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### Case Comment

#### Persimmon Homes (Thames Valley) Ltd v Stevenage BC

**Subject:** Planning. **Other related subjects:** Housing

**Keywords:** Conformity; Housing supply; Local plans; Planning authorities powers and duties; Structure plans; Wednesbury unreasonableness

**Legislation:** [Town and Country Planning Act 1990 s.36 \(4\)](#), [s.43 \(3\)](#), [s.287](#)

**Case:** [Persimmon Homes \(Thames Valley\) Ltd v Stevenage BC \[2005\] EWCA Civ 1365; \[2006\] 1 W.L.R. 334 \(CA \(Civ Div\)\)](#)

**\*J.P.L. 527** The Hertfordshire Structure Plan Review 1991-2011 was adopted by Hertfordshire CC ("HCC") on April 30, 1998. Policy 8 provided that land suitable for strategic housing allocations, together with necessary associated development would be identified in the following locations and excluded from the Green Belt--Stevenage--West of A1(M)--1,000. The planning of these developments would be brought forward through the review of the relevant local plans. Policy 8 further provided that in the case of the development west of the A1(M) Stevenage, the master plan would provide for (i) an initial phase of 5,000 dwellings, some of which to be completed after 2011; (ii) in the longer term, a possible second phase of a further 5,000 dwellings. Policy 9 provided that local plans should make provision in accordance with the development strategy as set out in Policies 6, 7 and 8, for a net increase in the period 1991-2011 of about 65,000 dwellings distributed as follows: Stevenage 5,700--includes 1000 West of A1(M).

A year later Stevenage BC ("SBC") put on deposit the Stevenage District Plan Second Review 1991--2011 ("SLP"). Policy H2 provided that, "In order to meet the provisions of Structure Plan Policy 8, land at Stevenage West is allocated for the development of approximately 1,000 dwellings". This version of the plan went to a local public inquiry. By the time of the pre-inquiry meeting in June 2002, HCC had been re-thinking Policy 8 of the Structure Plan Review and in July, HCC published a First Consultation Draft Alterations 2001-2016. This document deleted former Policy 8 and replaced it with the bare statement that no strategic allocations would be identified in the review of local plans and no further strategic scale housing developments should be permitted in Hertfordshire. Part of the background to this changed view consisted of important recent government policy relating to housing, contained in PPG3 published in March 2000.

The SLP inquiry opened in September 2002. HCC objected to Policy H2, arguing that the Stevenage West proposals should be deleted and asserting that the district local plan would still remain in general conformity with the Structure Plan if that were done. SBC submitted that a Local Plan without Stevenage West in it could not be in conformity with the Structure Plan. The Inspector concluded that, firstly, for the Local Plan to be in general conformity with the adopted Structure Plan it had to satisfy Policy 8 of that plan and identify land west of the A1(M) for the development of about 1,000 dwellings. Secondly, there was considerable uncertainty over the strategic justification for that development, particularly given the national planning policy guidance introduced by PPG3. Given that uncertainty, the Local Plan should make it clear that the identified land could not be granted planning permission for the proposed development until and if the strategic justification for it had been reconsidered and accepted. In spring 2003, HCC had produced a deposit draft version of its contemplated structure plan. However, it decided not to proceed to an examination in public and the draft document proceeded no further. The Inspector acknowledged this changed position in the corrigenda to his report issued in September 2003, but made no further recommendations. SBC accepted the Inspector's recommendations and modified the local plan accordingly.

SBC adopted the plan as modified on December 8, 2004. As adopted Policy H2 read as follows: "In order to meet the provisions of Policy 8 in the adopted Structure Plan, land at Stevenage West is identified for the development of approximately 1,000 dwellings. The allocated land is safeguarded from development pending reconsideration and acceptance of its strategic justification". The appellants sought to quash the second sentence of Policy H2 together with the following accompanying text, "Only if that review of the Structure Plan or an alternative form of reconsideration

of the strategic need for the development determines that Stevenage West is required to meet the County's development needs up to 2011 can the site be considered as allocated and available to be released for development", on two grounds, (1) the general conformity ground and (2) the green belt ground. HHJ Mole Q.C. dismissed the claim relating to ground (1) but allowed it in respect of ground (2). The issue on appeal was whether Policy H2 of the SLP, as adopted, was in general conformity with Policies 8 and 9 of the Structure Plan as adopted in April 1998.

**Held** , Lloyd L.J. dissenting,

**\*J.P.L. 528** 1. Section 287 of the Town and Country Planning Act 1990 ("the 1990 Act") created a form of statutory judicial review. That being so, (a) so far as the question whether a local planning provision was "in general conformity" with the structure plan involved any issue of statutory construction, it was the court's duty and prerogative to decide for itself what was the correct construction; but (b) so far as the question involved the application of judgment, or expert or mature opinion, to the circumstances of the case, the court's only role was to supervise the exercise of those faculties by the relevant public decision-maker according to the *Wednesbury* principle. Issues of both kinds arose in this case. It was therefore necessary for the court to ascertain the correct construction of the expression "general conformity". There was then the question whether the requirement was fulfilled in this particular case. The question whether there was general conformity between the plans was a matter of degree and of planning judgment.

2. The term "general conformity" was nowhere defined in the legislation. The court had to therefore apply its ordinary meaning as a matter of language, taking into account, however, the practicalities of planning control which were inherent in the statutory scheme. The question of construction was, essentially, as to the flexibility of the requirement of general conformity; was it relatively tight, or relatively loose? The practicalities of planning control included two features which between them informed the extent to which the general conformity requirement was strict or relaxed. The first feature was that the implementation of planning policies in structure and local plans were very likely to be subject to long lead times. The second was that, over such periods of time, the needs and exigencies of good planning policy were liable to change. In construing the general conformity requirement the court had to favour a balanced approach by which these factors could be accommodated. On its true construction the requirement could allow considerable room for manoeuvre within the local plan in the measures taken to reflect structure plan policy, so as to meet the various and changing contingencies that could arise. In particular, measures could properly be introduced into a local plan to reflect the fact that some aspect of the structure plan was itself to be subject to review. This flexibility was not unlimited. The measures of this kind could not pre-judge the outcome of such a review. They had to respect the structure plan policies as they were, while allowing for the possibility that that could be changed. The words "general conformity" were wide enough to encompass a reproduction of the structure plan policy in the local plan, subject to a qualification as to justification or timing that nonetheless contemplated that the purpose of the strategic policy could be achieved in the plan period.

3. If the above interpretation of "general conformity" was the right one, it would allow what would be a considerable degree of movement within the local plan to meet the various and changing contingencies that could arise. In that case the question whether the local plan was in general conformity with the structure plan was likely to admit of more than one reasonable answer, all of them consistent with the proper construction of the statute and of the relevant documents. In those circumstances the answer arrived at would be a matter of planning judgment and not of legal reasoning. The court's role would only be supervisory. SBC, in adopting the SLP plainly did not misconstrue the general conformity requirement. While measures could properly be introduced into a local plan to reflect the fact that some aspect of the structure plan was to be subject to review, they could not pre-judge the review's outcome. This was precisely the approach adopted by the Inspector. It was accordingly inherent in the decision of SBC, which accepted the Inspector's recommendations, to adopt the SLP. There was, therefore, no error of statutory construction. SBC was entitled to reflect the uncertainty of the strategy itself, without offence to the general conformity requirement. The decision did not fall short of the *Wednesbury* standard.

4. Appeal dismissed.

**\*J.P.L. 529** The following judgments were given.

**Laws L.J.:**

## Introductory

1. This is an appeal against the decision of H.H.J. Mole Q.C. sitting as a deputy High Court Judge in the Administrative Court on May 20, 2005. The litigation arises out of the adoption on December 8, 2004 by the respondent Borough Council (to which I shall refer as "SBC") of the Stevenage District Plan Second Review 1991-2011 ("the SLP"). The appellants, who are a consortium interested in the residential development of land to the west of the A1(M) at Stevenage, applied to the court under s.287 of the Town and Country Planning Act 1990 as amended ("the 1990 Act") for an order to quash the adoption of the SLP on two grounds, which have been referred to as (1) the general conformity ground and (2) the Green Belt ground. The judge dismissed the claim relating to ground (1) but allowed it in respect of ground (2). This appeal is only concerned with ground (1). Permission to appeal was granted by Mummery L.J. on consideration of the papers on July 11, 2005.

2. The appellants have applied to the SBC for planning permission for residential development of land which lies in part within the administrative boundary of Stevenage Borough and part within the administrative boundary of North Hertfordshire District, and wholly within the County of Hertfordshire. The First Secretary of State called in the applications, an inquiry was held, and the inspector's report was submitted to the Secretary of State in late 2004. No decision has yet been made. This appeal has been expedited, the appellants having submitted that the Secretary of State ought to have the benefit of this court's view of ground (1) before arriving at his conclusion on the planning applications.

## The Statutory Background

3. The case concerns an aspect of the relationship between the Structure Plan for the County of Hertfordshire and the Local Plan for the District of Stevenage. In Hertfordshire, as in other non-metropolitan counties in England, it was the responsibility of the county planning authority to produce the structure plan, and that of the district planning authorities to produce local plans for their areas. By s.54 of the 1990 Act the structure plan and the local plan, and any alterations to either, constituted "the development plan for any district outside Greater London and the metropolitan counties". I should set out s.54A:

"Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

The scheme of the 1990 Act is principally in play in these proceedings. However the development plan process, and indeed the meaning of "development plan", have recently been changed by measures contained in the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") so as to introduce, among other things, the new concept of a "regional spatial strategy" ("RSS"). Some of the provisions of the 2004 Act, coming into effect on September 28, 2004 (the commencement date of s.38), are material to the issues in this case. The successor to s.54A is s.38(6) of the 2004 Act:

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

**\*J.P.L. 530** This provision will apply to the Secretary of State's consideration in due course of the appellants' called-in applications.

