Neutral Citation Number: [2016] EWHC 2817 (Admin)

Case No: CO/2241/2016

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

Bristol Civil Justice Centre
2 Redcliff Street
Bristol

Date: 10/11/16

**Before** :

**MR JUSTICE HICKINBOTTOM**

**Between :**

**THE QUEEN ON THE APPLICATION OF**
**RLT BUILT ENVIRONMENT LIMITED**

**Claimant**

**and**

**THE CORNWALL COUNCIL**

**Defendant**

**and**

**ST IVES TOWN COUNCIL**

**Interested Party**


(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

**Charles Banner** and **Luke Wilcox** (instructed by **Stephens Scown LLP**) for the **Claimant**
**Mark Lowe QC** and **Jack Parker** (instructed by **Cornwall Council Legal Services**)
for the **Defendant**
**The Interested Party neither appearing nor being represented**

Hearing date: 6 October 2016

**Approved Judgment**

**Mr Justice Hickinbottom:**

## Introduction

1. The Claimant is a company specialising in, amongst other things, residential development design and planning in Cornwall. In this claim, it seeks to challenge the decision dated 17 March 2016 of the Defendant local planning authority ("the Council") to hold a local referendum on the making of the St Ives Neighbourhood Development Plan ("the St Ives NDP").

2. On 15 June 2016, Supperstone J ordered the claim to be listed for a rolled-up hearing. There were then eight grounds of challenge, including claims that the plan failed to have proper regard to the National Planning Policy Framework ("the NPPF") and did not contribute to sustainable development, both statutory criteria for proceeding to a referendum. However, upon reflection – and, if I might say so, wisely – the Claimant has abandoned all grounds but three. I need say nothing further about the abandoned grounds.

3. In relation to the extant claims, in short, the Claimant contends that the St Ives NDP includes policies on future housing provision, including in particular residency requirements intended to limit second home ownership in the St Ives area, which are both incompatible with article 8 of the European Convention on Human Rights ("the ECHR") and contrary to the requirements for strategic environmental assessment ("SEA") deriving from European Union law.

4. At the hearing before me, the Claimant was represented by Charles Banner and Luke Wilcox, and the Council by Mark Lowe QC and Jack Parker. At the outset, I thank each for his contribution.

## The Law

5. The Localism Act 2011 amended the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and the Town and Country Planning Act 1990 ("the 1990 Act"), by inserting sections 38A-38C into the 2004 Act and several new schedules including Schedule 4B into the 1990 Act. These, supplemented by the Neighbourhood Planning (General) Regulations 2012 (SI 2012 No 637), enable a "qualifying body" to initiate a process for the purpose of requiring a local planning authority to make a "neighbourhood development plan", setting out policies in relation to the development and use of land in a particular "neighbourhood area". Paragraph 17 of the NPPF, which gives, as one of the guiding principles of the Framework, the empowerment of local people to shape their surroundings, chimes with these statutory provisions.

6. Paragraph 8(2) of Schedule 4B to the 1990 Act sets out what are described as "basic conditions" for such a plan, of which conditions (d) and (f) are relevant to this claim. Condition (d) requires that:

> "(d) the making of the [neighbourhood plan] contributes to the achievement of sustainable development."

Again, the NPPF reflects that requirement: paragraph 6 states that the purpose of the planning system is to contribute to the achievement of sustainable development. That is the overarching aim of national planning policy. Condition (f) requires that:

> "(f) the making of the [neighbourhood plan] does not breach, and is otherwise compatible with, EU obligations".

7. The neighbourhood development plan process includes sequential requirements for independent examination and a local referendum. This claim focuses on the latter. Paragraph 12(4) of Schedule 4B, which applies only after the examiner has made a report, prescribes the circumstances in which a local planning authority may progress a neighbourhood plan to a referendum, in the following terms (so far as relevant to this claim):

> "If the authority are satisfied—
>
> > (a) that the draft order meets the basic conditions mentioned in paragraph 8(2), [and] is compatible with the Convention rights…, or
> >
> > (b) that the draft order would meet those conditions, be compatible with those rights and comply with that provision if modifications were made to the draft order (whether or not recommended by the examiner),
>
> a referendum… must be held on the making by the authority of a neighbourhood development order."

In this judgment, bare references to "paragraph 12(4)(a)" are to that sub-paragraph in Schedule 4B. By paragraph 17 of the same schedule, "the Convention rights" has the same meaning as in the Human Rights Act 1998, i.e. the rights conferred by the ECHR.

8. Therefore, for a draft neighbourhood development plan to progress to a referendum, the relevant local planning authority must be satisfied that, amongst other things, it is compatible with article 8 of the ECHR and with the requirements of EU law, including those of the Strategic Environmental Assessment Directive 2001/42/EC ("the SEA Directive") (as transposed into English law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633) ("the SEA Regulations")), where those requirements are triggered.

## The Factual Background

9. St Ives is a small town on the North Cornwall coast, attractive and well-known as a highly desirable tourist and leisure destination. It is therefore perhaps unsurprising that, with the adjacent Carbis Bay, it has one of the highest proportion of second homes and holiday lets in Cornwall; and the proportion of dwellings occupied other than by a resident household has substantially increased in recent years.

10. The Interested Party ("the Town Council") is the town council for the area covering the parish of St Ives. Encouraged by the statutory framework, it determined to have a

neighbourhood development plan, and gave that indication to the Council as the relevant local planning authority. On 2 December 2013, the parish of St Ives was designated by the Council as a neighbourhood area; and, for the purposes of the Localism Act, the Town Council is the qualifying body for that neighbourhood area.

11. The Town Council prepared a draft St Ives NDP. It included a Policy H2, designed to address the perceived problem of uncontrolled growth of dwellings used as second or holiday homes, by requiring new open market housing (including replacement housing) to have a restriction to ensure its occupancy as a principal residence, although there was some debate about how "principal residence" should be defined.

12. Between November 2014 and January 2015, the Town Council undertook pre-submission consultation in respect of that draft, before submitting it to the Council on 5 March 2015. The submission was accompanied by a Sustainability Appraisal of the plan dated March 2015 ("the SA"), which purported to comply with the SEA Directive and Regulations. In respect of alternatives for the use of future market housing in the area, the SA appraised two options: Policy H2, and taking no action (paragraph 11.1.10).

13. On 26 May 2015, the Council decided that the draft plan complied with the relevant statutory requirements, and should be publicised for consultation, prior to examination. The consultation was conducted in June and July 2015. It had many responses, including comments from the Council's Affordable Housing Team who expressed concern that Policy H2 would depress the value of new market housing to the extent that development of market housing with affordable housing attached would become commercially unattractive. Others were concerned that the policy would depress the tourist and leisure industries in St Ives.

14. The Council's Planning Policy Advisory Committee ("the PPAC") considered the consultation responses at its meeting on 16 September 2015. It had the benefit of an officer's report, from which it is clear that the requirement for the plan – but, specifically, Policy H2 – to comply with human rights requirements was well-appreciated. In relation to Policy H2, the report said (at pages 67-8):

> "The Council must be sure that human rights are not breached by restrictions on the occupation of housing proposed by plan policies. [It then set out the full text of article 8: see paragraph 73 below.]
>
> This Article requires exceptional justification for applying such a principal residence restriction. In the St Ives [NDP], evidence has been presented of the harm that excessive levels of second homes has on the social fabric of the community and that it is therefore contrary to sustainable development. The Council feels that a policy for the restriction of new dwellings to occupation for 'principal residence' may be justified if there is a strong case of the harm caused by second homes, provided that there is an express recognition in the text to demonstrate sensitivity to the human rights issue that could arise when enforcing the restriction.
>
> …

> However the policy is expressed, it is a pre-requisite for the Council to consider the issue of human rights in any enforcement action. [The] Council, as the Local Planning Authority, is the authority that determines planning applications and there may be circumstances when it is not appropriate to apply Policy H2, due to other material considerations."

15. At its 16 September 2015 meeting, the PPAC decided to progress the matter to examination, and an independent examiner, Deborah McCann BSc MRICS MRTPI DipArchCon DipLD ("the Examiner"), was duly appointed.

