Neutral Citation Number: **[2008] EWHC 1741 (Admin)**

Case No: CO/3902/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2008

Before:
Mr Justice Collins

Between:

Dinedor Hill Action Association	Claimant
- and -	
County of Herefordshire District Council	Defendant
- and -	
J S Bloor (Tewkesbury) Limited	Interested Party

Mr David Forsdick (instructed by Friends of the Earth) for the Claimant
Mr Timothy Jones (instructed by Mr Alan McLaughlin, Solicitor to the Council) for the Defendant
Mr Ian Dove Q.C. & Richard Kimblin (instructed by Hammonds) for the Interested Party

Hearing dates: 26 & 27 June 2008

Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice COLLINS :

1. The claimant is a company limited by guarantee which was formed to enable this claim under s.287 of the Town & Country Planning Act 1990 to be brought. The claim is directed at and seeks to quash Policy H2 in the Herefordshire Unitary Development Plan 2007 (the UDP) insofar as that policy allocates land at Bullinghope for housing. The claimant has the support of a number of individuals who objected to the inclusion of this land for housing purposes and who made their objections both at the public inquiry which was held in 2005 and to the defendant's intention to reject the inspector's conclusion that the land should not be included in policy H2.

2. Under the new procedures provided for by the Planning and Compulsory Purchase Act 2004, UDPs are no longer to be part of the planning process. However, there are transitional provisions in the 2004 Act which are designed to preserve the 1990 Act in relation to UDPs which in September 2004 were going through the process which would lead to their adoption. This is the relevant date for the purposes of the transitional provisions: see s.119 of the 2004 Act applying Schedule 8. It was, following argument and consideration of the relevant paragraphs, common ground that, having regard to the stage reached in consideration of the UDP, the 1990 Act provisions continued to apply and, in particular, the procedure to be adopted was governed by the Town and Country Planning (Development Plan)(England) Regulations 1999 (the 1999 Regulations)(SI 1999 No.3280).

3. Following a deposit draft in 2002, a revised deposit draft of the UDP was produced in 2004. In order to deal with a number of objections to various policies in the UDP, a public inquiry was held between February and June 2005. The inspector's report was published on 2 March 2006. At that point, Regulation 27(1) of the 1999 Regulations required the defendant:-

> "… after considering the report of the person holding the inquiry … [to] prepare a statement of
>
> (a) the decisions they have reached in the light of the report and any recommendations contained in the report, and
>
> (b) the reasons for any of those decisions which do not follow a recommendation contained in the report."

Where the intention of a planning authority is not to accept a recommendation, a further inquiry can be held into any objection to that intention: Regulation 29(4)(d). If the authority decides not to hold an inquiry, Regulation 28(1) requires it to "prepare a statement of case of their decisions as respects all the objections and their reasons for each decision." The defendant decided that a further inquiry need not be held and that decision is attacked. The claimant submits that a particular part of the reasons for failing to accept the recommendation should, since it had not been considered in depth in the inquiry that had been held, be subjected to the inquiry process.

4. There was thus a statutory obligation upon the authority to give reasons for deciding not to accept any recommendation made by the inspector. Separate reasons must be given in respect of each objection to any such decision (Regulation 28(1)). The courts' approach to the reasons given is, to adapt what was said by Lord Brown in *South Bucks D.C. v Porter (No 2)* [2004] 1 W.L.R. 1953 at p.1964 (Paragraph 36), that they must enable the reader to understand

why the particular conclusions were reached in relation to the objections so that the objectors can assess the lawfulness of the conclusions and what follows from them, so that any future action (if any) can be considered. Further, if the reasons are inadequate, relief can only be granted if the claimant has been substantially prejudiced by the inadequacy. S.287 of the 1990 Act enables a person aggrieved to make an application to the High Court on the ground that inter alia a plan or a policy in it is:-

> "(2)(a) not within the appropriate power; or
>
> (b) a procedural requirement has not been complied with.