4. Section 31(2) of the 1990 Act required that a structure plan should contain "a written statement formulating the authority's general policies in respect of the development and use of land in their area". Section 31(6) obliged the authority "[i]n formulating their general policies" to have regard among other things to strategic planning guidance given by the Secretary of State and current national policies. Where the authority adopted or approved an alteration or replacement of a structure plan, they were obliged by s.35C to supply "any authority responsible for a local plan in their area" with a statement that the local plan was or was not in general conformity with the altered or new structure plan.

5. The duty to prepare a local plan was imposed on district planning authorities by s.36(1) of the 1990 Act. Section 36(2) provided:

"A local plan shall contain a written statement formulating the authority's detailed policies for the development and use of land in their area."

Section 36(4) provided: "A local plan shall be in general conformity with the structure plan". A local plan (in contrast to a structure plan: see s.31(5) and para.5 of the Town and Country Planning (Development Plan) (England) Regulations 1999) had to contain a map: s.36(6). Section 36(9)(a) required authorities, in the formulation of their detailed policies, to have regard to considerations prescribed by the Secretary of State. Accordingly the SBC, when it came to revise the draft local plan, was obliged to have regard to the Secretary of State's policy document PPG3 issued in March 2000, to which I will refer below. Section 43 provided for the adoption by the local planning authority of proposals for a local plan or for its alteration or replacement. Section 43(3) stated: "The authority shall not adopt any proposals which do not conform generally to the structure plan". Section 43(4) allowed the Secretary of State to direct the modification of proposals submitted to him if he considered them to be "unsatisfactory". Section 46 was concerned with conformity between the structure plan and local plans, requiring the structure plan authority to issue a statement to the effect that the local plan or proposals which had been served on them were, or were not, in general conformity with the structure plan (s.46(2)). Where the statement is to the effect that the plan or proposals are not in general conformity, it falls to be treated as an objection to the plan or proposals in accordance with the relevant regulations (s.46(4)). Section 24 of the 2004 Act, which I will not set out, made provision for general conformity between what in that statute's language were called "the local development documents" and the RSS.

6. Section 46(10) of the 1990 Act provided:

"The provisions of a local plan prevail for all purposes over any conflicting provisions in the relevant structure plan unless the local plan is one -

- (a) stated under section 35C not to be in general conformity with the structure plan; and
- (b) neither altered nor replaced after the statement was supplied."

The provision made by the 2004 Act for the resolution of conflicts between plans differs somewhat from that contained in s.46(10). Section 38(5) of the 2004 Act provides:

"If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to be adopted, approved or published (as the case may be)."

**\*J.P.L. 531** 7. Schedule 8 to the 2004 Act contains transitional provisions. Their effect in part is to preserve in being the Hertfordshire Structure Plan, to whose history I shall come shortly, until September 28, 2007, or until the date (if earlier) of the adoption or approval of a new plan in its place. Paragraph 9 of Sch.8 preserves in this case (given the relevant dates) the procedure for the adoption of the local plan prescribed by the 1990 Act. Paragraph 12 has effect to continue the SLP in being until December 8, 2007 unless it is replaced meantime. A new provision, which had no analogue in the 1990 Act, is to be found in para.11 of Sch.8:

"11(1) This paragraph applies if the Secretary of State thinks--

- (a) that the conformity requirement is likely to give rise to inconsistency between the proposals and relevant policies or guidance, and
  - (b) that it is necessary or expedient to avoid such inconsistency.
- (2) The Secretary of State may direct that to the extent specified in the direction the conformity requirement must be ignored.
- (3) The Secretary of State must give reasons for the direction.
- (4) The conformity requirement is--

(a) the requirement under s.36(4) of the [1990] Act that the local plan is to be in general conformity with the structure plan;

(b) the prohibition under s.43(3) of the [1990] Act on the adoption of proposals for a local plan or for its alteration or replacement which do not conform generally with the structure plan."

8. Lastly while dealing with the statutory material I should refer to s.287 of the 1990 Act, which as I have foreshadowed confers the High Court's jurisdiction to entertain these proceedings. I need not set it out. It is enough for present purposes to say that it creates a form of statutory judicial review of a

range of planning decisions, certainly including the adoption by the SBC of the SLP.

## The History

9. The immediate focus of the appellants' challenge, as I have foreshadowed, is the adoption by the SBC on December 8, 2004 of the Stevenage Borough Council District Plan Second Review. It is said that Policy H2 as then adopted amounts to a violation of the mandatory requirement of general conformity with the structure plan specified in ss.36(4) and 43(3) of the 1990 Act. In order to understand how the issue arises, it is necessary to describe something of the history.

10. The Hertfordshire Structure Plan Review 1991-2011 was adopted by the Hertfordshire County Council ("HCC"), which is the structure plan authority, on April 30, 1998. But it is necessary to go a little further back in time. The deposit version of the plan was based upon a perceived need of 65,000 new dwellings. The HCC believed that the great majority would be provided through extant permissions, other commitments, and plan regeneration. However a balance of 6,000 would be left over for which specific strategic provision might have to be made. The judge takes up the story (para.3):

"... HCC therefore sought to make strategic provision 'on a contingency basis' for up to 6000 additional dwelling sites. Draft Policy 7 showed 5000 dwellings within the plan period being provided at Stevenage west of the A1(M). Of those dwellings 1000 were to be within SBC's *J.P.L. 532* boundary and the remainder within the boundary of North Herts District Council (NHDC). The Policy said that construction of dwellings would not be permitted to start until at least 2004, and in effect, not at all until it was clear they were needed."

11. There followed the statutory Examination in Public ("EIP") of the deposit version of the plan, held in March 1997. There was a good deal of objection to Draft Policy 7 because it was said to create, as the judge put it, "an undesirable uncertainty in a situation where there were long lead times to planning development" (para.4). The SBC was one of the objectors. The Panel, giving the conclusions of the EIP, took the view that there was "no realistic prospect of progress with regeneration removing or diminishing the need for supplementary provision for 6,000 dwellings over and above the 15,000 covered by Policy 6 if the total 65,000 dwelling requirement is to be met... Given the long lead time in planning for such developments, and the need for as much certainty as practicable in structure planning, planning should begin on a firm basis without delay". The Panel also considered the timetable for the proposals for West Stevenage. They set out their recommendations for the revision of Policies 7 and 8.

12. The HCC accepted the Panel's recommendations. The result was the renumbered Policies 8 and 9 as they appear in the Structure Plan Review adopted in April 1988:

### "POLICY 8 STRATEGIC LOCATIONS FOR SUPPLEMENTARY HOUSING DEVELOPMENT

Land suitable for strategic housing allocations, together with necessary associated development, will be identified in the following locations... and excluded from the Green Belt.

...

Stevenage West of A1(M) 1,000

North Hertfordshire West of A1(M) at Stevenage 2,600

The planning of these developments will be brought forward through the review of the relevant local plans.

In case of the development west of the A1(M) at Stevenage, the master plan will provide for

- i) an initial phase of 5,000 dwellings, some of which to be completed after 2011;
- ii) in the longer term, a possible second phase of a further 5,000 dwellings.

Providing that 3,600 dwellings in the initial phase are planned to be built by 2011, the detailed dwellings split at this location between North Hertfordshire district and Stevenage Borough will be determined in the relevant local plans, informed by agreed master planning work to establish the most sustainable form of development.

## POLICY 9 DWELLING DISTRIBUTION, 1991 TO 2011

Local plans will make provision in accordance with the development strategy as set out in policies 6, 7 and 8, for a net increase in the period 1991 to 2011 of about 65,000 dwellings distributed as follows:

...

Stevenage 5,700 includes 1000 West of A1(M)."

**\*J.P.L. 533** 13. Those, then, are the relevant structure plan provisions.

14. A year later the SBC put on deposit the Stevenage District Plan Second Review 1991-2011. There was a second deposit draft in May 2001. Policy H2 read:

"POLICY H2: STRATEGIC HOUSING ALLOCATION--STEVENAGE WEST

IN ORDER TO MEET THE PROVISIONS OF STRUCTURE PLAN POLICY 8, LAND AT STEVENAGE WEST IS ALLOCATED FOR THE DEVELOPMENT OF APPROXIMATELY 1,000 DWELLINGS."

This version of the plan went to a local plan inquiry. By the time of the pre-inquiry meeting on June 19, 2002, the HCC had been re-thinking Policy 8 of the Structure Plan Review. As the judge said (para.16):

"... It claimed that recent work showed that the EIP had dramatically underestimated the scope for planned regeneration. It was clear, HCC felt, that there was no need for strategic green-field allocations within the plan period. So in July HCC published a First Consultation Draft Alterations 2001-2016 to the HSP. This document deleted former Policy 8 and replaced it with the bare statement that no strategic allocations would be identified in the review of Local Plans and no further strategic scale housing developments should be permitted anywhere in Hertfordshire..."

Part of the background to this changed view consisted of important recent government policy relating to housing, contained in PPG3 published in March 2000. That required urban capacity assessments to be carried out, and also that previously developed land in urban areas should generally be developed first before greenfield land.

15. The local plan enquiry into the Stevenage District Plan Review opened in September 2002. The HCC objected to Policy H2, arguing that the Stevenage West proposals should be deleted and asserting that the district plan would still remain in general conformity with the structure plan if that was done. By contrast the SBC submitted "that a Local Plan without Stevenage West in it could not be in conformity with the Structure Plan".

16. The inspector's report on objections to the local plan was received in July 2003. The inspector considered that it was beyond his remit to take a position on the HCC's fresh views about the structure plan policy. He acknowledged that until they had been addressed and resolved "as part of a strategic exercise" there was bound to be some uncertainty "on the strategic justification for the development" (inspector's report, para.3.59). The inspector went on to state (3.60):

"In order to be in general conformity with the adopted Structure Plan I consider this Local Plan should identify the land necessary to provide about 1,000 dwellings as required by the Structure Plan.... At the same time, in order to reflect the current uncertainty, that identification should however be caveated [*sic*] by a statement that makes it clear the formal release of the land for development is dependent on completion of a strategic evaluation of the proposed development determining it continues to be needed. The necessary evaluation could be carried out as part of the preparation of the emerging Review Structure Plan. If development of the land continues to be justified strategically, then formal release of the relevant land in the form of granting planning permission can be considered. If that justification is not confirmed, this Local Plan will need to be reviewed to delete the proposed development ..."