16. The Examiner conducted the examination on the basis of written representations; and, in a report dated 2 December 2015 ("the Examiner's Report"), she found that, with certain specified amendments, the draft St Ives NDP complied with the relevant statutory requirements and should proceed to a referendum. She expressly concluded that:

    i) The St Ives NDP had been prepared in accordance with all statutory requirements (Section 5, Conclusion 1).

    ii) The plans and policies in the St Ives NDP would contribute to achieving sustainable development (Section 5, Conclusion 5); and, specifically, that, "due to the adverse impact on the local community/economy of the uncontrolled growth of second homes the restriction of further second homes [found in Policy H2] does in fact contribute to delivering sustainable development" (Section 4, paragraph 11.5, page 30).

    iii) The SA met EU obligations in respect of SEA (Section 5, Conclusion 4)

17. The Examiner did not specifically deal with human rights compatibility; and, on 11 February 2016, a firm of planning consultants (D2 Planning) on behalf of a developer, sent a letter to the Council ("the D2 letter"), threatening judicial review of any decision to progress the matter to a referendum, on more or less the same grounds as originally put forward in this claim by the Claimant. The letter said that the officer's report had rightly acknowledged that Policy H2 would amount to an interference with "private and family life and/or the home", so that justification under article 8(2) was required; but that report left open the question of justification, and the Examiner's Report had failed to address the issue at all.

18. At the request of the Council, the Examiner provided additional comments, that were then appended to her original report. They are set out in a further officer's report, prepared for the meeting of the PPAC on 17 March 2016. Having considered all of the relevant documents, including the earlier officer's report, the Examiner concluded that "there was no evidence to support a contention that [the St Ives NDP] did not comply with the Human Rights Act 1998". In particular, she said:

> "I do not consider that the Policy H2 is incompatible with the Human Rights Act 1998. Just as for the restrictions placed on agricultural occupancy or affordable housing it can be argued in the case of St Ives that it is in the interests of the economic well-being of St Ives and does protect the rights and freedoms of others who are currently being affected by the unrestricted

> occupancy of houses as second homes. In addition, it only applies to new housing development therefore not placing a restriction on the entire housing market.
>
> The plan and its supporting documentation does give clear and rational reasons for including Policy H2 (including supporting evidence). When considering the policy as presented I was mindful of this rationale and evidence and questioned it at length during the clarification meeting. I was satisfied that the policy – subject to the modifications suggested – is appropriate. I made clear in my comment on the policy my rationale for its inclusion – subject to modification.
>
> …
>
> I set out a clear rationale of why I considered that Policy H2 as modified would be consistent with the NPPF."

19. The officer's report for the 17 March 2016 meeting, having quoted those additional comments from the Examiner, then also specifically dealt with the suggestion in the D2 letter that the St Ives NDP was incompatible with the Human Rights Act. It stressed, again, that the Council had to be sure that human rights were not breached by the Policy H2 restriction. It then continued:

> "It is questionable whether [article 8] is in play where the restriction is imposed, as here, only on newly constructed accommodation so that those who subsequently purchase or occupy the homes subject to the restriction are aware of the restriction from the outset. However, it is prudent to assess the applicability of Article 8 from the outset of the creation of the policy since it may be invoked by those adversely affected in the case of enforcement for a breach of the restriction. In any event, the Council will need to be alert to the potential for the existence of such issues when exercising its discretion to take enforcement action on the breach of any such restriction.
>
> Article 8 requires that the restriction be justified in terms of necessity and proportionality. In the St Ives [NDP], evidence has been presented of the harm that excessive levels of second homes has on the social fabric of the community which harm will continue unabated if no such restriction is imposed to prevent the use and occupation of new homes by the second home and holiday home market and that it is therefore contrary to sustainable development. This conclusion was accepted by the Examiner. Your officers are of the view that members are entitled to conclude on the evidence base of the NDP that the policy is a necessary and proportionate response to a particular local issue of some significance to those living in the area of the Plan.
>
> …

> … [I]t is open for the Council to take the view that it is unlikely that article 8 will be engaged in this context, but if it is, the interference is or could be justified as set out below.
>
> [The substantive provisions of article 8(2) are then set out.]
>
> The policy is promoted for the social and economic well-being of the area as set out in the NDP and report of the Examiner. That is for the economic and social well-being of the area in which it applies rather than for well-being nationwide. Thus, in context, it can be said to relate to the economic well-being of that part of the country in which it will apply. In any event, it also applies to the protection of the rights and freedoms of others to own and occupy their own homes in the area and who are presently prevented from doing so by the strong second and holiday home market."

The officer's report also stressed that, under the 1990 Act, enforcement action can only be taken if the relevant planning authority find it expedient to do so; and, at that stage, the Council would be obliged to take into account all material considerations including any article 8 rights, and that enforcement could not proceed if it would be a breach of article 8.

20. The officer's report recommended that, with the modifications made by the Examiner, the St Ives NDP complied with the statutory requirements, and it should proceed to a referendum.

21. After debate, the PPAC followed that advice, and resolved to recommend to the relevant Portfolio Holder Councillor that the St Ives NDP should proceed to a referendum. A decision notice to that effect was published by the Councillor that day (17 March 2016). That is of course the decision challenged in this claim, issued on 28 April 2016.

22. On 5 May 2016, a referendum was held, in which voters were asked:

> "Do you want [the Council] to use the neighbourhood plan for St Ives to help decide planning applications in the neighbourhood area?"

On a 47% turnout, 83% of those who voted were in favour of the proposition.

23. That is the end of the statutory process, in the sense that, everything else being equal (and, of course, subject to this challenge), following the referendum result, the Council is now bound to make the St Ives NDP in its final form.

**The St Ives NDP: The Challenged Policies**

24. The St Ives NDP, as put forward for referendum, is a very substantial document of over 100 pages, covering many proposed policies in respect of a variety of matters including general development, culture and heritage, local economic development, land allocations, open spaces, well-being, sports and leisure, transport, as well as housing. Of these, the Claimant's complaint is focused on two policies relating to housing, namely draft Policies H2 and H3.

25. Policy H2 contains the proposal for a so-called "principal residence requirement". In the form that progressed to the referendum, it provides:

> "H2 Principal Residence Requirement
>
> Due to the impact upon the local housing market of the continued uncontrolled growth of dwellings used for holiday accommodation (as second or holiday homes) new open market housing, excluding replacement dwellings, will only be supported where there is a restriction to ensure its occupancy as a Principal Residence.
>
> Sufficient guarantee must be provided of such occupancy restriction through the imposition of a planning condition or legal agreement. New unrestricted second homes will not be supported at any time.
>
> Principal Residences are defined as those occupied as the residents' sole or main residence, where the residents spend the majority of their time when not working away from home.
>
> The condition or obligation on new open market homes will require that they are occupied only as the primary (principal) residence of those persons entitled to occupy them. Occupiers of homes with a Principal Residence condition will be required to keep proof that they are meeting the obligation or condition, and be obliged to provide this proof if/when [the] Council requests this information. Proof of Principal Residence is via verifiable evidence which could include, for example (but not limited to) residents being registered on the local electoral register and being registered for and attending local services (such as healthcare, schools etc)."

26. The supporting text for the Policy is as follows:

> "Objective:
>
> To safeguard the sustainability of the settlements in the St Ives NDP area, whose communities are being eroded through the amount of properties that are not occupied on a permanent basis.
>
> Justification:
>
> In order to meet the housing needs of local people, bring greater balance and mixture to the local housing market and create new opportunities for people to live and work here, to strengthen our community and the local economy the St Ives NDP also supports the principle of full time principal residence housing. This is new housing which has to be used as the principal residence of the household living in it, but does not have the price controls that affordable housing does, or any local connection requirement.
>
> St Ives and Carbis Bay are in the top five settlements in Cornwall with the highest proportions of second homes and holiday lets… and are

being proven in nationwide studies to be largely negative. In 2011, 25% dwellings in the NDP area were not occupied by a resident household - a 67% increase from 2001. Over this same period, housing stock in the NDP grew by 684 or 16%, but the resident population grew by only 270 or 2.4% and the number of resident households grew by less than 6%. The growth in housing stock in the NDP area between 2001 and 2011 was double the average across England. The socio-economic effects of such a high proportion of holiday properties are being felt by the local community…. This form of tourism has grown rapidly around St Ives, but a balance needs to be struck with the needs of local resident communities."