(3B) provides that the court may quash the policy if satisfied that it was outside the appropriate power, or if there was a failure to comply with a procedural requirement, that failure substantially prejudiced the claimant."

5. It is, I think, obvious that the reasons for rejecting an inspector's recommendation must explain clearly why the authority in question found it necessary to disagree with it. Since the authority is both proposer and judge, the obligation to deal thoroughly, conscientiously and fairly with any objection is enhanced: see per Thorpe LJ in *Stirk v Bridgnorth DC* (1997) 73 P. & C.R. 439 at p.444. Where there is an exercise of planning judgment based on a balancing of prospective housing need against the disadvantages of such development on a particular site, the reasons must enable readers to understand how the balance has been struck and why the inspector's judgment has not been accepted. When such a balance has to be struck, it is not solely a matter of subjective planning judgment: see *Peel Investments (North) Ltd v Bury Council* [1999] EWCA Civ 738.

6. Because of the new powers established by the 2004 Act, the UDP had a very limited life. The plan's period runs until March 2011 and its policies are saved for three years from the date of adoption, i.e. until March 2010, with the Secretary of State having power to extend this period. The defendant had provided in the deposit plan for 11,700 dwellings in the period 1996 – 2011 which reflected figures derived from a regional planning guidance of 1998. In order to meet that figure, the defendant had included a site to the north of the city at Holmer. This would provide 300 homes. A number of objections were raised to this site (which, in common with Bullinghope, is greenfield land). These included concerns about flooding and drainage and the high infrastructure costs, which among other things had to deal with overhead electricity services which at present cross the site. The objections persuaded the defendant to prefer instead of Holmer the Bullinghope site which would also produce 300 homes. Thus the defendant's case at the inquiry involved the choice of Bullinghope rather than Holmer. The defendant never suggested and it was no part of its submissions to the inspector that both sites were needed in order to meet the housing requirements in the plan period.

7. The inspector considered that the figures should be based on the up-to-date RPG11 which expressed housing requirement in terms of annual average rates. Applying this approach to known completions between 1996 and 2001, provision would have to be made for a maximum of 4800 to 2007 and 2400 from 2007 to 2011, namely 800 and 600 per annum respectively. This would mean that over the plan period there was a maximum requirement of 12,200, some 500 more than the figure used by the defendant. I have said a maximum. The requirement is expressed as a minimum for Major Urban Areas (in which Hereford is not included) but a maximum elsewhere: see Policy CF3 A in RPG11. Mr Dove submits that maximum means only that there should be no more than the

allocation, not that it should not be met. Mr Forsdick submits that it means that, while no doubt it is desirable to meet the allocation and it can properly be regarded as a target, there can be no real concern if it is not met. Thus it is unnecessary for the allocation in the plan to go above the figures required in case all are not completed within the period. It seems to me that the differentiation between minimum and maximum supports Mr Forsdick's construction. Particularly in the light of the expressed need for further study, it would not be right to allocate land in the UDP for housing development which was not required save in order to provide a surplus to meet unspecified future failures of identified sites to produce what was anticipated. The defendant itself in its Housing Land Study in 2004 identified a shortfall in the annual rate of completion, but indicated that rates should increase when the UDP allocation sites began to be developed (Paragraph 3.9).

8. The figures were discussed during the inquiry and I cannot believe that the possibility of the higher quantity which the inspector finally lighted on in his report was not mentioned. Whether or not this was so, the defendant at no time suggested that there was a need for both Holmer and Bullinghope in order to meet any allocation figure. Thus no objector dealt with this. The objections to Bullinghope were largely based on the contention that to develop the site would constitute an unwarranted and, in planning terms, harmful extension of the city into the countryside.

