

This letter has been prepared in line with the Pre-Action Protocol.

Introduction

1. Our client is Bioabundance Community Interest Company (Company number: 13063614). The company is a CIC incorporated by residents of South Oxfordshire to promote climate change mitigation and defend the natural world with the aim of restoring biodiversity and bioabundance for the benefit of current and future generations.
2. Our client is concerned that the South Oxfordshire Local Plan 2011-2035 (“the Local Plan”) adopted by South Oxfordshire District Council is deficient in respect of: requirements relating to the mitigation of, and adaptation to, climate change; the duty to have regard to the representations of Natural England; and administrative law requirements in respect of irrationality and irrelevant considerations. We have been instructed to challenge the validity of the South Oxfordshire Local Plan 2035, if necessary, through an application to the High Court under Section 113 of the Planning and Compulsory Purchase Act 2004.

Proposed Claimant

3. Bioabundance Community Interest Company

Proposed Defendant

4. South Oxfordshire District Council (“SODC”)

Details of the Proposed Claimant’s legal advisors

5. Brighton Legal Clinic, Leigh Day LLP

Details of any interested parties

6. The intervention of Robert Jenrick, Secretary of State for Housing, Communities and Local Government (“the SSHCLG”) in this matter is detailed below at paragraphs [13 – 15] and accordingly we consider the SSHCLG to be an interested party who should be joined to these proceedings.

Factual background

The climate emergency

7. The threat posed by climate change and the urgent action needed to effectively reduce carbon emissions are widely acknowledged at the international, national and local level.
8. On the international stage, the Intergovernmental Panel on Climate Change (“the IPCC”) reported in 2018 on the risks to our health, food supplies, economy and security associated with a failure to keep an increase in global temperatures to below 1.5 degrees Celsius above pre—industrial levels; and the need to accelerate effective climate change mitigation and adaptation strategies to stay within this limit.¹
9. National government is also aware of the risks associated with climate change and the urgent action needed. The government published ‘The Clean Growth Strategy’ document on 12 October 2017. It states:

“Without significant reductions in emissions, the world is likely to be on course for average temperature rise in excess of 2°C above pre-industrial levels, and possibly as much as 5°C for the highest emissions scenarios, by the end of this century.

....

This growing level of global climate instability poses great risks to natural ecosystems, global food production, supply chains and economic development. It is likely to lead to the displacement of vulnerable people and migration, impact water availability globally, and result in greater human, animal and plant disease. Climate change can indirectly increase the risks of violent conflicts by amplifying drivers of conflicts such as poverty and economic shocks.

.....

The UK is likely to feel the impact of climate change both directly and through impacts in other parts of the world which will affect our food and materials prices, trade, investments and security.”²

- ^{10.} At the local level, SODC is also fully aware of the need for effective action to mitigate the risks associated with climate change. At a full council meeting on 11 April 2019, SODC

¹ https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf (pp. 138-9)

- acknowledged the IPCC's 2018 report and declared a climate emergency. The resolution adopted committed SODC to "*deliver widespread carbon reductions*" (emphasis added).³
11. On 10th October 2019, Council unanimously resolved to 'aim to reach net-zero carbon emissions for the whole District of South Oxfordshire by 2030'. This intent is now a main plank of SODC's new Corporate Plan.⁴

South Oxfordshire District Council's adoption of the South Oxfordshire Local Plan 2011-2035

12. SODC submitted the South Oxfordshire Local Plan 2035 ("the SO Local Plan") to the Secretary of State for Housing, Communities and Local Government ("the SSHCLG") on Friday 29 March 2019 in accordance with Regulation 22 of the Town and Country Planning (Local Planning) (England) Regulations 2012 for Independent Examination.
13. In October 2019, the council cabinet of SODC resolved to make a recommendation to withdraw the SO Local Plan from inspection and instead take forward a new Plan with the climate emergency at its heart. It is noted that this suggests, on its face, that the proposed defendant considered that the SO Local Plan was, at this stage at least, deficient in relation to measures needed to address the climate emergency.
14. The Council was prevented from considering this recommendation following an intervention of the SSHCLG who imposed a Temporary Direction on the council to stop it from taking any decisions in relation to the SO Local Plan.
15. On 3 March 2020 the SSHCLG issued SODC with a Direction⁵ under Section 27 of the Planning and Compulsory Purchase Act 2004. This directed the Council to progress the SO Local Plan through examination to be adopted by December 2020.
16. The SSHCLG appointed the Planning Inspectorate (an agency of the Ministry of Housing, Communities and Local Government) to review and examine SO's Local Plan. The Planning Inspectorate then assigned Jonathan Bore MRTPI to carry out a review and examination of the Local Plan. Examination hearings into the SO Local Plan were held in July and August 2020. Following this, the main modifications consultation was carried out for a six-week period between 21 September and 2 November 2020.