27. Before me, Mr Banner submitted – as Mr Lowe agreed, and I accept – that, looking at the documents as whole, the aim of Policy H2 is to safeguard the sustainability of development by reducing the proportion of dwellings that are not used as a principal residence. The policy was based upon the proposition that a reduction in the proportion of non-principal residences was required to render further development in St Ives sustainable in planning terms. The aim of the national planning system is, of course, the achievement of sustainable development (see paragraph 6 above), including the "delivery of a wide choice of homes" (section 6 of the NPPF).

28. Policy H3 imposes limits on the nature of housing development that will be allowed once the figure of 1,100 for new dwellings in the St Ives NDP area is met. Under the heading, "Development of Un-Allocated Sites and Additional Sites Following the Commitment of all Allocated Sites", it states:

> "The development of un-allocated sites may be considered only if:
>
> a) they are for 50 dwellings or less;
>
> b) the site forms a logical extension to the existing built up area and is not an isolated development in the countryside;
>
> c) housing density is a maximum of 35 dwellings per hectare;
>
> d) they are affordable housing-led schemes (i.e. deliver the maximum viable amount).
>
> The purpose of such development must be primarily to provide affordable housing. Proposals should seek to provide 100% affordable housing. The inclusion of market housing will only be supported where it is essential for the successful delivery of the development proven by detailed financial viability appraisal. If viability appraisal demonstrates that less than 50% affordable housing is deliverable, the scheme will not be supported.
>
> The number, type, size and tenure of dwellings should reflect identified local needs as evidence through the Cornwall housing register or any specific local surveys completed using an appropriate methodology. Where there is no evidenced local need, development will not be supported.

> Proposals of over 25 dwellings must include a Masterplan setting out the proposed 'phasing' (expected completion years for different aspects of the development), taking account of the capacity of local infrastructure to meet residents' needs…".

In other words, any further development will be restricted to that which is "affordable housing-led".

29. In the supporting text, the justification for this policy is given, as follows:

> "All of the undeveloped land adjoining the existing built up areas is classified as grade 2 or 3 agricultural quality and is or could be in beneficial agricultural use. Although these areas lie outside the area of Great Landscape Value…, they are nevertheless attractive and cherished countryside. Therefore, if any of these areas are to be given over for development, it is considered that the community should receive the maximum possible benefit from them in terms of contribution towards meeting the need for affordable housing. There was strong feeling about this in all our consultations….
>
> There is also expected to be a significant contribution to Cornwall's strategic housing target – 1,100 dwellings were proposed under the revised Cornwall Local Plan by 2030 (December 2015) [a reference to the emerging Cornwall Local Plan 2010-30 ("the Cornwall LP")] – from windfall sites around the NDP Area. This policy also ensures therefore that any further housing development over and above this figure of 1,100 dwellings needed during the Plan period gives maximum community benefit…. This includes allocated sites that have not yet received planning permission prior to 1,100 being permitted – but does not preclude these sites from being developed. The high-grade nature of the land and strength of community feeling both justify such a policy".

**The Grounds of Challenge**

30. Mr Banner relies upon three grounds, which I have for convenience re-ordered and renumbered, as follows:

Ground 1: Policy H2 does not comply with the requirements of the SEA Directive and Regulations.

Ground 2: Policy H3 does not comply with the requirements of the SEA Directive and Regulations.

Ground 3: Policy H2 is incompatible with article 8 of the ECHR.

31. I will deal with those grounds in turn.

**Ground 1: Policy H2 and the SEA Directive**

32. Where development consent is sought for a project that is likely to have a substantial impact on the environment, EU legislation requires an environmental assessment.

However, by the time consent for development in respect of such a project is being considered, prior decisions may have been taken which effectively limit the room for significant change. The SEA Directive seeks to address that issue by requiring SEA to be an integral part of plans and programmes, so that potentially environmentally-preferable alternatives are not discarded as part of the process of approving plans and programmes without proper consideration of the environmental impacts of the various options.

33. The SEA Directive is expressly procedural in nature (see recital (9)). It does not impose any substantive duties on the relevant authority: it rather seeks to improve the quality of decision-making for development by requiring the authority to assess the potential environmental effects of a particular plan or programme before its adoption.

34. In line with its aim to ensure that future planning decisions are not constrained by earlier strategic decisions, article 5(1) provides:

> "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 I."

35. Annex I includes, as information to be provided in the report:

> "(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;…".

36. Article 6 requires consultation on the draft plan or programme; and, before adopting any plan or programme, article 8 requires the decision-maker to take into account the environmental report prepared under article 5 and the responses to consultation under article 6.

37. Those European provisions have been fully and properly transposed into domestic law by the SEA Regulations. For example, regulation 12(3) requires the responsible authority to prepare an environmental report which:

> "… 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."

38. The SEA Directive does not seek to define "reasonable alternatives"; although issued guidance gives some indicators. The European Commission guidance in relation to

the SEA Directive ("Implementation of Directive 2001/42 on the assessment of the Effects of Certain Plans and Programmes on the Environment") states:

> "5.13 … The first consideration in deciding on possible reasonable alternatives should take into account the objectives and the geographical scope of the plan….
>
> 5.14 The alternatives should be realistic. Part of the reason for studying alternatives is to find ways of reducing or avoiding the significant adverse environmental effects of the proposed plan…".

39. That is reflected in the guidance issued by the Office of the Deputy Prime Minister in September 2005, "A Practical Guide to the Strategic Environmental Assessment Directive: Practical Guidance on applying European Directive 2001/42/EC", which states (under the heading, "Identifying alternatives"):

> "Only reasonable, realistic and relevant alternatives need to be put forward."

40. In R (Friends of the Earth England, Wales and Northern Ireland Limited) v The Welsh Ministers [2015] EWHC 776 (Admin) at [88], after considering the relevant authorities (including Heard v Broadland District Council [2012] EWHC 344 (Admin), and Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2014] EWHC 406 (Admin)), I set out a number of propositions with regard to "reasonable alternatives" in this context. That case concerned the law in Wales, but it is derived from the same SEA Directive and the regulations that apply in Wales are substantially the same as the SEA Regulations. The propositions, so far as relevant to this case, are as follows:

> "(i) The authority's focus will be on the substantive plan, which will seek to attain particular policy objectives. The EIA Directive [i.e. Council Directive 85/337/EC] ensures that any particular project is subjected to an appropriate environmental assessment. The SEA Directive ensures that potentially environmentally-preferable options that will or may attain those policy objectives are not discarded as a result of earlier strategic decisions in respect of plans of which the development forms part. It does so by imposing process obligations upon the authority prior to the adoption of a particular plan.
>
> (ii) The focus of the SEA process is therefore upon a particular plan – i.e. the authority's preferred plan – although that may have various options within it. A plan will be "preferred" because, in the judgment of the authority, it best meets the objectives it seeks to attain. In the sorts of plan falling within the scope of the SEA Directive, the objectives will be policy-based and almost certainly multi-stranded, reflecting different policies that are sought to be pursued. Those policies may well not all pull in the same direction. The choice of objectives, and the weight to be given to each, are essentially a matter for the authority subject to (a) a particular factor being afforded particular enhanced weight by statute or policy, and (b) challenge on conventional public law grounds.

(iii) In addition to the preferred plan, "reasonable alternatives" have to be identified, described and evaluated in the SEA Report; because, without this, there cannot be a proper environmental evaluation of the preferred plan.

(iv) "Reasonable alternatives" does not include all possible alternatives: the use of the word "reasonable" clearly and necessarily imports an evaluative judgment as to which alternatives should be included. That evaluation is a matter primarily for the decision-making authority, subject to challenge only on conventional public law grounds.

(v) Article 5(1) refers to "reasonable alternatives *taking into account the objectives… of the plan or programme…*" (emphasis added). "Reasonableness" in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an "alternative" to the preferred plan, is not a "reasonable alternative". An option which will, or sensibly may, achieve the objectives is a "reasonable alternative". The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no "reasonable alternatives" to it.

(vi) The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process."

41. I do not understand any of those propositions to be controversial. It is true that, to a considerable extent, they drew on the judgment of Sales J (as he then was) in Ashdown Forest, which was later overturned ([2015] EWCA Civ 681). However, giving the judgment of the Court of Appeal, Richards LJ did not undermine the principles relied upon by Sales J or set out in Friends of the Earth – expressly accepting that the identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject only to review by the court on normal public law principles (see [42]) – but finding, in that case, that there was no evidence that the authority gave any consideration to the question of reasonable alternatives to the preferred option, except "do nothing", in circumstances in which there were (or may have been) alternatives which, like the preferred option, would have eliminated the risk of adverse effects (see [34]-[35], and [42]). Mr Banner relies upon the judgment of Richards LJ, to which I shall return.