9. The revised deposit draft described the Bullinghope site thus:-

> "This 13 hectare site includes land for structural landscaping and forms the largest Greenfield housing site in the Plan and lies directly adjacent to the Marches railway line (Hereford – Newport) south of the city of Hereford. This land, which lies between Bullingham Lane and Hoarwithy Road and is crossed by the Withy Brook to the east, would form the first phase of a much larger residential development to take place at Bullinghope beyond this Plan period. Access to this initial development of 300 dwellings would be via Bullingham Lane and Hoarwithy Road with new cycle and pedestrian routes within the development to link to those existing and the bus routes in the adjoining residential areas. Development within this area would be conditional on the delivery of the Rotherwas Access Road, the route of which is safeguarded through Plan policy T10 and now has planning permission. The release of housing development land will be subject to appropriate planning obligations and conditions of planning permission being in place to enable and ensure construction of the Rotherwas Access Road. In recognition of this requirement on the development, no affordable housing is being sought. The housing will be required to be designed and laid out to take account of existing residential amenity and issues of health and safety in respect of the railway line and Withy Brook, providing a range and mix of dwelling units with useable open space in accordance with Plan Policies. Initially a development brief will be required which will form part of an overall master plan for the area to establish the community facilities and development concepts required for this emerging new district of Hereford."

The reference to forming the first phase of a much larger residential development beyond the plan period has been deleted in the UDP as adopted (see paragraph 5.4.13). However, it is, I think, obvious that once a significant development is

allowed on the proposed site, it will be easier to establish that future requirements for housing should be allocated to adjacent land.

10. It is to be noted that there were a number of objectors, notably builders and developers, who wanted the figures to be increased and challenged assumptions made by the defendant in relation, for example, to windfalls and commitments which might not be delivered in the plan period or at all. All these matters the inspector resolved in the defendant's favour.

11. The site in question lies south of the railway line where at present it forms a natural boundary to the city. There is to the east outside this boundary an industrial site known as the Rotherwas Industrial Estate. This was established in 1914 as a munitions factory, no doubt making use of the railway to transport material. Access to it had become unsatisfactory since road traffic had become the main means of transport and heavy lorries had to use a minor road which meant driving through a residential area and there were problems with a railway bridge whose headroom was only 4.5 metres. It was considered essential to enable the estate to meet its potential that a new access road should be constructed. Planning permission had been granted for this and a Compulsory Purchase Order was pursued. This was granted by the Secretary of State for Transport on 29 August 2006 following an inquiry. The road has now been built, funding for it having been obtained by the defendant. This is of some importance since the defendant's decision to include Bullinghope in H2 was, to a considerable extent driven by the expectation that the developers would provide funds for the road. Indeed, this expectation was said to justify a decision that no affordable housing needed to be built on the site.

12. In his covering letter with his report, the inspector said, in relation to the extra 500 dwellings which he had decided needed to be provided for (Paragraph 15):-

> "Part of the extra 500 dwellings would be made up from increased capacity at allocated sites. In addition, there are a number of previously developed sites, all but one in Hereford, which I consider to be suitable in principle for residential development. However, I have not recommended the allocation of these sites. To do so could delay adoption of the Plan …"

He dealt with the Holmer and Bullinghope sites in Paragraphs 17 to 19, which read:-

> "17. In the deposit draft version of the Plan, an allocation was made for 300 dwellings at Holmer. This allocation was the subject of considerable objection. Also the Council later perceived benefits in a development at Bullinghope associated with the Rotherwas Access Road. As a result, in the Revised Deposit Draft, the allocation was switched to Bullinghope.
>
> 18. I support the initial position of the Council. I find that the Holmer site is suitable for housing development of the scale envisaged. It is a relatively well contained site that is seen in an urban context. By comparison, the Bullinghope site is totally unsuitable. Development there would be a major incursion, physically separated from the built-up limits of the city and harmful to the rural character and appearance of the area. In addition, the employment and transport imperatives that influenced the Council are no longer material.

> 19. I have considered all the objections to the alternative sites as well as the representations of support. Relevant matters were before the inquiry. As such, I feel that it would be possible to allocate the Holmer site without recourse to a modifications inquiry. I have no hesitation in commending the Holmer site."