³ <http://democratic.southoxon.gov.uk/mgAi.aspx?ID=9956>

⁴ <https://www.southoxon.gov.uk/wp-content/uploads/sites/2/2020/11/SODC-Corporate-Plan-2020.pdf>

⁵ <https://www.southoxon.gov.uk/wp-content/uploads/sites/2/2020/09/200303-SofS-SODC-Decision-Letter-1.pdf>

17. On 10 December, the Council met to debate and vote on whether to adopt the SO Local Plan. During the meeting, councillors made statements suggesting what factors they considered when reaching a decision on how to vote.

18. Councillor Celia Wilson, Labour representative for Didcot South said:

“We are subject to a level of coercion in terms of what we do tonight that is probably fairly unprecedented ... [I]f we vote against this plan the threatened implications are more likely than not that the money will not be available for Didcot ... and it is more likely than not that the threats about closing us down in some way and making the county responsible for planning ... will be followed through ... I include in the coercion the statement that says Didcot won't get any money unless you vote in such and such a way, so reluctantly I am expecting to vote in favour of the plan”

19. Councillor Maggie Filipova-Rivers, Liberal Democrat representative for Goring also reported being troubled by ‘bullying’:

“for me the most troubling aspect of this injustice ... is the intervention and the thinly veiled bullying that we have been subjected to”

20. Councillor Sam Casey-Rerhaye, Green representative for Sandford and the Wittenhams said:

“I truly believe that a vote that is made under duress, a choice that is offered under threat, is not a free vote, is not a real vote, and is not a fair exercise of the mandate that I have been given ... I know I am faced with a choice between adopting the plan or having it thrust upon South Oxfordshire. If I vote to adopt this plan, it will become South Oxfordshire's plan and if I vote not to adopt the plan, it will become South Oxfordshire's plan”

21. Councillor Leigh Rawlins, Liberal Democrat representative for Sonning Common set out what he considered to be the nature of the threats and bullying:

“[A]ll of the threats that we have seen recently: the bullying that's reached absurd levels; officers threatened through back channels, as to the future of the council and with clear job implications; councillors who have been browbeaten with suggestions of dire consequences even to their home”

22. Councillor Peter Dragonetti, Green representative for Kidmore End and Whitchurch, was frank in how his decision on whether to adopt the local plan had been affected, saying:

“I feel a foot on my neck and I do not know whether to be brave or cowardly”

23. On 11 December 2020, Councillor Anne-Marie Simpson, Cabinet Member for Planning, is quoted in the SODC press release accompanying the announcement that SODC had voted to adopt the plan:

“We were faced with no real choice but to adopt the plan – there was a very real possibility of the government removing planning powers from South Oxfordshire if the plan was not adopted – and so councillors have done what they needed to do to keep the final say on planning matters in our district.”⁶

The issues

24. The proposed claimant considers that the adoption of the SO Local Plan by SODC was unlawful as a result of the grounds outlined below

Ground 1: Failure to comply with Section 19(1)A Planning and Compulsory Purchase Act 2004

Climate Change Act 2008 (“CCA”)

25. The objective of the CCA is to legislate for a target of “net zero” (‘the 2050 target’), and takes the form in section 1 of an obligation on national government that:

“the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.” The following provisions of the CCA should be read with this overarching objective in mind.

26. Section 32 creates the Committee on Climate Change (“the CCC”):

“32 The Committee on Climate Change

(1) There shall be a body corporate to be known as the Committee on Climate Change or, in Welsh, as y Pwyllgor ar Newid Hinsawdd.”