42. As his first ground, Mr Banner submitted that the Council failed to discharge its obligations under the SEA Directive because it failed to consider (yet alone evaluate) what he describes as "the most obvious alternative" to Policy H2. He submits that the underlying mischief that Policy H2 purports to address is the lack of open market dwellings available to local residents to buy as their principal residence. This is caused by a shortage of market housing in the area. The most obvious solution is to facilitate more market housing. The provision through policy of more market housing

than otherwise might be required is, at least, a reasonable alternative to restricting the terms of occupancy of new homes; but the Council failed to consider it. That is reflected in the absence of reasons in the SA for why it was not considered as an alternative. Indeed, he submitted, as in Ashdown Forest, the Council here failed to give any consideration to any alternatives to its preferred option, save for do nothing; and this case is therefore materially indistinguishable from that.

43. However, I am unpersuaded by that submission.

44. Article 5(1) of the SEA Directive required the SA to identify, describe and evaluate the environmental effects of "reasonable alternatives", i.e. all alternatives that are capable of meeting the relevant policy objectives, not a selection of such alternatives (see Friends of the Earth at [93] and [105]). It was also obliged to give reasons for selecting particular options as "reasonable alternatives", and rejecting those options it did reject.

45. However, that does not mean that the SA must consider all theoretically possible options to that which it prefers. For example, where it is obvious that an "option" is not possibly a "reasonable alternative", because (e.g.) it would be incapable of achieving the relevant policy objectives, there is no obligation on the authority to give reasons for rejecting it. In the words of Ouseley J in Heard, such alternatives, "which could be regarded as obvious non-starters by anyone,… [do] not warrant even an outline reason for being disregarded" (see [66]). Even if the authority does not consider such an option, it clearly does not err in law.

46. Furthermore, as the SEA Directive itself makes clear (see paragraph 33 above), SEA is purely procedural in nature: it does not seek to drive or influence underlying policy, but only to require the proper assessment of (and, thereafter, consideration of) the potential environmental effects of a particular plan or programme before its adoption. "Reasonable alternatives" have to be seen through that, environmentally-focused, prism. Therefore, whilst the Court of Appeal in Ashdown Forest made clear that "reasonable alternatives" include options which are potentially environmentally-equal to the preferred option – in that case, options which, like the preferred option, eliminated the relevant risk – the SEA regime does not require consideration of alternatives that are environmentally-inferior. The SEA Directive is designed to ensure that potentially environmentally-preferable options that will or may attain policy objectives are not discarded as a result of earlier strategic decisions in respect of plans of which the development forms part. The discarding of environmentally-inferior options is not its concern.

47. As Mr Banner accepted, the relevant policy objective was to reduce the proportion of dwellings in the area that are not used as a principal residence (see paragraph 27 above). That was a legitimate policy objective. Mr Banner did not suggest otherwise. The preferred option for achieving that objective was Policy H2. A "reasonable alternative" would have been any potentially environmentally-preferable, or environmentally-equal, option which, in the assessment of the Council, would, or sensibly might, achieve that objective.

48. Mr Banner submitted that the "obvious" alternative to Policy H2 which the Council failed to consider was to increase market housing to the extent that, even if the second-home market would not become saturated, some additional housing for those

who wish to live in the area (i.e. have their principal residences there) would, in practice, likely become available.

49. However, in my judgment, that submission has no solid foundation.

50. The policies within the St Ives NDP no doubt have a range of policy aims; but the express aim of Policy H2 is "to safeguard the sustainability of the settlements in the St Ives NDP area…", by, not merely "meeting the housing needs of local people", but also, vitally, "bring greater balance and mixture to the local housing market and create new opportunities for people to live and work [in St Ives], to strengthen [the local] community and the local economy". As I have described (see paragraph 27 above), Mr Banner put it thus: the aim of Policy H2 is not simply to ensure that people who wish to live in the area as full-time residents are able to obtain housing, but crucially to safeguard the sustainability of development by reducing the proportion of dwellings that are not used as a principal residence. That is uncontroversial. Indeed, it was recognised by the inspector appointed by the Secretary of State to examine the Cornwall LP, who reported on 23 September 2016. Whilst the concerns of the Town Council and others are broader, he was particularly concerned about housing for the workforce that would be required to provide services for second homes across the county (see paragraph 35 of his report).

51. The evidence before the Council was that the demand for second-homes in the area showed no signs of abating. It was recognised in the Penwith Local Plan (which covered the relevant area), adopted in 2004, that "seasonal and second home use… cannot be quantified or controlled". Evidence submitted from residents as part of the St Ives NDP consultation process was that market forces would dictate that the majority of new builds would quickly go to people from outside the existing community (paragraph 3.3(6)(b) of the St Ives NDP Evidence Base). In statistical evidence set out in the supporting text to Policy H2 (see paragraph 26 above), the Evidence Base (at paragraph 3.1) indicates that, in the period 2001 to 2011, there was a very large rise in housing stock, which rose from 5,929 to 6,891 (16.2%); but the dwellings without a resident household rose from 1.021 to 1,705 (67%), i.e. from 17% of the total to 25%. On-going research by Exeter University (dealt with in paragraph 3.5 of the Evidence Base) suggests that the trend is likely to continue. There was simply no evidence to suggest that any increase in market housing – and, certainly, any increase that could sensibly be practical – might meet the policy objective behind Policy H2 of reducing the proportion of dwellings without residents. For that reason alone, the only alternative to Policy H2 suggested by Mr Banner was a "non-starter".

52. In any event, even if, contrary to my firm view, the option proposed by Mr Banner was not an unreasonable alternative on that basis, any "reasonable alternative" would have to be, at least, environmentally-equal to the preferred option. Mr Banner, who has an appropriately lively and fertile mind, was unable to say how the construction of many more dwellings in St Ives could be environmentally-neutral or better. The supporting text to Policy H3 (quoted at paragraph 28 above) describes the environmental challenges of increasing supply beyond the housing target.

53. For those reasons (together with the further reasons set out in relation to Ground 2, which concerns the St Ives NDP "target" figure for housing of 1,100 dwellings), on the basis put forward under this ground, the draft St Ives NDP did not breach, nor was it otherwise incompatible with, the EU obligations imposed by the SEA Directive:

and therefore progressing the draft plan to a referendum was not in breach of Paragraph 12(4) of Schedule 4B to the 1990 Act. Ground 1 consequently fails.

54. Before I leave this ground, I would make three final points.

55. First, the St Ives NDP has been the subject of examination. The Examiner found that the draft plan was compatible with the relevant EU obligations, which was a matter of planning judgment for her (BDW Trading Limited (trading as Barratt Homes) v Cheshire West & Chester Borough Council [2014] EWHC 1470 (Admin) at [74]). In my judgment, Mr Banner has fallen far short of showing that the Examiner's conclusion was irrational. BDW Trading is an example where, in SEA, consideration of only the preferred option and an alternative of no action was found to be lawful, and that "no other options-testing was required" (see [74]). Mr Banner submitted that, in that case, the relevant Sustainability Appraisal report at least considered other alternatives; and that, consequently, this case is distinguishable from it and is on all fours with Ashdown Forest. However, the only basis for that submission appears to be the reference in [71] of the judgment of Supperstone J in BDW Trading, that "the preparation of [the plan] had been 'an iterative process', and [in the SA] it [was] noted that the 'do nothing' option [had] been assessed". There seems to have been very little evidence indeed of active consideration of any other option. In any event, for the reasons set out above, there is no obligation to consider options that are "non-starters".

56. Second, whilst I appreciate that this was post-decision, it is in my view noteworthy that the examiner of the Cornwall LP (see paragraphs 29 and 50 above), of course looking at the whole of the county, concluded that, although some contributors to the examination considered that new housing should be increased in areas with a high proportion of second/holiday homes (such as St Ives) better to meet local needs, he was not convinced that "that is a logical or necessary step, since it may simply result in a greater proportion of new dwellings being used as such homes compared with new dwellings elsewhere."