**\*J.P.L. 534** There is an important passage in para.3.63:

"I have also taken into account the view expressed on behalf of one of the objectors who raised this issue... that deletion of the development proposed in this Local Plan west of the A1(M) at Stevenage would comply with the over-arching Policy 1 [sc. providing for consistency with the principles of sustainable development] in the adopted Structure Plan. It is argued that a version of the Plan

amended in this way would remain in general conformity with the Structure Plan. The proposed development has been justified strategically in the light of the sustainability provisions of Policy 1 in the adopted Structure Plan and represents an important part of the strategic policies/proposals of that Plan. *To remove the relevant part of that growth from this Local Plan would in my view pre-judge the outcome of a proper re-appraisal of its strategic justification, an exercise that could be carried out within the context of reviewing the Structure Plan. The county-wide considerations cannot properly and fully be assessed as part of this Local Plan. I cannot therefore accept that removal from this Local Plan of part of the development proposed to the west of the A1(M) at Stevenage that is proposed in Policy 8 of the adopted Structure Plan as a strategic housing allocation, would result in a Local Plan in general conformity with that plan.* Removal of the proposed development would represent a material change to the Structure Plan's proposals." (my emphasis)

17. The inspector concluded (para.3.64):

"In the light of all of the evidence on this issue placed before me in writing and verbally at the Inquiry, I have therefore formed the following views:-

Firstly, in order for the Local Plan to be in general conformity with the adopted Structure Plan it must satisfy Policy 8 of that Plan and identify land west of the A1(M) for the development of about 1,000 dwellings.

Secondly, there is considerable uncertainty over the strategic justification for that development, particularly given the national planning policy guidance introduced by PPG3. Given that uncertainty, the Local Plan should make it clear that the identified land cannot be granted planning permission for the proposed development until and if the strategic justification for it has been reconsidered and accepted. If the strategic justification for the development is not made, either in the emerging Structure Plan or within some other framework, then this Local Plan will need to be the subject of a review to delete that part of the proposed new settlement west of the A1(M) at Stevenage or otherwise to respond to the revised strategic policy context. As part of any review of the Plan it would also be necessary to introduce associated changes. These would include the reinstatement of the appropriate part of the Green Belt, and changing the relevant transport, countryside and employment proposals to reflect the deletion of the proposed development west of the A1(M) at Stevenage.

Thirdly, other provisions of the plan that relate to Policy H2 will also need to be changed to remain consistent with this approach. For example, given the current uncertainty referred to above and the suggested policy change I have recommended to Policy H2, I consider it is unlikely that 500 dwellings could be completed within West of Stevenage up to 2008. Policy H4 should therefore be amended to indicate the completion of 400 dwellings up to 2008, with 600 between 2008 and 2011.

Finally, I consider this approach would ensure the Local Plan remained in general conformity with the adopted Structure Plan whilst reflecting the changes in circumstance, such as the *\*J.P.L. 535* publication of PPG3, that have occurred since the Structure Plan was adopted. It would therefore most appropriately respond to the current situation."

18. I should say in passing that in spring 2003 the HCC had produced a deposit draft version of their contemplated structure plan alterations; however after consultation with the Government Office for the Eastern Region they decided not to proceed to an EIP and the deposit draft document got no further. The judge noted (judgment, para.25) that he was told "that it will not now do so". The Inspector acknowledged this changed position in *corrigenda* to his report issued in September 2003, but made no further recommendation. He said:

"The original justification for the principle of development west of Stevenage was provided strategically by the Structure Plan and my report advises that any reconsideration of this proposed growth will need to take place within a similar framework (e.g. strategic--countywide and with the same or similar opportunity for public involvement as would occur with the Structure Plan). The review of the Structure Plan would clearly have provided a suitable framework for that reconsideration. In the light of changes in circumstances since the Inquiry, that may not now be possible/practical.

I do not, however, consider it would be within my remit to determine or even to advise on procedural matters relating to how/where/when reconsideration of the west of Stevenage proposed development could or should place. It is for the relevant authorities to determine how this can best be achieved."

19. The SBC accepted the inspector's recommendations, and modified the local plan accordingly. After considering representations as to the proposed modifications they adopted the plan as modified,

as I have said on December 8, 2004. As adopted Policy H2 reads as follows (I have underlined, as the judge did, the passages which the appellants seek to have quashed):

"In order to meet the provisions of Policy 8 in the adopted Structure Plan, land at Stevenage West is identified for the development of approximately 1000 dwellings. *The allocated land is safeguarded from development pending reconsideration and acceptance of its strategic justification.*"

The accompanying text includes this:

"3.2.13 the Structure Plan is currently being reviewed in the light of the material changes that have occurred since it was adopted in 1998, including the need to take into account the provisions of PPG3. That exercise will reassess the justification for the strategic development west of the A1(M) at Stevenage. *Only if that review of the Structure Plan or an alternative form of reconsideration of the strategic need for the development determines that Stevenage West is required to meet the County's development needs up to 2011 can the site be considered as allocated and available to be released for development.* If the Review Structure Plan or alternative form of reconsideration does not justify development of the land up to 2011, it will be necessary to review this Local Plan to take account of the revised strategic policy context."

## The Issue

20. As I have said the appellants' contention in this court, as it was before the judge below, is that Policy H2 of the SLP, as adopted, is not in general conformity with Policies 8 and 9 of the *\*J.P.L. 536* Structure Plan Review adopted in April 1998. If the complaint is made out, the High Court would be empowered under s.287 of the 1990 Act to quash the offending passages in the document.

## Discussion

21. It is first necessary to identify with some precision the nature of the exercise which the court under s.287 is being asked to undertake. As I have said, s.287 creates a form of statutory judicial review. That being so, (a) so far as the question whether a local plan provision is "in general conformity" with the structure plan involves any issue of statutory construction, it is the court's duty and prerogative to decide for itself what is the correct construction; but (b) so far as the question involves the application of judgment, or expert or mature opinion, to the circumstances of the case, the court's only role is to supervise the exercise of those faculties by the relevant public decision-maker (here the SBC) according to the conventional public law test of rationality, generally referred to as the *Wednesbury* principle (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223).

22. In my judgment issues of both kinds arise. It is therefore first necessary for the court to ascertain the correct construction of the expression "general conformity". There is then the question whether the requirement is fulfilled in the particular case. That is not itself an issue of construction, although any proper answer to it must proceed upon a correct interpretation of the relevant structure and local plan policies: as to which, in this case, there is no dispute or difficulty. The question whether there is general conformity between the plans is a matter of degree and, as it seems to me, of planning judgment. As such its resolution on the merits is confined to the relevant planning authorities, including the Secretary of State where his statutory role is invoked. As I have indicated this court's function upon this aspect of the case is limited to the application of the *Wednesbury* principle. I believe this approach to be consistent with what was said, albeit in different language, by Ouseley J. in *Bloor* reported at [2002] P.L.C.R. 404 which the judge below described as "the correct approach" (judgment, [52]). However Ouseley J. was dealing with a different subject-matter, and I mean no disrespect if I do not set out the text. The judge also referred to the judgment of Brooke L.J. in *Ex p. Woods* [1997] J.P.L. 958, who in his turn cited Auld J. as he then was in *Northavon DC* [1993] J.P.L. 761. But the reasoning in those cases was concerned with the approach to be taken by the court to the ascertainment of the meaning of words included in a planning policy. *Ex p. Woods* was referred to (though very much in passing) at para.16 of the recent judgment of this court in *Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520, a transcript of which was helpfully sent to us by counsel after the hearing. In this case, as I have said, there is no dispute or difficulty as to the meaning of the respective plan policies.

23. The first of the two propositions I have set out, namely that the meaning of the term "general conformity" is a question of construction for the court, is surely beyond contention. As for the second, namely that the question whether there is general conformity between the plans is under s.287 of the



1990 Act subject only to *Wednesbury* supervision, there might, I suppose, be two objections. First, this question is as much a matter of construction (and therefore of law for the court) as is the meaning of the term “general conformity”. Secondly, and in the alternative, the level of supervision which the court will bring to bear on the issue is more intrusive than *Wednesbury* allows; or even that the court should simply decide the issue for itself.

### The Construction of “General Conformity”

24. Before turning to these objections I will deal with the construction of “general conformity”. The term is nowhere defined in the legislation. The court must therefore apply its ordinary meaning *\*J.P.L. 537* as a matter of language, taking into account, however, the practicalities of planning control which are inherent in the statutory scheme. The question of construction is, essentially, as to the flexibility of the requirement of general conformity: is it relatively tight, or relatively loose? Any attempt to elicit an exact meaning of the term “general conformity” would, I suspect, founder on what may be called the rock of substitution--that is, one would simply be offering an alternative form of words which in its turn would call for further elucidation. We have to confront the words the legislature has chosen.

25. The practicalities of planning control to which I have referred include two features which between them must surely inform the extent to which the general conformity requirement is strict or relaxed. The first feature is that the implementation of planning policies in structure plans and local plans is very likely, in the nature of things, to be subject to long lead-times. The second is that, over such periods of time, the needs and exigencies of good planning policy are liable to change. The interpretation of the general conformity requirement has to accommodate these factors. In my judgment they tend to militate in favour of a looser, rather than a tighter approach. Here we have a span of time between April 1998 when the HCC adopted the Hertfordshire Structure Plan Review 1991-2011, and December 2004 when the SBC adopted the SLP. The SBC was bound by statute (see for example s.36(9)(a) of the 1990 Act) to have regard to changing considerations over that period. The attention paid to PPG3 provides an example of this duty's observation in practice.