27. Section 36 mandates the CCC to report annually on the progress towards the 2050 target:

“36 Reports on progress

(1) It is the duty of the Committee to lay before Parliament and each of the devolved legislatures each year, beginning with the year 2009, a report setting out the Committee’s views on—

(a) the progress that has been made towards meeting the carbon budgets that have been set under Part 1 and the target in section 1 (the target for 2050),

(b) the further progress that is needed to meet those budgets and that target, and

(c) whether those budgets and that target are likely to be met.

(2) The Committee’s report in the second year after the end of a budgetary period must also set out the Committee’s general views on—

(a) the way in which the budget for the period was or was not met, and

(b) action taken during the period to reduce net UK emissions of targeted greenhouse gases.”

⁶ <https://www.southoxon.gov.uk/planning/councillors-vote-to-adopt-south-oxfordshire-local-plan/>

28. Section 56 requires the Secretary of State to produce a report containing an assessment of the current and predicted risks for the UK relating to climate change, having sought the advice of the CCC:

“56 Report on impact of climate change

(1) It is the duty of the Secretary of State to lay reports before Parliament containing an assessment of the risks for the United Kingdom of the current and predicted impact of climate change.

...

(5) Before laying a report under this section before Parliament, the Secretary of State must take into account the advice of the Committee on Climate Change under section 57.”

29. Section 58 creates a duty for the Secretary of State to produce a report containing objectives, proposals and policies that address the risks identified in the section 56 report:

“58 Programme for adaptation to climate change

(1) It is the duty of the Secretary of State to lay programmes before Parliament setting out —

(a) the objectives of Her Majesty's Government in the United Kingdom in relation to adaptation to climate change,

(b) the Government's proposals and policies for meeting those objectives, and

(c) the time-scales for introducing those proposals and policies, addressing the risks identified in the most recent report under section 56.

(2) The objectives, proposals and policies must be such as to contribute to sustainable development.”

Planning Act 2008 ("the Planning Act")

30. The Planning Act came into force on the same day as the CCA (26th November 2008) and contains several references to climate change mitigation and sustainability. The Planning Act and the CCA are best viewed as complimentary pieces of legislation. They are, in essence, meant to weave a common thread through departmental and local approaches to climate change.

31. Importantly, for the present purposes, section 182 of the Planning Act amended the Planning and Compulsory Purchase Act 2004:

“182 Development plan documents: climate change policies

In section 19 of PCPA 2004 (preparation of local development documents) after subsection (1) insert—

“(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contributes to the mitigation of, and adaptation to, climate change.”” (emphasis added)

Planning and Compulsory Purchase Act 2004 (“PCPA”)

32. The PCPA regulates the preparation, adoption and implementation of local development documents (“LDDs”). Local Plans are LDDs. The importance of a Local Plan is revealed by section 38, which mandates that planning decisions must be taken in accordance with the Plan unless “material considerations indicate otherwise”:

“38 Development plan

....

(6) 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.”

33. Section 19 PCPA sets out the requirements for preparing LDDs and Development Plan Documents (“DPDs”):

“19 Preparation of local development documents

(1) [Development plan documents] must be prepared in accordance with the local development scheme.

(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.

(1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.

(1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole).”

34. As noted in paragraph 30, section 19(1A) was inserted by the Planning Act and is significant here because it requires development documents to be read as whole when assessing whether they comply with the obligation imposed by this section to secure the mitigation of, and adaption to, climate change.

National Planning Policy Framework (“NPPF”)

35. Chapter 14 of the NPPF deals with how Local Plans should meet the challenge of climate change. The purpose of the guidance set out in this Chapter is stated in Paragraph 148:

“The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure.” (emphasis added)

36. The following paragraphs outline how Local Plans should approach climate change to meet the purpose stated above. Paragraph 149 states:

“Plans should take a proactive approach to mitigating and adapting to climate change, taking into account the long-term implications for flood risk, coastal change, water supply, biodiversity and landscapes, and the risk of overheating from rising temperatures” (emphasis added)

The accompanying footnote details that this sentence should be read “in line with the objectives and provisions of the CCA”, which are noted above at paragraphs 24 - 28 and includes the 2050 target.