57. Third, it is also instructive that, although Mr Banner spoke of the building of more market housing that otherwise would be the case as an "obvious" alternative, the D2 letter (referred to in paragraph 17 above), which set out lengthy objections to the draft St Ives NDP, largely in terms reflected in the original seven grounds of challenge in this claim, did not object on the basis that the SA had failed to consider it as a "reasonable alternative" (although it did object as to its asserted failure to consider a reasonable alternative to Policy H3, in terms that are found in Ground 2 below). This suggests that the option put forward by Mr Banner in respect of Policy H2 was somewhat less than obvious. In my respectful view, contrary to Mr Banner's submission, it was obviously never a "reasonable alternative".

**Ground 2: Policy H3 and the SEA Directive**

58. As indicated above (paragraphs 28-29), Policy H3 imposes limits on the nature of housing development which can occur once new dwellings in the St Ives NDP area reaches 1,100, that figure being the "dwellings needed during the Plan period", i.e. what the SA refers to as "the emerging Cornwall [LP]'s housing allocation for the St Ives area". As the Cornwall LP evolved, that figure rose from 700, to 1,000 and finally to 1,100. At the time of the SA, it was 1,000. As a threshold figure for Policy

H3, the SA did not consider any alternatives to the figure allocated in the emerging Cornwall LP.

59. As his second ground, Mr Banner submitted that the Council breached the requirements of the SEA Directive and Regulations in not considering "reasonable alternatives" to that threshold figure; and, in any event, the Council acted irrationally in effectively proscribing any further market housing after the figure of 1,100 dwellings had been met, by (in Mr Banner's words) treating the figure as a "maximum" and not a "minimum".

60. This submission requires a brief consideration of how future housing requirements are calculated, and who is responsible for their calculation. Since the 2011 Act, and subject to national policy, a local planning authority is responsible for strategic development plans for its own area. Such plans are subject to independent examination by an inspector appointed by the Secretary of State, who determines whether the plan is "sound" and whether it complies with various procedural requirements. Once a development plan is adopted, then it sets the background against which the authority performs its second function, namely to determine applications for planning permission.

61. A development plan must, of course, consider future housing requirements. As I described recently in Gallagher Homes Limited and Lioncourt Homes Limited v Solihull Metropolitan District Council [2014] EWHC 1283 (Admin) at [37], this is a complex business. It starts with demographically-based household projections, from which the Full Objective Assessment of Need for Housing ("FOAN") is assessed. This is a "policy-off" figure. The actual housing requirement figure for the development plan area is then determined on the basis of, not only the FOAN, but also any policy considerations that might require that figure to be manipulated to determine the actual policy-on housing need for an area. Once that figure has been determined, it is broken down, generally geographically, i.e. between the various towns and other areas within the development plan area.

62. In this case, at the time the St Ives NDP was being drafted and considered, there was an emerging development plan in the form of the Cornwall LP. In an early draft, the proposed allocation to St Ives was 700. As at April 2014, that had increased to 1,000. That was the figure in play at the time of the SA.

63. In the January 2016 iteration (which, as I understand it, was not materially changed before it went to examination), the housing requirement for the development plan area (i.e. the county of Cornwall) was set at 52,500. In Policy 2a ("Key targets"), the "housing allocation" for St Ives was set at 1,100.

64. Mr Banner emphasised that that figure was, in at least one draft, set out in a table with the heading, "Broad distribution of new dwelling will be a *minimum* of…" (emphasis added); although, later, that rubric appears to have been lost, and more references to that figure being a "target" appear. He submitted that the figure was in any event a minimum figure; but, in Policy H3, the Council treated it as a maximum figure. In doing so, they erred in law in two ways. First, they failed to consider, as a "reasonable alternative" for the purposes of the SEA Directive and Regulations, a higher threshold figure. Second, given that it was a minimum figure, it was irrational for it to have been treated as a maximum figure.

65. In my view, there are two answers to that submission.

66. The short answer is that, prior to progressing the St Ives NDP to a referendum, the Council *did* consider the issue. Post-SA, the D2 letter raised the objection that the (then) 1,000 figure was expressed as a minimum figure, and so (the letter asked) why was a higher figure not tested as a reasonable alternative. That was considered in the officer's report for the PPAC meeting on 17 March 2016; and that report was before the PPAC before it decided to progress the plan to a referendum. I will return to that report; but it seems to me that that is a short, but complete, answer to this ground. It does not seem to me to be in point that that consideration was not in the SA document to which I have referred.

67. However, there is a more fundamental flaw in the submission. Whether, in the context of the St Ives NDP, the figure of 1,100 is appropriately described as a "minimum", or a "target", or (as was suggested during the course of the debate) a "minimum target", is a side issue: the real issue is upon whom the statutory scheme imposes the obligation to meet housing need. Although it was sensible and right to ensure that the St Ives NDP had policies within it to meet its Cornwall LP allocation, and although it may have had the power to increase the basic housing supply figure for its area over that allocation, there was no obligation upon the Town Council in relation to meeting housing need. As I have described, the burden of ensuring that national policies with regard to housing requirements are met is a matter for the development plan; there is no obligation on a qualifying body for preparing strategic policies in a neighbourhood development plan to meet objectively assessed housing needs (see R (Crownhall Estates Limited) v Chichester District Council [2016] EWHC 73 (Admin) at [29] per Holgate J). It was incumbent upon the Cornwall LP to assess the FOAN, and then manipulate that figure to take into account policy at county level, thereby arriving at the housing requirement for the county. That could properly be described as a "minimum" figure to meet policy-on needs – and it is understandable that that figure was allocated, on what Mr Lowe described as "pro-rata plus", as between the various towns, communities and areas within the county. However, the allocations made to the various towns etc were not minimum figures in their hands. As the examiner of the Cornwall LP said (at paragraph 139 of his report):

> "I conclude… that a change is required to ensure that the overall housing requirement is regarded as a *minimum*. However, it is not necessary to similarly indicate that all the apportionments for each town and CNA [i.e. Community Network Area] residuals should be minimum figures. The basis for the apportionments is not an exact science and some flexibility in delivery is reasonable…".

In other words, in the hands of the various towns etc, the allocation should be treated as a target – but a target seen in the knowledge that the development plan overall housing requirement to which it contributed was a minimum. Whilst I appreciate this report was after the decision challenged in this claim, it nevertheless identifies the substantive nature of the allocations.

68. But, in any event, Policy H3 does not proscribe residential development once consent has been granted for 1,100 dwellings; nor does it strictly limit any further housing to affordable housing. The Council had taken on board the comment that such a

restriction might be objectionable (see response to objection (iv) in the officer's report for the 17 March 2016 meeting). Policy H3 describes further development in terms of being "affordable housing-led" (see paragraph 28 above). I accept that, in its terms, it is highly restrictive of such further development; but, in the justification for the policy (see paragraph 29 above), it sets out the rationale for it; and, in my view, it is not arguably irrational. Specifically, for the reasons I have given, the Council did not, irrationally, treat a housing figure that was a minimum as a maximum. It was clearly open to the Council to proceed on the basis that the St Ives NDP would aim to meet the figure for housing for the St Ives area contained in the Cornwall LP, rather than setting a higher level for market housing; and it was clearly open to them to restrict any housing development over that figure to affordable housing-led development as proposed in Policy H3.

69. Nor was Policy H3 in breach of the SEA Directive. I stress, again, the procedural nature of the SEA regime; that regime did not arguably oblige the Council to commit resources and time to assessing different policies and alternatives, irrespective of the environmental objectives of the SEA Directive. As indicated in the discussion of Ground 1, there is no basis for the suggestion that simply increasing market housing would meet the policy objective, nor is there any basis for suggesting that it would have been environmentally-preferable or environmentally-equal to Policy H2.

70. Finally under this ground, I return to the officer's report for the 17 March 2016 meeting. As I have indicated, the officer dealt with the issue there. The terms in which she did so are worth noting:

> "Reasonable alternatives should be identified and considered at an early stage in the plan making process as the assessment of these should inform the preferred approach.
>
> There is no express description of the 1,100 units as a minimum or as a maximum in the [Cornwall LP]. It is the figure identified by the emerging Local Plan for the St Ives area. The testing of alternative requirements in terms of quantum may well be a matter for the SEA of the Local Plan but for the [NDP] the issue is how to accommodate the requirement identified for the area by the emerging Local Plan. So the SEA quite properly considered alternative means of accommodating the 1,100 units within the area as reasonable alternatives; it was not its role to test reasonable alternatives to the proposed allocation."