Not surprisingly, Mr Forsdick relies heavily on the inspector's clearly expressed opinion that the Bullinghope site was "totally unsuitable". Paragraph 18 reflects what he said in Paragraph 5.15.35 of his report.

13. The inspector concluded that the objections to Holmer should not prevail and that it was far superior to Bullinghope in land use terms. It is not necessary to go into any further detail since the defendant has not disagreed with the inclusion of Holmer. I should, however, deal with the inspector's reasons for rejecting Bullinghope. He rejected the view that Bullinghope was an appropriate site for future development beyond the plan period so that the 300 would represent a first phase allocation. This has now, as I have already indicated, been deleted from the UDP. He considered that, although considerably more than 300 dwellings would be needed to meet Hereford's future requirements, the shortfall could be met from other sites. He recognised that the allocation of 300 houses to the site would be an obvious commitment to future further development, but this would be premature and would prejudice open discussion of alternatives in the city. While this conclusion was reached in the context of an expressed approval for future development, it is, as it seems to me, clear that the objection has validity even without any specific reference to possible future development in the UDP.

14. In Paragraph 5.14.23 he noted that the Rotherwas Access Road would be intimately linked with the proposed housing allocation and regarded the funding of the road on the back of the housing development as legitimate, noting the unequivocal commitment by the prospective developers to fund the construction of the road. This justified in his view waiver of the normal requirement to provide affordable housing. His conclusions on damage to landscape quality local amenity and on the need to retain the railway as a boundary are contained in Paragraphs 5.14.34 to 5.14.37 which read:-

> "5.14.34. In terms of landscape quality and local amenity, I have visited this area several times. I have observed the objection site from roads, from footpaths and from the high ground of Dinedor Hill. On each occasion, the predominant impressions that I gained in this locality are of open countryside; of a landscape that is distinctly rural in its character and appearance; and of an extensive, gently rolling agricultural prospect.
>
> 5.14.35. I appreciate that there is an outlier of development at Bullinghope Lane and at Bullinghope itself. Also, further to the east, the Rotherwas Industrial Estate is to be found beyond Watery lane. I have also borne in mind the likely impact of the Rotherwas Access Road. However, the abiding picture is of a landscape devoid of large scale built development and the associations of an urban area. The objection site itself has all the hallmarks of the open rural countryside; and it is an integral part of the wider agricultural landscape unsullied by urban development.
>
> 5.14.36. I consider that the proposed development would be a material and unjustified incursion into the open countryside

> surrounding Hereford. It would be significantly harmful to the rural character and appearance of the area and, in the circumstances that I have described, an unwarranted accretion to the south of the city. I have no hesitation in recommending that the proposed allocation should not be pursued under the unitary development plan.
>
> The railway as a physical barrier.
>
> 5.14.37. I strongly support the view that the railway is an obvious physical boundary to the spread of Hereford. I appreciate that, as referred to above, there are elements of built development to the south of the railway line. There is also the prospect of the Rotherwas Access Road. However, to my mind, these elements do not in any way diminish the marked contrast between the city to the north of the railway and the agricultural land to the south. To breach this boundary and to allow housing development to spill into the rural countryside would not be justified."

15. The defendant's reasons for rejecting the inspector's recommendation and in respect of each objection made to its proposal are contained in a document of September 2006. The reasons for rejecting the recommendation are:-

> "The Inspector has increased the overall strategic dwelling requirement for the County from 11,700 to 12,200 dwellings for the Plan period, in line with the Regional Spatial Strategy. To ensure certainty that this requirement will be delivered, and given the proximity of the end of the Plan period (2011) and the fact that development of several allocated sites is yet to commence, it is considered that an additional allocation is required. Further provision should be made at Hereford which is a defined sub-regional foci within the Regional Spatial Strategy. The Bullinghope site offers the opportunity to help ensure that the strategic housing requirement is appropriately met. Its allocation and development will serve to provide new housing in a Greenfield location to the south of Hereford, well related to employment provision at Rotherwas.
>
> The site also offers the opportunity to secure funding for the proposed Rotherwas Access Road. The Inspector has accepted that this is a legitimate requirement and that the Access Road would be a necessary accompaniment of housing development at Bullinghope. Further promotion of industrial development on the Estate is a key priority of the Council and is recognised as an essential component in sustaining the growth and competitiveness of the local community. This is in line with the objective of the Plan (as proposed to be modified pursuant to the Inspector's recommendation 3.19/5) to direct most new employment development to Hereford. The provision of access improvements through a package of transport measures which include the Access Road will help achieve this aim."