26. The shape of the statutory provisions also promotes a somewhat looser approach. Here the terms of s.46(10) of the 1990 Act, which I have read, are important. I repeat the subsection for convenience:

“The provisions of a local plan prevail for all purposes over any conflicting provisions in the relevant structure plan unless the local plan is one -

- (a) stated under section 35C not to be in general conformity with the structure plan; and
- (b) neither altered nor replaced after the statement was supplied.”

In my judgment it is a premise of this provision's application that there may be a conflict between the structure plan and the local plan such as to require resolution in favour of one or the other *even though* the two are in general conformity within the meaning of ss.36(4) and 43(3) of the 1990 Act. The words *general conformity* seem to me to point in a like direction. The adjective “general” is there, as the judge said at para.52, “to introduce a degree of flexibility”.

27. Mr Purchas Q.C. for the appellants sought to neutralise the argument against him based on s.46(10) by pointing to para.11 of Sch.8 to the 2004 Act, which I have set out. He submitted that it was implicit in this provision that, absent the use by the Secretary of State of the power there provided, the requirement of general conformity was not to be displaced by any supervening evolution of national policy; yet on the respondents' case that is precisely what has happened here. I do not accept this submission; or rather, I think it misses the mark. Of course the formulation of national policy cannot justify the displacement of the requirement of general conformity. The requirement is imposed by statute. But this tells us nothing as to the reach or content of the requirement, whether it is relatively tight or relatively loose; and that is the issue in the appeal.

28. I acknowledge (as is submitted at para.26(2)(d) of the appellants' skeleton argument) that because structure and local plans together form the development plan under the 1990 Act (see s.54, whose effect I have summarised), they must, broadly at least, be consistent; otherwise s.54A of the 1990 Act, which I have set out, would not be workable. I agree with the judge (para.53) that to read “general *\*J.P.L. 538* conformity” as simply meaning that the proposals of the local plan should be “in character” with the structure plan would be to accept too broad a construction. On the other hand, there are the features to which I have earlier referred--the long lead-times involved, the fact that the exigencies of planning policy may present a changing picture, and the statutory words themselves. In

construing the general conformity requirement the court should in my judgment favour a balanced approach by which these different factors may be accommodated. I consider that on its true construction the requirement may allow considerable room for manoeuvre within the local plan in the measures taken to reflect structure plan policy, so as to meet the various and changing contingencies that can arise. In particular (for it is relevant here) measures may properly be introduced into a local plan to reflect the fact, where it arises, that some aspect of the structure plan is itself to be subject to review. This flexibility is not unlimited. Thus measures of this kind may not pre-judge the outcome of such a review. They must respect the structure plan policies as they are, while allowing for the possibility that they may be changed. I doubt whether it is possible to derive any more focussed conclusion on the construction of the general conformity requirement. I agree with these observations made by the judge below (para.53):

“While the requirement that the Local Plan should be in general conformity with the Structure Plan is an important legislative purpose, there are other purposes. The local plan is there to inform and guide local planning decisions. The guidance of the Local Plan is likely to be of considerable significance to local investment and to choices made about the pattern of local development and the environment. It is desirable in the public interest that the Local Plan should address relevant issues and do so as accurately and fully as it reasonably can. The word ‘general’ is likely to have been put in to make it clear that, to a degree, the need for conformity may be balanced against the need for the local plan to take account of and explain the circumstances in which the strategic policy will be given effect. In the first instance it will be for the local planning authority to decide how to strike this balance subject, of course, to the power of the Secretary of State to direct them to prepare proposals for alteration or to direct that the proposals they have prepared should be submitted to him for approval. (See section 39(2)(b) and section 44(1) and 45).”

I agree also with this statement of the judge, which appears as part of his conclusion on the general conformity issue:

“... [J]udged objectively, the words [sc. “general conformity”] are wide enough to encompass a reproduction of the structure plan policy in the local plan, subject to a qualification as to justification or timing that nonetheless contemplates that the purpose of the strategic policy may be achieved in the plan period.”

### **The Application of the “General Conformity” Requirement--the Court's Role**

29. Is the court's task at this stage no more nor less than one of *Wednesbury* review? The question whether a local plan provision is in general conformity with the structure plan is not in my judgment one of statutory construction. How could it be? Let this or that interpretation of “general conformity” be accepted (and the interpretation of the relevant structure and local plans likewise). Those processes exhaust the role of statutory construction. But after our books on construction are put away, there must remain on various sets of facts a question still unanswered: is this local plan in general conformity with the structure plan or not? The proper construction of the general conformity requirement, and of the relevant plans, is a necessary step along the way to the question's answer. But it is not the final step. If it were, the exercise of interpretation or construction would **\*J.P.L. 539** give the answer. But plainly it does not; at least it may not. It is true that if you adopt a more or less extreme construction of “general conformity”, so as (depending which extreme is chosen) either to allow or to prohibit virtually every dissonance between structure and local plan, then of course the construction exercise will, nearly always, answer the question. But if the right interpretation of “general conformity” is, as in agreement with the judge I would hold, a balanced one, it will as I have said allow what may be a considerable degree of movement within the local plan to meet the various and changing contingencies that can arise. In that case the question whether the local plan is in general conformity with the structure plan is likely to admit of more than one reasonable answer, all of them consistent with the proper construction of the statute and of the relevant documents. In those circumstances the answer at length arrived at will be a matter of planning judgment and not of legal reasoning.

30. If that is right, the court's role in dealing under s.287 of the 1990 Act with a challenge to an authority's view of the application in a particular case of the general conformity requirement can only be supervisory. It cannot be to re-take the merits decision itself; s.287 confers no jurisdiction to embark upon such matters of fact or judgment. Can the standard of review, or supervision, be anything more than *Wednesbury* ? There are, of course, now familiar areas of our law in which the court's role in judicial review cases is much more intrusive than would be contemplated by the

*Wednesbury* doctrine. In particular, we are accustomed to consider whether an executive decision is proportionate to a legitimate public interest aim; and it is elementary that the test of proportionality is closer to an adjudication of merits than is *Wednesbury*. But cases of that kind engage the court's duty to see to the protection of the citizen's constitutional rights (whether or not arising through the medium of the Human Rights Act 1998), where such a right is threatened by government action. Such instances concern the tension, the stand-off, between individual claims of right and general claims of public interest. Nothing of that kind arises here. The stand-off here is not between citizen and State; it is between two sets of planning policy, both adopted in the public interest. There is every reason why the judgment of broad consistency between them--the application of the general conformity requirement--should rest firmly in the hands of the statutory policy-makers themselves, while the court fulfils its traditional duty (a) to see that there is no mistake of "black letter" law--no error of construction--and (b) if there is not, to see that the merits judgment as to general conformity is a reasonable one given the surrounding facts and the correct interpretation of the relevant documents.

31. This approach is in my judgment supported by the submission made by Mr Straker Q.C. for the respondents, which I accept, that the statutory schemes under the Acts of 1990 and 2004 confer major decision-making functions on executive authority, especially the Secretary of State, in relation to issues of conformity or disconformity between structure plan and local plan. Mr Straker refers in particular to ss.43(4) and 46(4) of the 1990 Act and s.24 and Sch.8, para.11 of the 2004 Act. The argument is that the legislative intention cannot have been to require the courts to second-guess the outcome of these functions, provided they are properly and lawfully executed, by means of the jurisdiction given by s.287 of the 1990 Act. That seems to me to be right.

## Conclusions

32. Did the SBC, in adopting the SLP on December 8, 2004, misconstrue the general conformity requirement? In my judgment they plainly did not. In dealing with the construction issue I have stated that while measures may properly be introduced into a local plan to reflect the fact that some aspect of the structure plan is to be subject to review, they must not pre-judge the review's outcome. *\*J.P.L. 540* This is precisely the approach adopted by the local plan inspector at para.3.63 of his report which I have set out above (see in particular the italicised passages). It is accordingly inherent in the decision of the SBC, which accepted the inspector's recommendations, to adopt the SLP on December 8, 2004. There was, therefore, no error of statutory construction; quite the contrary.

33. Did the SBC fall foul of the *Wednesbury* principle in adopting the SLP on December 8, 2004? The appellants submit (skeleton argument para.26(4)) that the requirements set out in Policies 8 and 9 for 1,000 dwellings in West Stevenage by the end of the plan period constituted an important strategic policy and were accepted as such by the local plan inspector and the SBC; Policy H2 fails to deliver this strategic allocation, though it was bound to do so; and accordingly the local plan was not in general conformity with the structure plan. It is said that the effect of Policy H2 and its explanatory material is to prevent the implementation of Policies 8 and 9 indefinitely; and the judge was wrong (judgment, [57]) to place reliance on the local plan inspector's view that his proposed formulation would not or should not be taken as meaning that the strategic provision might not go ahead at all in the planned period (i.e. to 2011).

34. First, I incline to think that the inspector's view to which I have just referred is, as it were, the fifth wheel of the coach. Whether or not he himself believed that the strategic provision would be implemented by 2011 does not, in the circumstances, colour the question whether the SBC took a perverse approach when they adopted the SLP.

35. It seems to me that on this part of the case the most that can be said for the appellants is that the inspector's recommendation, and the SBC's decision, necessarily envisaged the possibility that the strategic allocation of 1000 dwellings west of the A1(M) to be built by 2011 might not be fulfilled. But the true genesis of that possibility was the advent of uncertainty as to the strategy itself. In my judgment the SBC was entitled to reflect that uncertainty, without offence to the general conformity requirement, in their decision of December 8, 2004. Their decision cannot be said to fall foul of the *Wednesbury* standard. In truth the appellants' arguments on what may be called the factual side of the case run into the ground if the construction I have offered of the general conformity requirement is correct. What was done here was plainly within the range of measures open to the SBC given that construction. I should have held the decision to be right even if the court were the judge of the factual merits of the matter.

36. For all these reasons I would dismiss the appeal.

**Lloyd L.J.:**

37. On December 8, 2004 the Respondent, Stevenage Borough Council, adopted the Stevenage District Plan Second Review 1991-2011 (the Stevenage Local Plan). It identifies land for housing development, for 1,000 dwellings, in an area to the west of the A1(M), known as Stevenage West. In so doing it sought to comply with general policies set out in the Hertfordshire County Council Structure Plan Review 1991-2011, which had been adopted in April 1998 (the Hertfordshire Structure Plan).

