR JUSTICE MITTING: It is not a second appeal. This is a challenge and not an appeal.

126. MR FORSDICK: It would be a first appeal. It is not restricted to the Court of Appeal granting permission. I think it is fair to say that Mr Hargreaves' witness statement recognising this is the first test case of importance on SCA and on that discrete Harlow North issue, in my respectful submission, both have reasonable prospects of success and are of a general public interest in how these matters ought to be grappled with. For that reason I do ask for permission to appeal.

127. MR JUSTICE MITTING: Mr Reed?

128. MR REED: I do not ask for permission to appeal on that discrete point we raised. I am grateful to your Lordship.

129. MR JUSTICE MITTING: I refuse your application, Mr Forsdick. I do not think that the Harlow issue raises an issue of wider importance that requires to be resolved one way or the other, and I doubt that you have a realistic prospect of success on that issue.

130. Mr Swift, I will extent your time for applying for permission to appeal whether to me or to the Court of Appeal to 28 days after you have received the corrected transcript.

131. MR FORSDICK: Could I ask for that same indulgence as well should I wish to renew my application to the Court of Appeal?

132. MR JUSTICE MITTING: Yes. Will somebody please daw up an order which incorporates both the things that I have decided and those that you are going to refine as a result of my main judgment?