In my judgment, that, at the very least, gave reasonable consideration to the issue on an appropriate analytical basis. Although there may well have been power for the St Ives NDP to increase the housing supply figure over the housing allocation in the Cornwall LP, it was properly open to the Council to consider that the St Ives NDP should primarily concern itself, not with what the target should be, but how that target should be delivered.

71. For those reasons, this ground too fails.

**Ground 3: Policy H2 and Article 8**

72. Section 6(1) of the Human Rights Act 1998 provides that:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

"Convention rights" are defined to include the rights set out in the ECHR (see section 1(1)).

73. Article 8 of the ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

74. As I have indicated (see paragraph 7 above), by virtue of paragraph 12(4)(a) of Schedule 4B to the 1990 Act, a draft neighbourhood development plan cannot be progressed to a referendum unless the planning authority (in this case, the Council) is satisfied that it is "compatible with the Convention rights", defined in the same terms as in the Human Rights Act, and therefore including any rights under article 8 of the ECHR.

75. Mr Banner submitted that the draft St Ives NDP was not compatible with article 8 of the Convention, and thus progressing it to a referendum was in breach of paragraph 12(4)(a).

76. The argument was not straightforward. Mr Banner did not suggest that the Council had breached article 8 (or, he seemed to accept, section 6 of the Human Rights Act99 Act) by progressing the St Ives NDP. That concession is well-made: as Mr Banner himself said (see paragraph 45(3) of his skeleton argument):

> "… [T]he [St Ives NDP] itself neither creates rights nor imposes obligations: the most it can do is to affect the outcomes of later decisions which do create rights and impose obligations (i.e. the determination of planning applications) via the statutory priority afforded to development plan documents."

77. He also conceded that article 8 would not be breached if, applying Policy H2, in granting an application for planning permission for a new dwelling in the future, the Council imposed a restriction ensuring that occupancy would be as a principal residence. That concession too was properly made: article 8 does not extend to a home which has not yet been built (Loixidou v Turkey [1996] 23 EHRR 513 at pages 533-4).

78. However, Mr Banner submitted that the policy was nevertheless not compatible with article 8, for the purposes of paragraph 12(4)(a). His argument ran thus.

79. Paragraph 12(4)(a) requires a planning authority to consider whether future compliance with the policies contained in a neighbourhood development plan would, or might, result in future violations of Convention rights. He submitted that, if a policy might possibly result in article 8 rights being engaged in some way in the future (not restricted to the direct application of the policy itself), then article 8 would be engaged when the policy is progressed and made; and a real risk of an interference with the right of an individual in those circumstances is sufficient to require the relevant authority to provide justification. It is not difficult, he said, to envisage a future occupier of a dwelling with that restriction attached who, as result of changes in family or work circumstances, finds that his or her family and private life are circumscribed by the principal residence requirement, e.g. if he or she wished to keep the house in St Ives as a home, whilst being required to work away from the area during the week. "Home", as a concept, is broadly defined in the context of the ECHR; and may include a second home (Demades v Turkey (2003) Application No 16219/90) or even a home that is empty to which an individual intends to return at some point (Gillow v United Kingdom [1986] 11 EHRR 335).

80. The focus therefore turns (Mr Banner's argument ran) to whether such an interference is justified. He submitted that it was not. Indeed, he contended that it failed to surmount any of the justification hurdles set by article 8(2), as follows.

i) The policy is not in pursuit of any of the legitimate public interests identified in article 8(2).

ii) In any event, any interference with the article 8 rights of future householders would not be in accordance with the law. If an individual continued to live in the dwelling as anything but his principal residence, he would be in breach of the planning restriction, and be liable to enforcement action, which might include criminal sanctions. However, he would not know how the Council would exercise its discretion not to take enforcement action: the policy does not address the issue of the circumstances in which article 8 rights will be sufficiently infringed that it will decline to enforce. That gives rise to such uncertainty as to render unlawful the part of the scheme into which Policy H2 fits.

iii) In any event, the interference would be disproportionate, and therefore, in article 8(2) terms, unnecessary.

81. The relationship between the domestic planning scheme and article 8 has been considered in a number of cases, notably Chapman v United Kingdom (2001) 33 EHRR 18, Lough v First Secretary of State [2004] EWCA Civ 905 and Stevens v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin) at [47] and following (approved in Collins v Secretary of State for Communities and Local Government [2013] EWCA Civ 1193). These cases largely concerned planning control, e.g. decisions in respect of planning permission (often, in the cases, sought retrospectively) or enforcement, frequently in the context of caravans which had been sited without any cognisance of the planning regime. With regard to planning control, the following relevant propositions can be drawn from them.

i) Article 8 does not give a right to a home, or to a home in any particular place.

ii) However, where someone has a home in a particular dwelling, it may interfere with the article 8 rights of him and/or his family to require him/them to move.

iii) Whilst those rights demand "respect", they are of course not guaranteed. In this context, as much as any other, the public interest and/or the rights and interests of others may justify interference with an individual's article 8 rights.

iv) Where article 8 rights are in play in a planning control context, they are a material consideration. Any interference in such rights caused by the planning control decision has to be balanced with and against all other material considerations, the issue of justification for interference with article 8 rights effectively being dealt with by way of such a fair balance analysis.

v) That balancing exercise is one of planning judgment. Consequently, it may be amenable to more than one, perfectly lawful, result; and this court will only interfere if the decision is outside the legitimate range. Indeed, in any challenge, the court will give deference to the decision of the primary decision-maker, because he has been assigned the decision-making task by Parliament, and he will usually have particular expertise and experience in the relevant area. Such a decision-maker will be accorded a substantial margin of discretion. The deference and margin of discretion will be the greater if he has particular expertise and experience in the relevant area, and/or if he is acting in a quasi-judicial capacity (such as an inspector).

vi) If the decision-maker has clearly engaged with the article 8 rights in play, and considered them with care, it is unlikely that the court will interfere with his conclusion. Article 8 rights are, of course, important: but it is not to be assumed that, in an area of social policy such as planning, they will often outweigh the importance of having coherent control over town and country planning, important not only in the public interest but also to protect the rights and freedoms of other individuals. In practice, cases in which this court will interfere are likely to be few.

82. Those apply equally to decisions made in respect of plans and programmes in the planning field. That was confirmed in Buckley v United Kingdom (1996) 23 EHRR 101, a case concerning the system of designation of areas in which gypsies could not station a caravan, and the criminalisation of "unauthorised camping" under the Criminal Justice and Public Order Act 1994, in which the Grand Chamber of the European Court of Human Rights said (at [75]):

> "The Court has already had the occasion to note that town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community. It is not for the Court to substitute its own view of what would be the best policy in the planning sphere…".

Indeed, given that planning plans provide a framework for decision-making in individual cases – and, generally, human rights cannot be considered in a vacuum but only in the application of law and policy to an individual case: see Chapman at [77]) – the margin of appreciation allowed to planning authorities in preparing such plans must be particularly broad.

83. Furthermore, in considering whether a statutory scheme (including policy) is compliant with article 8, it is necessary to look at the scheme as a whole, including the checks and balances that are designed to protect – or have the effect of protecting – an individual from any potential breach of article 8. A regime is compliant with article 8 if, as a whole, it is capable of protecting relevant article 8 interests (see Manchester City Council v Pinnock (No 1) [2010] UKSC 45, especially at [45(c)], and [71]-[74]).

84. With that introduction, I turn to dealing *seriatim* with the propositions relied upon by Mr Banner.

85. I will first deal with engagement of article 8, and interference. They can conveniently be dealt with together.

86. As Mr Banner emphasised, the officer's report for the 16 September PPAC meeting (quoted at paragraph 14 above) appears to have assumed that Policy H2 did engage article 8, and that there would or might realistically be some interference with the article 8 rights of future homeowners, because the officer proceeded straight to a consideration of justification for that interference. The Examiner was satisfied with that justification, and concluded that the St Ives NDP was compatible with ECHR rights (see paragraph 18 above). However, in the officer's report for the 17 March 2016 meeting (quoted at paragraph 19 above), the officer said that she considered it was "questionable whether [article 8] is in play"; although the report (it said, out of prudence) went on to re-consider justification, in any event. The Council have therefore been ambivalent about whether article 8 is, here, even engaged.