Mr Forsdick attacks these reasons as inconsistent with its approach at the inquiry and on the ground that they fail to address the inspector's reasons for disapproving the allocation in planning terms and for concluding that it was not needed to meet the requirements for housing completion to 2011. The defendant

has produced material which, it is said, shows that it was correct to doubt that allocations would come forward and, which, incidentally, shows that development at Holmer has not commenced. But that material cannot show that the defendant was at the time justified in rejecting the inspector's view since it did not (because it could not at the time) refer to those matters. If it had, objections could have focussed on this and further evidence might have been produced. Mr Forsdick further attacks the first sentence since, as he submits, it shows a flawed approach. It was not necessary to be certain that the housing numbers could be achieved: they were maxima. Thus over allocation to meet possible shortfalls was unnecessary and no reason was given to differ from the inspector's planning judgment.

16. The reasons must however be read as a whole and further details are given in dealing with specific objections. I do not propose to lengthen this judgment by citing them all, but I should note any further points raised. I will do so by reference to the material page numbers of the document. At page 5, in answer to an objection that the defendant's doubts that the sites apart from Bullinghope could not all come forward were inconsistent with its approach at the inquiry this is said:-

> "The housing strategy, in terms of both the levels and distribution of housing was the subject of considerable debate at the inquiry … [The] proposed modification does not indicate that allocated sites will not come forward within the Plan period, but rather doubts whether all such sites will be completed by 2011. It is delays in the Plan's progress rather than problems with the sites themselves which has resulted in this uncertainty … The reasons for the rejection of the inspector's recommendation make clear that this will ensure certainty that its target of 12,200 will be achieved, rather than exceeded."

On page 9, the point is made that "the site is that which best relates to the existing built form of the city in this location and does not fall within any designated landscape." These do no more than specify the concern that there will be insufficient completions by 2011 and assert that the absence of any designated landscape together with the alleged good relationship with the built form of the city justify the objection based on landscape impact.

17. Mr Dove makes the point that planning permission to develop the site has been sought and should be considered very soon. Whether in the light of present economic conditions it (or indeed any major housing developments) will go ahead is I imagine unclear, but that is not a relevant consideration for me. It merely shows that forecasts for the future are always uncertain, but the best must be done on the evidence produced at the material time. In challenges to the lawfulness of such decisions, subsequent developments are of only limited relevance; they are of no relevance unless they can be used to throw light on what may properly have been taken into account at the time.

18. No doubt the defendant was entitled to take account of any change of circumstances since the conclusion of the inquiry and the inspector's report. But it did not deal with the inspector's detailed assessment of the allocations and the numbers which would be available. It is true that there is evidence that the figures were not being met, but that was, on the defendant's own case at the inquiry, to a considerable extent because the UDP had not made clear that the sites were allocated. Furthermore, no reasons are given to reject the inspector's planning judgment and, since there was a need to balance any disadvantages in planning terms against potential gains, some such reasons were in my view

needed. The expressed need for certainty is suspect in the light of the approach that the figures were maxima. The need for clear reasons was all the more important because the defendant had never suggested at the inquiry that both Holmer and Bullinghope were needed. If there was cogent new evidence that that was no longer appropriate, it should at least have been identified.