38. The Claimants have interests in developing land at Stevenage West. They complain that the terms of the Stevenage Local Plan do not give proper effect to the requirements of the Hertfordshire Structure Plan, that it is not in general conformity with that Structure Plan, and that in this respect it is unlawful. They also had another complaint about the Stevenage Local Plan. On January 18, 2005 they commenced these proceedings, under s.287 of the Town and Country Planning Act 1990 (the 1990 Act), seeking to have two parts of the Local Plan declared unlawful. The proceedings *\*J.P.L. 541* came before His Honour Judge Mole QC, sitting as a Deputy Judge of the High Court on April 28 and 29. On May 20 he gave judgment ([2005] EWHC 957 (Admin)) and declared one part of the Local Plan unlawful, but not the other of which the Appellants complained. They pursue their claim to have that other part declared unlawful by this appeal, for which permission was granted by Mummery L.J..

39. The Hertfordshire Structure Plan proceeded on the basis of a need for a further 65,000 dwellings in Hertfordshire by 2011, and identified Stevenage West as a suitable location for a significant contribution to this need. Part of Stevenage West is within Stevenage Borough and the rest is within North Hertfordshire District. The Hertfordshire Structure Plan set out policies intended to secure the provision of these dwellings, including in particular two of direct relevance to the present case, numbered 8 and 9. These are as follows:

**“POLICY 8: STRATEGIC LOCATIONS FOR SUPPLEMENTARY HOUSING DEVELOPMENT.**

Land suitable for strategic housing allocation, together with necessary associated development, will be identified in the following locations indicated on the Key Diagram and excluded from the Green Belt.

District or Borough Location Dwellings

...

Stevenage West of A1(M) 1,000

North Hertfordshire West of A1(M) 2,600

at Stevenage

The planning of these developments will be brought forward through the review of the relevant local plans.

Master planning briefs will be prepared and negotiated with the developers. This shall be done by a joint local authority partnership of the relevant district and borough council where more than one is affected. In the case of the development west of the A1(M) at Stevenage, the partnership will include the County Council....

In the case of the development west of the A1(M) at Stevenage, the master plan will provide for:

- (i) an initial phase of 5,000 dwellings, some of which to be completed after 2011;
- (ii) in the longer term, a possible second phase of a further 5,000 dwellings.

Providing that 3,600 dwellings in the initial phase are planned to be built by 2011, the detailed dwelling split at this location between North Hertfordshire District and Stevenage Borough will be determined in the relevant local plans, informed by agreed master planning work to establish the most sustainable form of development.”

**“POLICY 9: DWELLING DISTRIBUTION 1991 TO 2011**

Local plans will make provision, in accordance with the development strategy as set out in policies 6,

7 and 8, for a net increase in the period 1991 to 2011 of about 65,000 dwellings distributed as follows:

**\*J.P.L. 542** ....

North Hertfordshire 10,400 includes 2,600 west of the A1(M) at Stevenage

...

Stevenage 5,700 includes 1,000 west of A1(M)

...

HERTFORDSHIRE 65,000 of which 4,600 at strategic locations identified in Policy 8

The exact dwelling allocations for North Hertfordshire and Stevenage may be varied between these two districts, depending on the dwelling split at the location to the west of the A1(M) in accordance with the provisions of Policy 8.

The County Council will review the need for alterations to this Plan when new Regional Planning Guidance for the South East is issued."

40. Hertfordshire County Council having adopted this revised Structure Plan, Stevenage Borough Council prepared a draft revision of its local plan, the first version being deposited in November 1999. This included a Policy H2, as follows:

"H2: NEW HOUSING ALLOCATIONS

IN ORDER TO MEET THE STRUCTURE PLAN HOUSING REQUIREMENT THE FOLLOWING SITES ARE ALLOCATED FOR HOUSING:

Site Area (ha.) Estimated number of dwellings

Stevenage West 93 ha. 1,000"

41. The draft also included a number of specific policies relating to Stevenage West. In the meantime work had also started on the collaborative master planning exercise called for by policy 8.

42. Stevenage BC produced a further revised draft in 2001, which is before the court in a still later version incorporating changes made before the inquiry on the draft local plan. By then, in March 2000, the Government had issued a new version of PPG3, emphasising the need to use brown-field sites so far as possible before encroaching on the Green Belt. Stevenage Borough Council amended the draft to take account of this guidance, among other things. In this revised draft, policy H2 is expressed more succinctly, as follows:

"POLICY H2: STRATEGIC HOUSING ALLOCATION--STEVENAGE WEST

IN ORDER TO MEET THE PROVISIONS OF STRUCTURE PLAN POLICY 8 LAND AT STEVENAGE WEST IS ALLOCATED FOR THE DEVELOPMENT OF APPROXIMATELY 1,000 DWELLINGS"

43. Under policy H1 (existing commitments) the land at StevenageWestwas treated as a commitment. In the explanatory text, para.3.2.11 was as follows:

"Structure Plan Policy 8 identifies land for 3,600 dwellings at Stevenage West of which approximately 1,000 dwellings are to be within the Stevenage Borough Council boundary and 2,600 dwellings are to be within the North Hertfordshire District Council boundary. The exact number is to be determined by the Master Plan, however, for the purposes of this **\*J.P.L. 543** Plan, Policy H2 allocates land at Stevenage West for 1,000 dwellings. The allocation of 3,600 dwellings forms part of an initial phase of 5,000 of which 1,400 dwellings are to be completed after 2011."

44. Hertfordshire CC had confirmed that each successive draft of the Stevenage Local Plan was in general conformity with the Hertfordshire Structure Plan. However, at the inquiry into the Stevenage Local Plan, Hertfordshire CC objected to the local plan in respect of the provision for Stevenage West, and sought to have this removed entirely from the local plan. Hertfordshire CC had embarked on a review of its own structure plan and in July 2002 published a consultation draft which omitted any provision as regards StevenageWest, on the basis that all of the additional housing need could be met without encroaching on the Green Belt. In March 2003 this process reached the stage of a deposit draft but shortly after that, in the light of adverse comment, in particular from the

Government's Regional Office, Hertfordshire County Council decided not to take the necessary further steps to progress this review.

45. The Inspector rejected the argument that the Stevenage Local Plan could properly fail to identify land at Stevenage West, but he noted that the need for the strategic allocation of land was subject to question and was to be reviewed. He recommended that the land be identified but that its release for development should be conditional on the reconsideration of the strategic need taking place and resulting in the need being confirmed. In his judgment the judge quoted some relevant passages from the inspector's report. I will limit myself to quoting two short passages from those mentioned by the judge, parts of paras 3.60 and 3.64 of the report:

"3.60 ... At the same time, in order to reflect the current uncertainty, that identification should however be caveated by a statement that makes it clear the formal release of the land for development is dependent on completion of a strategic evaluation of the proposed development determining it continues to be needed. The necessary evaluation could be carried out as part of the preparation of the emerging Review Structure Plan. If development of the land continues to be justified strategically, then the formal release of the relevant land in the form of granting planning permission can be considered. If that justification is not confirmed, this Local Plan will need to be reviewed to delete the proposed development...."

3.64 ... Secondly, there is considerable uncertainty over the strategic justification for that development, particularly given the national planning policy guidance introduced by PPG 3. Given that uncertainty, the Local Plan should make it clear that the identified land cannot be granted planning permission for the proposed development until and if the strategic justification for it has been reconsidered and accepted. If the strategic justification for the development is not made, either in the emerging Structure Plan or within some other framework, then this Local Plan will need to be the subject of a review to delete that part of the proposed new settlement west of the A1(M) at Stevenage or otherwise to respond to the revised strategic policy context...."

46. In the light of the Inspector's report, Stevenage Borough Council adopted the Stevenage Local Plan including further revisions to the text, as recommended by the Inspector. Policy H2 was expressed in different terms, and with new explanatory text, as follows:

"POLICY H2: STRATEGIC HOUSING ALLOCATION--STEVENAGE WEST

IN ORDER TO MEET THE PROVISIONS OF POLICY 8 IN THE ADOPTED STRUCTURE PLAN LAND AT STEVENAGE WEST IS ALLOCATED FOR THE \*J.P.L. 544 DEVELOPMENT OF APPROXIMATELY 1,000 DWELLINGS. THE ALLOCATED LAND IS SAFEGUARDED FROM DEVELOPMENT PENDING RECONSIDERATION AND ACCEPTANCE OF ITS STRATEGIC JUSTIFICATION.

....

3.2.13 The Structure Plan is currently being reviewed in the light of material changes that have occurred since it was adopted in 1998, including the need to take into account the provisions of PPG3. That exercise will reassess the justification for the strategic development west of the A1(M) at Stevenage. Only if that review of the Structure Plan or an alternative form of reconsideration of the strategic need for the development determines that Stevenage West is required to meet the County's development needs up to 2011 can the site be considered as allocated and available to be released for development. If the Review Structure Plan or alternative form of reconsideration does not justify development of the land up to 2011, it will be necessary to review this local plan to take account of the revised strategic policy context."

47. The Appellants object to the second sentence in the statement of the policy, and to all, or at least to the third sentence, of the explanatory paragraph 3.2.13. They contend that the inclusion of these passages has the result that the Stevenage Local Plan is not in general conformity with the Hertfordshire Structure Plan. They accept that policy 8 is satisfied, because land is allocated for 1,000 new dwellings, but they say that effect is not given to policy 9, because the qualification to policy H2 is such that the land may not be made available for housing in time for the required 3,600 dwellings (of which 1,000 in the Stevenage Borough Council area) to be constructed by 2011.

48. Stevenage BC put in a witness statement before the judge, made by Mr Bandy, their Head of Development and Planning. At the end of his witness statement he said this:

"In the Borough Council's view, the plan as adopted is in general conformity with the Structure Plan. It has allocated the land for the development of approximately 1,000 houses; and the commencement of development before 2011 is not ruled out."