87. I understand that ambivalence. Mr Banner submitted that article 8 is engaged because, although the St Ives NDP (like any plan or programme) necessarily comprised forward-looking statements of policy – and therefore is itself incapable of immediately interfering with anyone's rights – unless paragraph 12(4)(a) is to be deprived of all meaning and content, it must be intended to require a planning authority to consider whether policies contained in a neighbourhood development plan might result in future violations of Convention rights. In his skeleton argument, he restricted that to potential violations at the time the policy is applied; but, for the reasons I have given, there would be no possible direct breach of article 8 as a result of a decision to grant planning permission with the restriction (see paragraph 77 above). As I understood it, in the course of debate, he extended the proposition to any possible future infringement of article 8 rights of any homeowner subject to the restriction, including the homeowner in the example set out in paragraph 79 above.

88. However, Policy H2, if adopted, will give rise to, not a breach of article 8, but merely the risk of a future breach of article 8; and, despite my view of compatibility (see paragraph 95 below), I am not entirely convinced that a policy that might give rise to future circumstances in which article 8 is engaged and infringed, necessarily itself engages article 8 – or, in this case, does so.

89. I would make three points in relation to that provisional conclusion.

90. First, in this case, the risk of potential future engagement of, and infringement of, article 8 must not be overstated. There is no one before this court who suggests that his or her article 8 rights have been, or even might possibly in the future be, breached or otherwise interfered with. Without casting any doubt on the status or ability of the

Claimant to bring this claim, its interest in this policy is commercial. It does not suggest otherwise. Mr Banner submitted that it was not difficult to see how circumstances could arise when an individual, who was living in a dwelling subject to the restriction as his full-time residence, was required (e.g.) to work at a distance away, but still wished to keep that dwelling as a home. However, the circumstances are likely to be very rare, as they involve the individual, not only having an attachment to the dwelling etc that would trigger an article 8 interest that outweighed the public interest in having a planning regime based on sustainable development, but also acquiring another property as his principal dwelling, whilst being able to keep (and, in fact, keeping) his dwelling in St Ives as a second home. I accept that that may happen. I do not accept that it will happen more often than very rarely.

91. Second, for those who face that risk, there are considerable checks and balances within the regime. If there has been a breach of planning control, a planning authority may issue an enforcement notice where it appears to it that it is expedient to do so, having regard to the provisions of the development plan and to any other material considerations (section 172 of the 1990 Act). As I have indicated, where article 8 rights are in play in a planning control context, they are a material consideration: and, as an enforcement notice may deprive an individual and his family of a home, article 8 is certainly engaged at this stage. In deciding to bring enforcement proceedings, a planning authority, as a public body, has a duty under article 8 to consider proportionality (see Pinnock at [71] and [94]); and, in any event, if enforcement would breach an individual's article 8 rights, the question of whether enforcement would be expedient would arise. Any person having an interest in, and any occupier of, the relevant land has a right to appeal an enforcement notice to the Secretary of State (section 174), which has a similar duty. If the Secretary of State upholds the notice, then the appellant has a right to appeal to the High Court on a point of law (section 289). The court has a similar duty. Failure to comply with an enforcement notice is a criminal offence (section 179 of the 1990 Act); but a local planning authority would have to take any possible infringement of article 8 rights into account before commencing criminal proceedings, and the magistrates' court would also have to take that into account if proceedings were commenced.

92. Therefore, any householder who is at risk of being dispossessed of his home at the suit of a planning authority for breach of the restriction has the ability to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right to stay in the dwelling has come to an end under domestic law. The same is true in any criminal proceedings; and it is noteworthy that section 172A of the 1990 Act enables a local planning authority to give a person a binding assurance that he will not be prosecuted despite being in breach of an enforcement notice.

93. That right – to have the question of proportionality determined by an independent tribunal – was the underlying right which the House of Lords considered in the context of possession proceedings in Pinnock. It was not suggested in Pinnock that the Housing Act scheme, as a scheme, might be unlawful as in breach of article 8 simply because there was risk that possession proceedings brought under the scheme may engage article 8. Of course, the scheme for enforcing planning conditions and that for enforcing possession are different in many ways; but they each put in jeopardy an individual's right to live in particular dwelling that is their home – and, looking at

the matter broadly and fairly, for the purposes of the issue in this claim, it seems to me that the schemes are materially indistinguishable. I do not accept Mr Banner's submission that the cases are distinguishable because, in Pinnock, the interests in the opposite side of the article 8 balance included the property rights of landlords: the nature of the interests with which article 8 rights might compete is, in this context, immaterial.

94. Third, I do not consider there was any force in Mr Banner's submission that paragraph 12(4)(a) was conceptually different from section 6 of the 1999 Act, so that, even if the policy is not in breach of the latter, it might be in breach of the former. Section 6 makes actions of public authorities that are incompatible with a Convention right unlawful. Paragraph 12(4)(a) requires a planning authority to be satisfied that a draft plan is compatible with the Convention rights, before the plan progresses to a referendum. A draft plan that is not compatible with Convention rights, is clearly incompatible with at least one such right. Paragraph 12(4)(a) therefore reflects the obligations under the Act; although it only requires the planning authority to be satisfied as to compatibility, rather than requiring objective compatibility.

95. Mr Banner submitted that a policy was not compatible with article 8 if, as a consequence of applying that policy, there was a real risk that the article 8 rights of an individual might, at some stage, be infringed. Mr Lowe, on the other hand, contended that a policy was compatible with article 8 unless it necessarily resulted in a breach of an individual's article 8 rights. In my view, each of those views fails to appreciate that compatibility involves a more open-textured enquiry. Paragraph 12(4)(a) requires the relevant local planning authority to consider the potential prospective effect of the policy, and to make a broad judgment as to whether it is satisfied that it is in general harmony with the Convention rights – notably, rights under article 8 – of those the policy may affect.

96. However, despite those concerns about engagement, for the purposes of this claim, like the officer in her report for the 17 March 2016 PPAC meeting, I shall assume that article 8 is engaged, and that there is a risk of an interference to the article 8 rights of some future home owner of one of the dwellings with the restriction. The question then arises: Is such interference justified?

97. Mr Banner submitted that the policy failed to meet any of the article 8(2) criteria. I shall take them in turn.

98. First, Mr Banner submitted that the policy is not in pursuit of any of the legitimate public interests identified in article 8(2), namely "the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

99. The officer's report for the 17 March 2016 PPAC meeting suggests that, in promoting Policy H2, two of these interests were being promoted, as follows:

    i) The report says that the policy was "promoted for the social and economic well-being of the area as set out in the NDP and [Examiner's Report]. That is for the economic and social well-being of the area in which it applies rather than for well-being nationwide".

ii) The report also suggests that the policy is justified by reference to the "rights and freedoms of others to own and occupy their own homes in the area and who are presently prevented from doing so by the strong second and holiday home market".

100. As to these, Mr Banner submitted:

i) "Social well-being" is not, in any event, within the ambit of article 8(2); and, with regard to economic well-being, the St Ives NDP is a neighbourhood plan, which is concerned with a very small area – a single parish – such that its policies cannot, on any analysis, engage the economic well-being "of the country". In support of that contention, Mr Banner relied upon authorities such as Gillow and Hatton v United Kingdom [2003] 37 EHRR 28, which, he submitted, looked at the economic effect of a decision on a national scale.

ii) Local residents have no right to future market ownership; and, by imposing restrictive conditions, the market value of dwellings would in any event reduce, which in turn would reduce the viability of housing developments generally. Consequently, the Policy H2 is likely to have an adverse effect on the rights (if any) and interests of local residents with regard to future housing.

101. However:

i) Having a coherent planning system is a matter of national public interest. The overarching national planning policy is the achievement of sustainable development (paragraph 6 of the NPPF), i.e. it is in the national interest that development is sustainable. The NPPF defines "sustainable development" as comprising three dimensions: economic, social and environmental. As for the economic role, paragraph 7 of the NPPF provides that it includes:

> "contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements…".

Where a development makes such a contribution, it thus contributes to "the economic well-being of the country".

The justification for Policy H2, as set out in the supporting text of the policy (see paragraph 26 above), is as follows:

> "… to meet the housing needs of local people, bring greater balance and mixture to the local housing market and create new opportunities for people to live and work here, to strengthen our community and the local economy…".