The overall framework

37. It is contended that these legal and policy provisions cannot meet the challenge of the climate emergency if read and applied in isolation. Furthermore, on a proper construction of the legislation the provisions are inherently linked. The Planning Act, which introduced section 19(1A) to the PCPA, received royal assent on the same day as the CCA, as noted in paragraph 29. The NPFF advocates in Paragraph 148 for a “radical reduction in greenhouse gas emissions”, which Paragraph 149 states is to be achieved by taking a “proactive approach to mitigating and adapting to climate change” to be read in line with the objective of the CCA. The CCA has a clear objective of achieving the 2050 target and contains provisions to support that purpose that are outlined in paragraphs 24 - 28. These provisions create an important role for the CCC in assessing the risks associated with climate change and assessing what needs to be done to mitigate and adjust accordingly.

38. The recommendations of the CCC in their most recent report, published in June 2020, pursuant to section 36 of the CCA, highlighted in paragraph 26, supports our suggested approach to this issue. The report states:

“Increasingly, all policy and infrastructure decisions will need to be checked against their consistency with the UK’s Net Zero target”⁷

39. The government has set out how the legislative framework is intended to work, specifically in relation to adaptation measures, in their most recent Climate Change Risk Assessment, published in January 2017 and produced pursuant to section 56 of the CCA:

“The Climate Change Act 2008 provides a legally binding framework to cut UK greenhouse gas emissions and a framework for building the UK’s ability to adapt to the changing climate.”⁸

⁷ https://www.theccc.org.uk/wp-content/uploads/2020/06/Reducing-UK-emissions-Progress-Report-to-Parliament-Committee-on-Cli.._-002-1.pdf (p164)

⁸ UK Climate Change Risk Assessment 2017 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584281/uk-climate-change-risk-assess-2017.pdf (p5)

40. The government intends for the planning framework to be responsive to the latest information about climate change, stating in its National Adaptation Programme, published in July 2018 and pursuant to section 58 of the CCA:

“The NPPF is designed so that local authorities are able to react to the latest climate change information when they update their plans.”⁹

As noted in paragraph 37, the most recent view of the CCC is that it is now increasingly necessary to measure the effectiveness of decisions against their consistency with the “net zero” target.

Reading Section 19(1A) Planning and Compulsory Purchase Act 2004 within the wider framework

41. Interpreting section 19(1A) PCPA (see paragraph 32) consistently with the overarching legal and policy framework set out above at paragraphs 24 - 39 has the effect of creating a requirement that a Local Plan should, when read as a whole, be effective in contributing a meaningful effect to the mitigation of, and adaptation to, climate change in order to secure the 2050 target mandated in the CCA.
42. It would be contrary to the entire purpose of the legislative and policy framework outlined above if a Local Planning Authority could discharge the obligation contained in section 19(1A) PCPA through the inclusion of measures in a Local Plan that, whilst acknowledging and considering climate change, did not effectively secure a reduction in carbon emissions that secured the 2050 target.

The SODC Local Plan

43. Though a range of council policies refer to climate change, it is unclear that the relevant DPDs include, on the whole, policies designed to mitigate or adapt to climate change.
44. Mitigation, in particular, must reference the 2050 target as amended. At present, it is not clear how SODC intends to do its part to achieve the 2050 target while building houses in excess of demonstrated need.
45. The Local Plan provides for the construction of 30,056 dwellings, the majority of which will be new homes. With the construction of a typical house using nearly 50 tonnes of CO₂, the emissions potential of building is immense. It is unclear where the Local Plan accounts for the carbon emissions from these new homes.
46. The Section 19(1A) obligation indicates that policies designed to promote climate change mitigation and adaptation must be included. In the Local Plan, it is not clear where substantive mitigation policies are set out. To the extent they are present, they are arguably rendered ineffective by emissions-intensive policies. We invite SODC to disclose how it has discharged this obligation.

⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727252/national-adaptation-programme-2018.pdf (p42)

Ground 2: Irrelevant considerations

47. A discretionary power must be exercised for proper purposes which are consistent with the conferring statute. The exercise of such a power should be quashed by the court where, on a proper construction of the relevant statute, the decision-maker has failed to take account of relevant considerations or has taken into account irrelevant considerations.¹⁰

48. Administrative law requires that decision makers only consider relevant factors and disregard irrelevant factors. This requirement was stated by Lord Greene MR in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 at 229:

"[A] person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."

49. Taking into account irrelevant factors and those irrelevant factors being a material consideration when reaching a decision such as the adoption of a local plan causes the decision to be fundamentally flawed and based on errors of law.

50. We contend that the Council unlawfully took into account factors that were irrelevant. The Council misdirected itself in law as to the matters that were relevant and material when making a decision on whether to adopt the local plan.

51. The presence of these irrelevant considerations arguably led to a different outcome than if the members of the council had refused to pay heed to these irrelevant considerations.

52. We have identified at least four factors that appear to be irrelevant to the decision:-

- a. The use of incorrectly calculated data for determining housing need
- b. Councillor's fear of personal ramifications to themselves and their personal finances if they did not vote through the local plan.
- c. A threat to usurp the council's function and possibly remove planning powers from SODC.
- d. A threat to install commissioner(s) to take over management of SODC and force SODC to cover the high costs of this level of management, effectively forcing SODC into a potentially unstable financial state.

(a) The use of incorrectly calculated data for determining housing need

¹⁰ See generally *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 682–683, CA, per Lord Greene MR; *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929; *Re Duffy* [2008] UKHL 4, [2008] NI 152.

53. The first of these irrelevant factors concerns the housing need calculations relied on by the Inspector in the Inspector's Report of November 2020 ("the IR"). While it is accepted that the Council must take into account data informing them of the housing needs across the location, this data should be relevant and up to date. Formulas and algorithms should use the most up-to-date figures at the time of publication.

54. Paragraph 60 of the NPPF states:

60. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for.

55. A local authority may use an alternative method to calculate housing need, this is provided for by the Planning Practice Guidance Chapter "Housing and economic needs assessment" ("the Chapter") at Paragraph 3, however only in exceptional circumstances and subject to close scrutiny at examination:

Is the use of the standard method for strategic policy making purposes mandatory?

No, if it is felt that circumstances warrant an alternative approach councils can expect this to be scrutinised more closely at examination. There is an expectation that the standard method will be used and that any other method will be used only in exceptional circumstances.

56. At paragraph 33 of the IR, the Inspector relies on Paragraph 10 of the Chapter as "exceptional circumstances" that justify using the housing need number given in the SHMA, rather than the standard method. It is worth quoting Paragraph 10 in full:

When might a higher figure than the standard method needs to be considered?

The government is committed to ensuring more homes are built and are supportive of ambitious authorities who want to plan for growth. The standard method for assessing local housing need provides the minimum starting point in determining the number of homes needed in an area. It does not attempt to predict the impact that future government policies, changing economic circumstances or other factors might have on demographic behaviour. Therefore, there will be circumstances where actual housing need may be higher than the figure identified by the standard method.

Where additional growth above historic trends is likely to or is planned to occur over the plan period, an appropriate uplift may be considered. This will be an uplift to identify housing need specifically and should be undertaken prior to and separate

from considering how much of this need can be accommodated in a housing requirement figure. Circumstances where this may be appropriate include, but are not limited to:

- where growth strategies are in place, particularly where those growth strategies identify that additional housing above historic trends is needed to support growth or funding is in place to promote and facilitate growth (e.g., Housing Deals).
- where strategic infrastructure improvements are planned that would support new homes;
- where an authority has agreed to take on unmet need, calculated using the standard method, from neighbouring authorities, as set out in a statement of common ground;

In addition, authorities should also consider:

- previous delivery levels. Where previous delivery has exceeded the minimum need identified it should be considered whether the level of delivery is indicative of greater housing need; and
 - recent assessments of need, such as a Strategic Housing Market Assessments (SHMA). Where these assessments suggest higher levels of need than those proposed by a strategic policy-making authority, an assessment of lower need should be justified.
- (emphasis supplied)

Without prejudice to our position on whether the Inspector was correct in his assessment in respect of exceptional circumstances, the point here is that Paragraph 10 cannot provide justification for substituting the standard method for an alternative method. It can only be used to justify an uplift to the baseline figure calculated using the standard method. It also noted that the circumstances set out in Paragraph 10 are not stated as “exceptional circumstances”; simply “circumstances”.