49. The relevant legislation is mainly to be found in the 1990 Act. Since September 24, 2004 this has been repealed and replaced by other provisions in the Planning and Compensation Act 2004, but this includes transitional and saving provisions.

50. The significance of the local plan arises in this way. Under s.54A of the 1990 Act:

"Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the development plan unless material considerations indicate otherwise."

51. Among the circumstances in which regard is to be had to the development plan is where a local authority is considering whether or not to grant planning permission: 1990 Act, s.70(2). The same applies if the Secretary of State calls in the application under s.76A: see sub-s.(10)(a).

52. For this purpose "development plan" is now to be interpreted in accordance with s.38 of the 2004 Act, and means, in the present type of case, the regional spatial strategy for the relevant region, and the development plan documents, taken as a whole, which have been adopted or approved in relation to the area: s.38(3). Before the 2004 Act came into force, the meaning of development plan was given by s.54 of the 1990 Act. In effect it meant the relevant structure plan and local plan for the area and any alterations to either of them.

**\*J.P.L. 545** 53. The relationship between the structure plan and local plans was governed by the 1990 Act. A structure plan had to contain a written statement of the authority's general policies in respect of the development and use of land in their area: s.30(2). A local plan had to contain a written statement formulating the authority's detailed policies for the development and use of land in their area, and was to be in general conformity with the structure plan: s.36(2) and (4). The authority "shall not adopt any proposals which do not conform generally to the structure plan": s.43(3). Thus in an area such as Hertfordshire, the County Council had to set out general policies for land in the County, by means of the structure plan, and each District and Borough Council within the County had to prepare a local plan by which those general policies were to be given effect.

54. The 1990 Act contains further provision as to the form and content of structure plans, and of local plans, and enables such provision to be made by regulations as well. Structure plans will contain diagrams illustrating the general policies, but these must not be map-based. Local plans, by contrast, must be supported by maps showing how and where the detailed policies will apply. They must also contain explanatory text giving a reasoned justification for the policies, which must be distinct from the statements of policy.

55. The Respondent points out that an authority which is formulating detailed policies to be set out in a local plan is required to have regard, among other things, to current national policies: see s.36(9)(a), and s.12(6) applied by reg.20 of the Town and Country Planning (Development Plan) (England) Regulations 1999. That required Stevenage BC to take account of the new PPG3 issued in March 2000 when revising the draft local plan thereafter, as it did.

56. The 1990 Act also provides for structure plans and local plans to be altered or replaced: ss.32 and 39. If a structure plan is altered or replaced, the responsible authority must notify all authorities responsible for local plans in their area of the adoption or approval of the proposals for the alteration or replacement of the structure plan, and must provide a statement as to whether the relevant local plan is or is not in general conformity with the new or altered structure plan: s.35C(1). If an authority responsible for a local plan receives a statement that its local plan is not in general conformity with the new or altered structure plan, it is obliged to consider whether it needs to prepare proposals for the alteration or replacement of the local plan: s.39(2)(a).

57. If an authority responsible for a local plan proposes that it be altered or replaced, it must make copies of the proposal available for public consultation: see s.40(2). Before doing so, however, it must serve a copy of the proposals on the authority responsible for the structure plan for the area, and must allow a specified period to elapse. During that period the authority responsible for the structure plan is to supply the other authority with a statement as to whether the plan or proposals are or are not in general conformity with the structure plan. If the statement is to the effect that the plan or proposals are not in general conformity, this does not prevent the authority from proceeding, but it

counts as an objection to the plan or the proposals: see s.46(1)-(4).

58. In order to shorten the timescale required to proceed from proposals for alterations to a structure plan to giving effect to those, once adopted or approved, by consequential alterations to local plans, it is possible for a district or borough authority to put forward proposals for the replacement or alteration of a local plan before the adoption of the alterations to or replacement of the structure plan. This can only happen once the proposals for the new or altered structure plan have been deposited for public comment, under s.33. If it is to happen the district or borough authority must state in terms that it is making what is called the "permitted assumption", namely that the proposals in relation to the structure plan have been adopted. That procedure was not used in this case. The *\*J.P.L. 546* revised structure plan only got to the stage at which it could have been followed (the deposit draft) in March 2003, after the local plan inquiry had been held.

59. Section 46 also provides for the eventuality of conflict between plans. Under sub-s.(10), the provisions of a local plan prevail for all purposes over conflicting provisions of the relevant structure plan, unless the local plan has been stated under s.35C not to be in general conformity with a new or altered structure plan, and has not been altered or replaced since then. Some cases of conflict may be unavoidable, but the fact that this is provided for does not seem to me to cast light on the requirement of general conformity. One plan may be in general conformity with another despite there being particular points of conflict. The question would be to what does the conflict relate and how important is it.

60. The Hertfordshire Structure Plan, adopted under the 1990 Act, continues in force under the transitional provisions of the 2004 Act (Sch.8) until three years after the 2004 Act came into force (i.e. September 28, 2007) or, if earlier, until a new plan is adopted or approved in its place. The Stevenage Local Plan was not adopted until after the 2004 Act came into force, but the same transitional provisions nevertheless preserve the effect of the 1990 Act regime for the process that was already under way. The Stevenage Local Plan will also have effect until September 28, 2007 or until its replacement if earlier.

61. The transitional provisions in Sch.8 contain one new provision, in para.11. By this, if the Secretary of State thinks that the conformity requirement (namely the provisions in ss.36(4) and 43(3) of the 1990 Act) is likely to give rise to inconsistency between the proposals and relevant policy or guidance, and that it is necessary or expedient to avoid such inconsistency, he may direct that, to a specified extent, the conformity requirement must be ignored, and he must give reasons: para.11(1)-(3). This possibility only arose on September 28, 2004. It was not used in this case.

62. The 2004 Act also contains a different provision for the resolution of conflicts between plans. By s.38(5) any such conflict is to be resolved in favour of the policy contained in the last document to be adopted approved or published, as the case may be.

63. It seems to me plain that there is a conflict between the Hertfordshire Structure Plan and the Stevenage Local Plan. In accordance with the Hertfordshire Structure Plan's requirement in policy 8, Stevenage BC has allocated land at Stevenage West for 1,000 new dwellings. But the effect of the qualification imposed on policy H2 when it was adopted is that the land, though allocated, is not and cannot be made available for residential development unless and until something else happens, over which Stevenage Borough Council has no control, and nor does any developer. It is possible that the contingency to which the release of the land for development has been made subject could be satisfied soon, but it is just as possible that it will not be satisfied by 2011, or certainly not in time for the housing to be made available by 2011, as is required by policy 9, and in any event not while the Hertfordshire Structure Plan remains in force, for almost two more years from now. That is the conflict. Unless the conditional nature of the policy can be set aside, that conflict is to be resolved, whether under the 1990 Act or the 2004 Act, in favour of the Stevenage Local Plan. Thus, subject to any material considerations which might lead to a different conclusion, any planning applications must at present be determined in accordance with the Stevenage Local Plan. The Claimants have in fact made planning applications for residential development of land at Stevenage West. Those applications have been called in by the First Secretary of State, and are being considered. That gives particular point to the need for urgency in dealing with these proceedings.

*\*J.P.L. 547* 64. The long lead-time for matters concerning planning policy, on the one hand, and its implementation on the ground, on the other, are not in doubt, and form the background to this case. It is not in dispute that, if 3,600 new dwellings are to be made available at Stevenage West by 2011, it is necessary to start by now or even earlier with applications for planning permission. (Stevenage



BC's policy H4 in the draft revised Local Plan provided for 500 of the new houses to be provided in 2005-2008 and the remaining 500 in 2008-2011. This phasing was altered in the light of the Inspector's recommendations, to 400 and 600 respectively.) It is also clear that the sequence of proposing and effecting alterations, first to the Structure Plan and secondly to the Local Plan, in consequence, can be very long drawn out, and things may change during that process. It took almost two years for the Hertfordshire Structure Plan to get from the stage of the deposit draft to adoption, and over five years elapsed between those stages for the Stevenage Local Plan.

65. The terms of the qualification, in the statement of policy H2 itself, are that "the allocated land is safeguarded from development pending reconsideration and acceptance of its strategic justification". The explanatory text referred to a review of the Hertfordshire Structure Plan, or an alternative form of reconsideration of the strategic need for the development, and subjected the release of allocated land to the completion of that reconsideration. It is clear that the review of the Hertfordshire Structure Plan to which the Inspector referred will not take place. It is altogether unclear what he meant by an alternative form of reconsideration of the strategic need for the development. That is not something which Stevenage BC can undertake. It could be, but is not being, undertaken by Hertfordshire CC, since the abandonment of its proposals to alter the Structure Plan. The result is that the availability of the allocated land is deferred for an indefinite period.

66. The judge said that it did not seem that the Inspector thought that his qualification of the policy would result in an indefinite deferral. The Inspector rejected the proposition that Stevenage West could be taken out of the Local Plan altogether while leaving the Local Plan in general conformity with the Structure Plan. He was aware, before he completed his task, that Hertfordshire CC had, in effect, abandoned its review of the Structure Plan. He said that, even though this meant that the most obvious form of reconsideration of the strategic factors could not take place, it was not for him to determine or advise how, where or when the reconsideration could or should take place, and that this was a matter for the relevant authorities to decide on.

67. Both before the judge and before us there were submissions as to what is meant by "general conformity", on which assistance was sought to be derived from the judgment of Ouseley J. in *J.S. Bloor Ltd v Swindon BC* [2001] EWHC Admin 966; [2002] P.L.C.R. 404 which was concerned with the ambit of "general policies", as distinct from detailed policies, in s.31(2) of the 1990 Act. As my Lord, Lord Justice Laws, says at [22] of his judgment, Ouseley J. was dealing with a different subject-matter, as to the level of detail permitted to, or conversely generality required of, a structure plan as a statement of "general policies". The facts of the case demonstrate that a structure plan may legitimately include policies at the level of detail of policies 8 and 9 in the Hertfordshire Structure Plan. There (as here in the Hertfordshire Structure Plan) the structure plan had identified not only the need for additional housing but also the area near Swindon where it should be provided. It was argued, unsuccessfully, that the location of the provision had to be a matter for detailed policy, and therefore properly belonged in the local plan not in the structure plan. The judge held that the location of a strategic area for new housing development could be a matter of general policy. On that basis, whether it was in fact such a matter depended on the view taken, literally as a matter of policy, by the authority in question.