On the basis of that justification, the Examiner expressly found that "the restriction of further second homes does in fact contribute to delivering sustainable development", a conclusion which the Claimant does not seek to challenge – nor could it. In making that "economic" contribution to

sustainable development, Policy H2 thus promotes the interests of "the economic well-being of the country".

In a very different context, in Zammit Maempel v Malta (2011) (Application No 2402/10, 22 November 2011), it was held (at 64]) that legislation which permitted the letting off of fireworks was justified because "fireworks displays are one of the highlights of a village feast which attracts village locals, other nationals and tourists, an occasion which undeniably generates an amount of income which therefore, at least to a certain extent, aids the general economy". That shows that something which is of local economic advantage may be in the interests of the economic well-being of the country.

ii) Steps taken to safeguard the environment can be relied upon as protecting the rights and freedoms of others (see Chapman). The Examiner found that Policy H2 operates to safeguard the sustainability of St Ives. As such, it operates to protect the rights and freedoms of (amongst others) those who live (or who, in the future, will live) in St Ives.

102. For those reasons, which reflect Mr Lowe's compelling submissions on this issue, I consider that Policy H2 is in pursuit of legitimate public interests identified in article 8(2), namely the interests of the economic well-being of the country, and for the protection of the rights and freedoms of others.

103. Second, Mr Banner submitted that the interference with the article 8 rights of future householders would not be in accordance with the law. If an individual is in potential breach of the restriction, he will not know how the Council will exercise its discretion not to take enforcement action (which might include criminal sanctions). The policy does not address the issue of the circumstances in which article 8 rights will be sufficiently infringed that it will decline to enforce.

104. In support of that submission, Mr Banner relied upon R (Purdy) v Director of Public Prosecutions [2009] UKHL 45, and particularly the requirement for certainty as an element of legality identified in that case (see [40]). Ms Purdy suffered from progressive multiple sclerosis for which there was no known cure. She believed that there would come a time when she would consider her continuing existence unbearable, and would wish to end her life; but, by that stage, it was likely that, unaided, she would be unable to travel to a country where assisted suicide was unlawful, and would therefore require assistance. Her husband was willing to give that assistance; but she was concerned that he might be prosecuted under section 2(1) of the Suicide Act 1961 for aiding and abetting suicide. She asked the Director of Public Prosecutions ("the DPP") to publish his policy on the factors he would take into account in exercising his discretion, and he refused. She judicially reviewed that refusal. The issue was whether the way in which the DPP could be expected to exercise his discretion under section 2(4) as to whether to bring or consent to a prosecution under section 2(1), in the circumstances postulated by Ms Purdy, was formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. The House of Lords concluded that the DPP's Code for Crown Prosecutors (which gave some guidance with regard to the exercise of the discretion to prosecute) did not satisfy the article 8(2) requirements for accessibility and foreseeability for a person seeking to identify the factors which were likely to be taken into account by the DPP in exercising his discretion. The DPP was

consequently under an obligation to clarify what those factors were. Mr Banner submitted that, with such imprecision and uncertainty as to how the Council would exercise its discretion to enforce the Policy H2 restriction, this case is materially on all fours with Purdy.

105. However, particularly in this field, each case is necessarily fact-specific – and the facts of Purdy are very different from those here. I leave aside the fact that, in that case, the claimant Ms Purdy was an individual whose own human rights would be impacted by the relevant decision – and impacted in the most personal and traumatic way – which I accept is not relevant to the legal analysis although, in respect of any infringement of article 8 rights, there was an immediacy in that case which is missing from this. Nevertheless, there are two, related material differences between the cases.

106. First, Ms Purdy's case was based upon very specific circumstances, in which she and others were likely to find themselves. The House of Lords were addressing only that scenario. In this case, although Mr Banner has suggested one example, the circumstances in which an individual might find themselves in breach of the restriction are entirely open-ended. Consequently, this case offends the general principle that the court only examines the application of measures and policies to the facts of an individual case, whereas Purdy did not – or, at least, did not to anything like the same extent.

107. Second, Purdy was concerned with the failure of the DPP to identify factors he would take into account when exercising his discretion as to whether or not to prosecute those in the very limited circumstances postulated by Ms Purdy, i.e. those who aided and abetted suicide by helping another person to travel to a country where assisted suicide was unlawful. In that case, it was difficult to see what factors the DPP might take into account in exercising his discretion. Here, although the circumstances in which the issue might arise are open-ended, it is easier to see the sorts of factors the Council should have in mind when exercising its discretion to enforce the planning restriction, e.g. the length of time the homeowner had been resident in the dwelling, whether the article 8 rights of other family members (including children) were engaged, the circumstances surrounding his new principal residence, and his intentions for the dwelling in St Ives. These are, of course, examples of factors, not intended to be comprehensive. They are the sorts of factors that would arise in any article 8 claim. The range of circumstances in which article 8 issues might arise in this case is wide: this case lacks the uniqueness of the postulated circumstances in the Purdy case (see also Silver v United Kingdom (1983) 5 EHRR 347 at [88]).

108. Consequently, I consider Policy H2, and its consequences, sufficiently certain that an individual can reasonably organise his affairs. He will know, when he purchases and/or occupies a dwelling with the restriction that, if he chooses to move away – or, by dint of circumstance, is required to do so – then that restriction will require him to sell the St Ives dwelling. Any claim that his article 8 rights will be infringed by enforcement of the restriction will have to be considered through that glass. Any purchase price he may have paid will have reflected that risk. In any event, I do not consider that this policy is, in any respect, not "in accordance with the law".

109. Finally, Mr Banner submitted that Policy H2 is not "necessary", i.e. is disproportionate in its effect. In particular, he criticised the proportionality analysis and balancing exercise performed by the Council in this case by reference to two of

the factors set out by Lord Sumption JSC in Bank Mellatt v Her Majesty's Treasury (No 2) [2013] UKSC 38 at [20], contending that Policy H2 (i) is more intrusive than it need be, and (ii) does not strike a "fair balance" between its impacts and benefits.

110. He submitted that there is no evidence that the "second home" market in St Ives is causing demonstrable harm or, at least, there is no evidence quantifying such harm. Furthermore, there is no need to impose such a restriction to ensure that demand for second homes does not result in those looking for a primary residence being unable to find a home: the solution would be to include an allowance in the housing requirement to reflect the second home market, so that planning would accommodate both those looking for primary residence and those looking for second homes. The Cornwall LP does that in relation to the county (which then generated the 1,100 dwelling figure housing figure): the St Ives NDP could equally have adopted such an approach, which would have achieved the policy aim without any interference with the article 8 rights of future homeowners.

111. I am afraid I am unimpressed by these submissions. Mr Lowe submitted that they inappropriately seek to re-open what was a matter of planning judgment for the Council, based upon the Examiner's Report, notably as to whether Policy H2 was "appropriate" and "in general conformity with the development plan". I agree.

112. As I have described (see paragraphs 81-82 above), there is a wide margin of appreciation given to national authorities in respect of the choice and implementation of planning policies. In this case, the Council (and, for her part, the Examiner) considered the article 8 implications for Policy H2, in detail, before determining that the policy was justified despite the potential infringement of the article 8 rights of future homeowners subject to the restriction, which they expressly considered. The Council considered that further development in St Ives was unsustainable without the restriction in Policy H2; the Examiner concluded that that policy contributed to sustainable development; the Council were entitled to adopt that conclusion, which it too had independently made; and it is not simply open to the Claimant now to challenge that judgment on its merits. Mr Banner's specific submission, based on the alternative of merely increasing the amount of market housing, is dealt with under Grounds 1 and 2: there is no evidence that that alternative would work in practice or satisfy the policy objective of Policy H2.

113. The Council have therefore satisfied me as to each element of justification in article 8(2).

114. Ground 3 thus also fails.

**Conclusion**

115. For those reasons, none of the grounds is made good.

116. This is a rolled-up hearing, and I have considered carefully whether I should refuse permission to proceed. However, although, as will be apparent from this judgment, I do not consider any of the grounds strong – and I have expressly found some to be unarguable – I heard full submissions on all of the grounds, and I have given a full judgment. In all the circumstances, not without some hesitation, I shall grant

permission to proceed on all grounds; but, having done so, refuse the substantive application.