57. Furthermore, in the Plan itself at 3.25 the calculation of housing need is described as follows:

“The Growth Deal commitments and the Oxfordshire SHMA are a sound justification for uplifting South Oxfordshire’s housing requirement above the 556 homes per year from the standard method.”

It is noted that the Plan itself refers to an ‘uplift’ from the figure calculated using the standard method. If SODC had intended to use an alternative to the standard method, this should have been made explicit so that it could have been given the proper scrutiny at examination. Furthermore, it would be strange if such an alternative method, for example the SHMA, would instead be given as a justification for an uplift in the Plan itself.

58. If the Inspector, in the IR at paragraphs 32 to 44 (“the Housing Need paragraphs”) was seeking to substitute the standard method for calculating housing need for the methodology and figures provided for in the SHMA, we contend that this was the incorrect approach and an irrelevant consideration. The Inspector would have mistakenly relied on Paragraph 10 of

the Chapter and such an approach to calculating the housing need would not be supported by the statement at 3.25 in the Plan, as noted above.

59. In the alternative, the only other plausible construction of the Inspectors comments in the Housing Need paragraphs would be that the Inspector considers that the circumstances listed in Paragraph 10 of the Chapter justify an uplift from the figure calculated using the standard method. If this is the correct construction of the Inspectors approach, this does not materially assist the Inspector, as we contend that the calculation that the Inspector gives in the IR at paragraph 33 of 627 dwellings per annum (“dpa”) has been calculated incorrectly. This causes the entire subsequent calculation of housing need to be incorrect.
60. The figure of 627 dpa appears to originate in the TOP01 Housing Topic Paper (“the TOP01 Paper”) published in January 2019, which states:

2.29 Taken collectively, the Council considers the evidence justifies uplifting the housing need from the standard method. We consider it appropriate to raise the annual housing need for South Oxfordshire from 627 homes a year, to 775 homes a year. This is justified by South Oxfordshire’s commitment to the Growth Deal, which is itself based on the housing numbers in the SHMA. Although our conclusions above recommend the SHMA alone is not a sufficient justification for uplifting the need, when taken alongside the Growth Deal, it provides the most appropriate housing need for the district.

61. Even if the Inspector was entitled to rely on the figures as they were in January 2019, which we doubt, this number appears to have been incorrectly calculated. Using the figures that were available in January 2019 should have resulted in a figure of 618 dpa. Our calculations are as follows:

The January 2019 calculation:

2019 housing projection: 57819

2029 housing projection: 61968

10 year supply: $61968 - 57819 = 4149$

1 year supply: $4149 / 10 = 415$ (rounded)

Ratio of median house price to median gross annual workplace based earnings: 11.81 (figure for 2017, published March 2018)

Affordability adjustment: $((11.81 - 4) / 4) * 0.25 = 0.488125$

Standard method calculation $(1 + 0.488125) * 415 = 618$ (rounded)

62. Using the most recent figures that were available in November 2020, we calculate the housing need for South Oxfordshire as 608dpa. If this is correct, the starting point from which uplifts were made should have been 19dpa lower. Our calculation is as follows:

The November 2020 calculation:

2020 housing projection: 58246

2030 housing projection: 62369

10 year projection: $62369 - 58246 = 4123$

1 year projection: $4123 / 10 = 412$ (rounded)

Median workplace-based affordability ratio: 11.6 (figure for 2019, published 31 March 2020)

Affordability adjustment equation: $((11.6-4) / 4) * .25 = 0.475$

Minimum household need: $(1 + .475) * 412 = 608$

63. On any construction of the Inspectors approach, the Local Plan is based on incorrect and unsound calculations as to housing need.