19. It is clear from the minutes of the Council meeting in July 2006 which considered the cabinet reports on the UDP and the inspector's report that the funding of the Rotherwas Access Road was regarded as of vital importance for the economic well being of Hereford. Housing development at Bullinghope would provide this funding. It is apparent that the development was not needed since the road has now been constructed. This renders doubtful the decision to waive the requirement for affordable housing reflected in paragraph 5.4.13 of the UDP.

20. Mr Jones and Mr Dove submitted that it was not open to the claimants to rely on the grounds put forward since they had not been raised as objections to the proposed modifications by the defendant. It is hardly surprising that the assertion that there was a need for both sites was not addressed since it had not been raised by the defendant until the proposed modifications. Reliance is placed on the objections put forward by Mr David Miller on behalf of the Dinedor Hill Action Group, the claimant's predecessors. These did not specifically refer to the need for both sites. But I see no reason to preclude a claimant from relying on grounds which establish that a plan or a policy in it was not within the appropriate power even though they had not been raised before. No doubt in appropriate cases the raising of a new ground which the Council was unable to deal with may result in the court deciding that relief should not be granted, at least if the ground should have been raised earlier. But here, whether or not by members or supporters of the Action Group, the relevant ground was raised and the defendant was able to and purported to deal with it.

21. The defendant has in my judgment failed to deal with the inspector's findings in the reasons given for disagreeing with his recommendation. The inclusion of Bullinghope was considered most desirable because of the expectation that only thus could the Access Road be assured. That expectation has been shown to be wrong, but I have no evidence to suggest that it was not at the time reasonable. Nevertheless, the reasons given by the inspector for rejecting Bullinghope had to be dealt with. They were not and that in my judgment amounted to a substantial flaw in the decision making process.

22. It has been submitted that the claimant cannot show that it has been substantially prejudiced. It represents a number of people who had objected to the allocation at Bullinghope and who pursued their objections at the inquiry and thereafter. They clearly had an interest in what happened on the site and were entitled to expect that the inspector's recommendation would be rejected only if proper reasons were given for that rejection. They and so the claimant have in my view been substantially prejudiced by the failure of the defendant to carry out the duty to give reasons which is required by the 1999 Regulations: cf *Miller v Wycombe DC* [1997] JPL 951 at p.956. That failure has led to a decision which is flawed. Since the approach that certainty of achieving the figure was needed is incorrect and there are, in the light of the inspector's positive findings, very strong reasons to reject the allocation on planning grounds, it cannot be said that the flawed reasons could make no difference and the same decision would be made if the matter were reconsidered. Thus I would not refuse relief on the ground that the flawed reasons could have made no difference to the result.

23. Mr Forsdick submitted that the defendant should have reconvened the inquiry to deal with the need for both Holmer and Bullinghope to meet the number of

dwellings to be completed in the Plan period. This was said to be a new matter and so the refusal to have an inquiry, which was based on the contention that new matters had not been raised, was wrong. At the inquiry the only issue was whether the allocation should be Holmer or Bullinghope and it was not suggested that an increase of 500 would mean that both would be needed: indeed, the inspector's analysis was that they would not. Thus it would be important to have the full facts before assessing whether the disadvantages in planning terms – the 'total unsuitability' as the inspector found of the site – was outweighed by the need for the extra dwellings.

24. Mr Forsdick relies on the observations of Mr Robin Purchas, Q.C., sitting as a deputy judge in *Drexfine Holdings Ltd v Cherwell DC* [1998] JPL 361 at 371-373. The defendant had a discretion whether or not to hold a second inquiry and was entitled to have regard to the cost and delay which would be occasioned as against the matters which favoured a consideration by an independent inspector. Mr Purchas said this:-

> "The fact that a proposed modification involves issues which have not been subject to consideration at the deposit stage could be a highly material consideration in determining whether or not a further inquiry should be held.
>
> Considerations which would generally be material to that decision would include:
>
> > (1) whether or not the issue raised had been previously subject to independent scrutiny by an inspector so as to provide independent examination of the opposing contentions; …
> >
> > (3) the practical implications of a second inquiry and, in particular, whether it would potentially be of material benefit to the decision making process;
> >
> > (4) delay and the desirability of securing an up to date adopted development plan;
> >
> > (5) fairness to the objector and to other parties, as with all decisions of this kind, the determination whether or not to hold a further inquiry should seek to achieve fairness, balancing the interests of all relevant parties … [subject to Wednesbury principle]."