**\*J.P.L. 548** 68. I agree with my Lord that the question of the meaning of "general conformity" is one of statutory construction for the court but, as he says at para.24, not one which we should seek to define in general or abstract terms. Quite apart from the issue of statutory interpretation, of course, the issue "relatively loose or relatively tight" in its practical application may be affected by the terms of the structure plan itself. A relatively more detailed policy statement in a structure plan allows less freedom in the local plan by way of the application of that policy. I also agree with what my Lord says on this point at paras 25-27 of his judgment and at para.28, except for his approval of the second passage from the judge's judgment quoted in that paragraph (and at [78] below) with which, for my part, I disagree. I will say something more about the content of the requirement of general conformity later, at [86] below.

69. How then should the court approach the question whether a local plan is in general conformity with the relevant structure plan? Clearly to answer the question involves reading and properly interpreting each plan, and doing so in the light of the relevant circumstances as they were at the date of adoption of the local plan. No doubt there is a range of possible local plans, all of which would be in general conformity with the structure plan, the width of that range depending on the level of detail in which the relevant policies are stated in the structure plan. It seems to me that the answer to the question, general conformity or no, is objective, not one which depends on a properly directed view being formed by one or other of the relevant local authorities. Either the local plan is in general

conformity with the structure plan or it is not. Of course questions of policy arise when formulating each plan, and there could no doubt be a number of different versions of a local plan, each of which would satisfy the general conformity requirement. But once the two authorities have done their task, each formulating a relevant plan, it is then a question of comparison and interpretation, in the light of the relevant circumstances, to see whether one is in general conformity with the other.

70. However my Lord, Lord Justice Laws at [29] and [30] of his judgment gives powerful reasons for regarding the court's role under s.287 as limited (subject to any issue as to the true construction of general conformity) to a *Wednesbury* review. My Lord, Lord Justice Wall agrees with this. I see the force of that proposition, and propose to address the question on that basis as well.

71. The use of the phrase "general conformity" leaves some scope for flexibility and even, as noted above, for some conflict. The context is that of the structure plan authority setting a general policy, which could no doubt be regarded as a strategy, for its area, leaving it to the local plan authorities within the area to implement those policies and that strategy by detailed policies. It cannot be open to a local plan authority to subvert the general policies, or to resolve that it will not give effect to a general policy within its area. It is open to such an authority to exercise some flexibility as to how the general policy is implemented, though the degree of flexibility may depend on the nature of the general policy. It is apparent from the *Bloor* case that a general policy in a structure plan may be more or less detailed in its content. Policies 8 and 9 in the Hertfordshire Structure Plan in the present case are more rather than less detailed. As it seems to me, they leave less scope for flexibility in their implementation. That is clear from the very words of policy 9:

"Local plans will make provision in accordance with the development strategy ... for a net increase in the period 1991 to 2011 of about 65,000 dwellings distributed as follows"

72. It does not seem to me that this leaves scope for a local plan to do other than make such provision, under which the relevant number of dwellings for the area of the particular district or borough will be made available by 2011.

**\*J.P.L. 549** 73. The difficulty with the qualified version of policy H2 is that, though it complies with policy 8, it does not give effect to policy 9. The judge noted that the inspector did not think that the qualification would prevent the 1,000 dwellings being provided by 2011, though he clearly did have in mind the possibility that, following a fundamental strategic rethink, the Stevenage Local Plan might have to be revised and the proposals for Stevenage West dropped altogether: see para.3.64 of his report, quoted at [22] of the judge's judgment and in part at [45] above. I agree with Laws L.J. at [34] of his judgment that what the inspector thought the effect would be, however, is not the point. The question is as to the true meaning and effect of the Stevenage Local Plan as adopted.

74. The judge commented at [53] that events may cast doubt on a structure plan policy, but that adjustments to such a policy have to be dealt with through the process laid down for altering a structure plan. Only in that way can they be considered by the appropriate authority, with the benefit of public participation in the way that is laid down for structure plans. He observed that whatever flexibility is afforded by the phrase "general conformity" cannot extend to accommodating important adjustments to the strategic policy. I agree with him on this. Otherwise there could be different and conflicting variants of the overall policy in different local plans adopted by different authorities at borough or district level within the same county. It is not legitimate for a structure plan authority to seek to anticipate changes to a structure plan which have not yet been adopted by proposing changes to a draft local plan which is otherwise consistent with the current structure plan.

75. In the same paragraph the judge identified other legitimate purposes of a local plan:

"But not all unresolved questions are equally important or need recording in the same way. While the requirement that the Local Plan should be in general conformity with the Structure Plan is an important legislative purpose, there are other purposes. The local plan is there to inform and guide local planning decisions. The guidance of the Local Plan is likely to be of considerable significance to local investment and to choices made about the pattern of local development and the environment. It is desirable in the public interest that the Local Plan should address relevant issues and do so as accurately and fully as it reasonably can. The word 'general' is likely to have been put in to make it clear that, to a degree, the need for conformity may be balanced against the need for the local plan to take account of and explain the circumstances in which the strategic policy will be given effect. In the first instance it will be for the local planning authority to decide how to strike this balance subject, of course, to the power of the Secretary of State to direct them to prepare proposals for alteration or to

direct that the proposals they have prepared should be submitted to him for approval. (See section 39(2)(b) and section 44(1) and 45.)”

76. I agree with those comments. He went on to consider the courses open to a district or borough council who have doubts about the policy set out in the structure plan. A drastic course (that adopted by North Hertfordshire District Council in 2001) would be to withdraw its proposals to alter the local plan to conform with the structure plan, thereby leaving an old local plan in place, even though it may have been stated not to conform with the more recent structure plan. Whether, overall, that is likely to be a constructive approach is another matter. At [55] he said this:

“On the other hand, a local planning authority who judge that, although there is a reason for caution, it is unlikely to affect the basic correctness of the Structure Plan policy, may reasonably choose, it seems to me, to adopt a local policy that generally conforms with the Structure Plan but sets out a particular reservation, qualification or reason for caution in respect to that policy. Which course is best will depend upon the balance, as each council sees it, *\*J.P.L. 550* between the likelihood that the Structure Plan policy will not prove to be soundly based and the desirability of having a local plan that sets out policies for their area in a realistic and fair way. The Local Plan authority that chooses to take the latter course will have to ensure that its plan is in general conformity with the Structure Plan. The proposition that the principle of general conformity allows the local plan nothing between a bare and misleading repetition of the structure plan policy on one hand or silence, on the other, would be unattractive.”

77. Turning from the general towards the particular, at [56] he continued:

“At one end of the range, if the local planning authority's judgment is that it is likely that further work will show that a Structure Plan strategic housing allocation is not justified at all, it would seem unhelpful to promote a proposed policy that said, without qualification, that land should be allocated to meet it. Equally, to allocate land for strategic housing in terms that were so qualified that it was clear that the allocation was considered unlikely to be translated into planning permissions during the plan period would not, it seems to me, be in general conformity with a Structure Plan policy that required allocation. In such a case silence or the withdrawal of proposals, would probably be the only sensible course. At the other end of the range, for a council to allocate land required for a strategic housing provision within the plan period, confident in the need for it, but to add a caution that for reasons, for example, to do with the proper development of the urban land in the borough, the local planning authority would oppose development starting before a specified time into the plan period, would be in general conformity with the Structure Plan, in my judgment.”

78. The judge rejected the Claimants' contention that the qualified terms of Policy H2 were such that it was not in general conformity with the Hertfordshire Structure Plan. He considered that it was legitimate for Stevenage Borough Council to refer to the doubts that had been raised as to whether the strategic allocation of land at Stevenage West was in fact needed, and indeed that to fail to refer to those doubts would be misleading. His conclusion appears at [59]:

“It is difficult to define the scope of the statutory phrase ‘in general conformity’ as a matter of universal principle; it is easier to decide whether specific policies come within it. However it seems to me that, judged objectively, the words are wide enough to encompass a reproduction of the structure plan policy in the local plan, subject to a qualification as to justification or timing that nonetheless contemplates that the purpose of the strategic policy may be achieved in the plan period. The way the SBC have worded Policy H2 and its explanatory material does fall within the scope of the phrase. The application on Ground 1 therefore fails.”

79. I respectfully disagree with the judge on this point, and therefore with his dismissal of the Claimants' claim in this respect, whether the question is approached as an objective question of construction or on the basis of a *Wednesbury* review.

80. First, it seems to me that, in relation to a policy which is an important one in the context of the structure plan, as policies 8 and 9 undoubtedly are, it is not sufficient for the local plan to make provision in the terms of the detailed policies which are such that “the purpose of the strategic policy *may* be achieved in the plan period”. If the terms of the local policy were correctly summarised in that way, they would equally contemplate that the strategic purpose may not be achieved in the plan period. In my judgment, in the case of an important strategic policy such as policies 8 and 9 it is not open to the district or borough council in its local plan to do other than provide that the purposes *\*J.P.L. 551* of the structure plan shall be implemented. There may be scope for refinement as

regards the details of the timing, but much of the detail was expressly left to be dealt with in the Master Plan to be agreed between Hertfordshire CC, Stevenage BC and North Hertfordshire DC. That is the proper forum for debate about details of that kind. The terms of policy 9, in particular, do not seem to me to permit anything other than direct implementation in the local plans of the affected district and borough councils.

81. Secondly, it seems to me that the judge understated the significance and effect of the qualification within the terms of policy H2 in the circumstances. He makes the point, correctly, that explanatory text, though distinct from the formal policies in a local plan, is nevertheless part of the development plan, and therefore something to which regard has to be had. For myself, though it is hypothetical, I would not agree with the judge (at [58]) that it would have been in general conformity with the Structure Plan, while omitting the sentence objected to in the statement of policy H2, to include an explanatory passage to the effect that Stevenage Borough Council considered that planning permission could not be granted unless and until the strategic need for Stevenage West had been reconsidered and reaffirmed. At [56] of his judgment (quoted at [77] above) the judge referred to a local authority being entitled to state that it would oppose an application for planning permission to take effect before a specified time. In some circumstances that might be consistent with the relevant general policy. But that is not what Stevenage Borough Council has done here: there is no specified time after which planning applications can be expected to be successful, and it is not possible to foresee when (if ever) the condition precedent in the policy will be satisfied. On the contrary, it seems to me that the effect of the conditional policy which has been adopted is the same as that which, in the second sentence of [56], the judge said would not be in general conformity with the Hertfordshire Structure Plan.

82. I accept that it would be legitimate to have referred in the explanatory text to the fact that questions had been raised about the continuing need for the strategic allocation of the land, and to point out that steps might be taken, for example by the County Council, which would result in a change in the strategic policy, and that if such a change were recognised and accepted, this might be a material consideration which would militate against the grant of planning permission on the basis of policy H2. (The Hertfordshire Structure Plan itself contains a cautionary note about the possible review of the policy at the end of the text relating to policy 9.) Mr Straker Q.C. for Stevenage BC submitted that the distinction is very fine between the terms of the Stevenage Local Plan as adopted, on the one hand, and on the other a statement of policy H2 which in terms is unqualified but is accompanied by a cautious or qualified explanatory statement such as I have described. That may be a fair comment, though how fine the distinction is would depend on the terms of the caution or qualification in the explanatory statement. Even so, it seems to me that the difference, however fine, is real and significant. In the one case the policy is subject to an express condition such that planning permission cannot be granted in accordance with it now or in the foreseeable future, and a grant of planning permission would therefore depend on material considerations being identified which would justify departure from the recently adopted local plan. In the other case, planning permission could be granted on the basis of the local plan but the parties interested are warned that there may be circumstances in which material considerations may indicate the opposite outcome of a planning application.

83. In that context it seems to me that the course taken by Stevenage BC had exactly the effect which the judge earlier (at [53]) said was not legitimate, namely to thwart the implementation of what remained the current and effective strategic policy set out in the Hertfordshire Structure Plan, *\*J.P.L. 552* which remains the governing policy unless and until the County Council takes steps to alter it. Of course the Council had embarked on such steps but, by the time that Stevenage Borough Council adopted the Stevenage Local Plan, the County Council had abandoned that course of action.

84. It seems to me that Mr Purchas Q.C., for the Claimants, was justified in submitting that, by adopting the Stevenage Local Plan with policy H2 and its supporting text in their actual terms, Stevenage BC did the same as Hertfordshire CC had proposed to do at a much earlier stage, as the judge explained at [3]-[7] of his judgment, and as mentioned by Laws L.J. at [10] and [11], namely to make only a contingent allocation of land for the strategic purpose.

85. Under policy H2 as it stands, although policy 8 has been complied with by the statement as to the allocation of land at Stevenage West for 1,000 dwellings, there is currently no prospect that policy 9 will be implemented, unless and until the whole position is eventually changed under the 2004 Act, on the adoption of new policies. There is a stalemate as between the Hertfordshire Structure Plan, which requires that the necessary steps be taken to allow for the creation of 1,000 dwellings in the Stevenage BC area at Stevenage West by 2011, and the Stevenage Local Plan which says that this

cannot happen unless something else happens first, of which it can be said, first, that there is currently no foreseeable prospect that it will happen, secondly, that at the very least it may never happen, and thirdly that if it does happen, no-one can foresee when that will be. At best, it seems to me that this makes the statement of policy H2 contingent in a way which is not legitimate by way of general conformity with policies 8 and 9. It could also be said that the qualification contradicts policy 9, by, in effect, deferring its implementation indefinitely. It is not sufficient for Stevenage BC to be able to say, as Mr Bandy does in his witness statement, that the development of 1,000 houses by 2011 is not ruled out.

86. As I said at [68] above, it is not sensible to attempt to define the statutory phrase “in general conformity with” a structure plan, and I do not propose to try. However, it seems to me that, at least, in order to be in general conformity with a structure plan, the local plan must give effect to the main policies set out in the structure plan, and must do so in a way which does not contradict or subvert their achievement. There is room for flexibility, subject to the terms in which the general policies are stated. There may be scope for variations of detail as regards timing, for example. But the local plan must not put obstacles in the way of the fulfilment of the strategic policies in the structure plan such that they will not, or may well not, be achieved as provided for in the structure plan. Otherwise the purpose of the structure plan, and the basis of the relationship between one structure plan and a series of local plans would be altogether undermined, with the purpose behind an overall strategic policy being implemented differently and in conflicting ways in different parts of the area governed by the structure plan, and in some of those parts possibly not implemented at all.

87. If I consider the question on the basis of a *Wednesbury* review, and disregarding the conclusion which I have expressed in the last paragraph as to the basic content of the requirement of general conformity as a matter of construction, I come to the same result. In my judgment it was perverse or irrational of Stevenage BC to adopt the local plan including policy H2 in the qualified terms actually adopted. The Council was obliged, by the general conformity requirement, to give effect to the Hertfordshire Structure Plan as it stood, with general policies stated in relatively detailed terms in respect of Stevenage West at policies 8 and 9. There had been a proposal for a review of the strategy underlying those policies, but that review had been abandoned by the date of adoption. There could, of course, always be another review, but the first articulation of such a review having been abandoned (however reluctantly) by the relevant authority, Hertfordshire CC, it was not to be *\*J.P.L. 553* foreseen that such a review would be embarked upon again. Thus the strategy still stood and was not subject to any current formal review.

88. I therefore disagree with the proposition that it was open to Stevenage BC to adopt policy H2 in its qualified terms on the basis that to do so reflected the fact that the relevant aspect of the Structure Plan was subject to review, but did not pre-judge the result of the review. In my judgment, the terms of the policy pre-judged the very fact of the review, let alone its outcome. They put the implementation of the policy on hold pending the outcome of a review which was not, at the time of adoption, under way in any sense of which it would be legitimate for Stevenage BC to take notice. The effect of the qualification to policy H2 was to defer the implementation of policy 9 to the Greek Calends or, if not quite so long, at least until the Hertfordshire Structure Plan was replaced by a new plan under the 2004 Act, which might not take place until 2007. In my judgment no reasonable Borough Council, considering the matter on the proper basis, could decide to adopt policy H2 in the qualified terms in which Stevenage did.

89. The irony of the present case is that, at the local plan inquiry, Stevenage BC sought to uphold its draft plan which would have included policy H2 in unqualified terms, and would clearly have given effect to policies 8 and 9 in a way which was undoubtedly in general conformity with the Hertfordshire Structure Plan. It was Hertfordshire CC who sought to have the implementation of their own policies 8 and 9 withdrawn from the Stevenage Local Plan or at least qualified in the sort of way that was recommended by the inspector and eventually adopted by Stevenage BC. It seems to me that the County Council was thereby seeking to subvert the local plan process, and to achieve indirectly something which, by the end of the enquiry stage, they were not even seeking to do directly by an alteration of their own structure plan.

90. In my judgment the inclusion in policy H2 of the second sentence, and in the explanatory statement of the third sentence of paragraph 3.2.13, in the Stevenage Local Plan as adopted, had the result that the Stevenage Local Plan was not in general conformity with the Hertfordshire Structure Plan, and was therefore in contravention of s.31(4) and s.43(3) of the 1990 Act. I would allow this appeal.

**Wall L.J.:**

91. I have had the advantage of reading in draft the judgments of Laws and Lloyd L.JJ. Whilst I see the intellectual attraction of Lloyd L.J.'s approach, I find myself in complete agreement with both Laws L.J.'s analysis of the nature of the exercise which the court is required to undertake pursuant to s.287 of the 1990 Act, and the conclusion to which this leads him.

92. I highlight only one point. This is a highly specialist area. Like Laws L.J., I see the question whether or not there is "general conformity" between identified plans as essentially a matter of degree, and of planning judgment. In such circumstances, it seems to me entirely appropriate that the function of the court under s.287 should be limited to review on *Wednesbury* principles. To hold otherwise runs the obvious danger, it seems to me, of the court being invited to re-take the merits decision.

93. In my judgment, therefore, the judge adopted the right approach, and was entitled to hold that the statutory phrase "general conformity" was wide enough to encompass a reproduction of the structure plan policy in the local plan, subject to a qualification as to justification or timing that nonetheless contemplated that the purpose of the strategic plan may be achieved in the plan period.

**\*J.P.L. 554** 94. In these circumstances, I gratefully adopt Laws L.J.'s reasoning, and see no purpose in seeking to reproduce his clear conclusions in words of my own. I would, accordingly, dismiss the appeal for the reasons he gives.

**Comment.** Stevenage has its part in the annals of public law. *Franklin v Minister of Town and Country Planning* [1948] A.C. 87 concerned the adoption of the new town designation order. The House of Lords considered whether the minister had given an appearance of bias by saying at a public meeting, before considering his inspector's report, "it is no good your jeering, it is going to be done". Sixty years later, urban expansion is still a local issue.

Persimmon appealed against Judge Mole Q.C.'s decision on general conformity. There was no appeal by the Council against the exercise of discretion to quash the Norton Green designation. The Court of Appeal dismissed the appeal, but by a majority, with Lloyd L.J. dissenting. Laws and Wall L.JJ. took the view that the statutory construction of "general conformity" was a matter of law but whether a plan was in general conformity was a matter for the local planning authority, subject to *Wednesbury* review. Lloyd L.J. took an objective approach but also concluded that the Council had exceeded any *Wednesbury* discretion they had.

Commentary by Richard Harwood.

J.P.L. 2006, Apr, 526-554