25. While the precise issue whether both sites were needed was not before the inspector, he did consider how many dwellings should be provided and whether that provision could be met with the 300 at one or other of the two sites. He decided that it could. The defendant has clearly made up its mind that it should have Bullinghope and so any further recommendations by an inspector were, in the light of the robust rejection of the allocation, unlikely to make any material difference. The plan needed to be adopted as soon as possible having regard to its short life. In all the circumstances, I do not think that the exercise by the defendant of its discretion not to hold an inquiry could be said to have been irrational and be flawed. All I can do in accordance with the terms of s.287 is to quash the policy if persuaded that the decision making process was flawed. Now that time has elapsed and the plan has only some 21 months of life, it would not, I think, be cost effective or sensible to hold a further inquiry but that will be for the defendant to decide if the inclusion of Bullinghope in H2 is quashed.

26. The claim is aimed at the inclusion of Bullinghope in H2 and that is the only relief which is sought. Policy H1 refers to the settlement boundary of Hereford and provides that within it residential development will be permitted. Mr Dove pointed out that this would remain so that, even if Bullinghope were removed from H2, the site would, since it lies within the redrawn settlement boundary, be one in respect of which the plan would permit residential development. Thus s.38(6) of the 2004 Act would mean that such development was in accordance with the plan and should therefore be permitted unless material consideration required refusal. While Mr Dove is, I think, correct, it seems to me that the removal of Bullinghope from H2 because the process whereby it was included was wrong in law is a material consideration.

27. Mr Forsdick submitted that it was possible to quash the settlement boundary insofar as it surrounded the Bullinghope site and keep it to what it had been, namely the railway line. Mr Dove and Mr Jones submitted that it is not possible for this to be done since s.287(4) requires any challenge to be made within 6 weeks from, in this case, March 2007. The decision of the House of Lords in *Smith v East Elloe DC* [1956] A.C. 763 means that there is no power to extend time and a decision is unimpeachable if not challenged within the 6 weeks. It follows, it is submitted, that policy H1 cannot now be challenged.

28. It is now too late to challenge the settlement boundary. That means that policy H1 will remain, but, as I have said, I do not think that is at all problematical. While an application for planning permission can be made and policy H1 can be said to favour it, the defendant or, on appeal, the Secretary of State would be entitled to have regard to the removal of Bullinghope from H2 (and the deletion of Paragraph 5.4.13 which must follow that removal) and the reason for it as a material consideration in considering any application.

29. Since drafting this judgment, I have received (I fear that they took some time to reach me) further material which I had suggested should be produced, namely the records of the relevant Council and cabinet meetings. That material ought to have been produced before the hearing since it was clearly relevant and I shall add a postscript to deal with the procedure which should be adopted to avoid late or absence of proper disclosure. It shows that the decision of the cabinet, following advice, was to accept the H2 recommendation and to remove Bullinghope. That was on 29 June 2006. On 6 July 2006 the government refused to provide funding for the Rotherwas Access Road. On 28 July 2006 at the full Council meeting the leader of the Council (it seems from evidence produced without prior notice) stated that the recommendation should be rejected because of the importance of funding being provided through the development at Bullinghope for the Access Road. The Council agreed. Mr Forsdick has asked what change there was between the cabinet decision and the full Council meeting in the perceived need for both Bullinghope and Holmer. The answer is, on the material produced, none. In my view, this supports the contention that the decision was in reality driven by the Access Road funding and explains the absence of any proper reasons for rejecting the inspector's recommendation.

30. Mr Dove has made further written submissions in the light of the new material and the further submissions of Mr Forsdick. He correctly makes the point that the full Council and not the cabinet were the ultimate decision makers and so there was no reason why the cabinet decision should be followed if, after full consideration and discussion, the Council decided otherwise. He also refers to the existence of material which led to the conclusion that the actual completion rates had fallen behind what was required up to and including the year 2003 – 4. Thus it was said to be 'unlikely that the housing completions anticipated in the UDP for the period 2001 – 2006 will be achieved': see the Housing Land Study 2004. But

this document was available for the inspector when he considered the figures and the need for more than the 300 dwellings to be provided either at Bullinghope or Holmer. No doubt if the defendant had the material to justify the addition of Bullinghope on housing need grounds it could have referred to it in its reasons since it would have been a justification for changing its approach. But it did not and I fear that what is referred to by Mr Dove is in reality an ex post facto justification which was not relied on at the time. I do not find the further submissions persuasive.

31. There can be no doubt that the minutes and officer advice ought to have been disclosed. Not only are they relevant but in some aspects (certainly so far as the claimant is concerned) may be thought to be detrimental to the defendant's case. Ever since the decision of the Court of Appeal in *R v Lancashire CC ex p Huddleston* [1986] 2 All ER 941 it has been made clear that a public body against whom judicial review proceedings are brought is obliged to adopt a 'cards on the table' approach. It must put before the court all relevant material making full and fair disclosure and not adopting a partial approach. The same principle applies to claims under ss.287 and 288 of the 1990 Act and their successors under the 2004 Act. It has been suggested on behalf of the defendant that it was entitled to assume that the existence of the documents in question must have been known to the claimant and in particular that it must have been aware of the existence of minutes of Council meetings. Thus their absence from the claimant's documentation meant, so the defendant believed, that the claimant thought they did not assist. I do not accept that reasoning. It should have been apparent to the defendant that they did assist and were clearly relevant and, since for whatever reason the claimant had not produced them, the defendant should have done so.

32. The failure to produce this relevant material was compounded by the failure of the defendant to produce its evidence until after 5 June 2008, albeit the claim was lodged in May 2007. This was only at most 3 weeks before the hearing. It is unfortunate that the CPR do not contain any timetable for the lodging of evidence or grounds to resist the claim by either the defendant or any interested party. This has meant in too many cases that such evidence and grounds has been left very much to the last minute. This is a thoroughly unsatisfactory state of affairs and is not compliant with CPR 1.1(2).

33. The court's case management powers, in particular those contained in CPR 3.1(2)(m), enable the court to make any orders to achieve a just result. When initiating a claim under ss.287 or 288 or their successors, the claimant should, if he considers it appropriate, apply in the claim for an order for directions as to the filing of any evidence and defence by the defendant or any interested party. I recognise that there is no need for the defendant, who will normally be a planning authority or the Secretary of State, to be given advance notice of any claim; indeed, the requirement that it be brought within 6 weeks will often make such advance notice somewhat impractical. Thus a somewhat longer period than is appropriate in judicial review claims, where there will usually have been advance notice, an Acknowledgement of Service and a lapse of time before permission is granted so that the defendant or interested party will have had time to prepare evidence and detailed grounds of defence, is required.

34. I am aware that the Treasury Solicitor needs some time to consider a decision letter (which may be lengthy and complicated) and must seek instructions from the inspector before advising the Secretary of State whether the claim should be conceded or resisted. Equally, no doubt, planning authorities will have to go through the same process with their legal advisors. Accordingly, the general rule will be if directions are sought that evidence and at least summary grounds of

defence should be lodged within 10 weeks. If a shorter period is sought, it must be requested specifically and good reasons given for the shorter time. Equally, if the defendant or interested party wants a longer time, they should make a specific request, again giving good reasons for it.

35. In the circumstances and for the reasons I have set out I propose to grant the relief sought and quash the housing allocation at Bullinghope in policy H2 together with the reference to the Bullinghope allocation (paragraph (g) in paragraph 5.4) and the narrative at paragraph 5.4.13 of the UDP.