64. What also emerges from the Plan, the IR, the TOP01 Paper, and a Cabinet Report dated 11 July 2019 titled 'South Oxfordshire Emerging Local Plan' ("the Cabinet Report"), is that it does not matter which figure is used as a starting point by SODC, the final housing need figure will always be 775dpa. The Cabinet Report states at page 7:

a) Identifying our housing need: Our starting point, as per Paragraph 60 of the NPPF, was the application of the "standard method". This gives an annual housing need of 632 homes per annum⁵ (see Appendix 2). We do not believe there are exceptional circumstances for following a different approach to the starting point. Then, following the Guidance⁶, we considered that the Oxfordshire Housing and Growth Deal and the Council's agreement to take unmet need from Oxford, justified a further uplift in need. This resulted in a housing need of 775 homes per annum, with an additional 4,950 homes for Oxford's unmet need being provided between 2021 and 2031. Across the plan's 23 year lifespan (2011 to 2034), this gives a total housing need of 22,775 homes.

65. This means that in the Plan the starting point is 556dpa but uplifted to 775dpa. In the IR and the TOP01 Paper the starting point is 627dpa but uplifted to 775dpa. In the Cabinet Report, the starting point is 632dpa but uplifted to 775dpa. All other justifications for the uplift being equal, we cannot understand how this is possible. A rational approach to calculating housing need, which considered only relevant factors, could not have produced such results. This would indicate the local plan is predicated on unlawful and irrelevant factors with regards housing need.

(b) Other irrelevant factors given material weight in the decision

66. It is clear from the judgment of Sir Thomas Bingham MR in *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 at 1041-2 that statements made during the debate at a

council meeting at which a motion is voted on is relevant evidence for determining the factors that the members of the council considered when voting on that motion.

67. We contend that the statements referenced at paragraphs 17 - 22 indicate that councillors voting on the motion to adopt the SO Local Plan placed significant weight on threats and pressure relating to their powers and positions as councillors, as well as threats relating to the security of their own homes. These are not factors that should properly have been considered when reaching a decision to adopt a Local Plan. These factors can be considered irrelevant considerations as they do not directly or indirectly relate to the purpose of the decision making, to ensure the soundness of the Local Plan. Considering these factors in coming to the decision to vote through the local plan therefore introduces a suggestion of irrationality in the decision making process. In the alternative these irrelevant factors are so far removed from the list of factors a reasonable decision maker needs to take into account that they are unlawful and render the decision unsound by the presence of illegality.
68. In addition, we argue that where the decision was taken by the Council primarily on the basis of the indications made by the SSHCLG to councillors via both covert and overt threats to their position and the future of the Council generally, rather than relevant and proper considerations relating to the development and use of land in the area, it is unlawful; that is, these were irrelevant considerations that materially affected the decision. It was irrational of the voting councillors to allow their minds to be directed to what may happen to them personally or the future of SODC if they should refuse to vote through the local plan. It is accepted that the threat of an intervention by the SSHCLG and losing planning powers is 'relevant' in a political sense, however it cannot be relevant to the purposes and ultimate success of a local plan as set out in the 2004 Act. Therefore, again the presence of such irrelevant factors being front of mind for the decision makers renders the decision unlawful.
69. Further to this, councillors, in particular Sam Casey- Rerhaye and Elizabeth Gillespie also reported, via emails to members of the public, feeling heavily pressured that if they did not accept the plan the SSHCLG would intervene in the matter to install a commissioner or commissioners and force SODC to fund this new level of management. These councillors in particular, but others who were also made aware of this threat, say they were convinced right up to the day of the vote that these imposed management costs would effectively bankrupt the council or at the very least it was stated that the consequential cost which SODC would incur could remove its Best Council status and put it into a dire financial state. The threat to the council's finances and status that these councillors were democratically elected to serve is an extremely concerning matter and while there is considerable sympathy for their strength of feeling on the matter, it is patently irrelevant to hold this potential financial outcome as front of mind when deciding whether to vote through the SO local plan.
70. We note that the following statements are in the papers provided to councillors on the day of the vote:
 - a. There are also wider considerations in favour of adoption beyond the content of the Plan: Decision-making in respect of this Plan would remain with the Council. Future plan-making should also remain with the Council. Reputational damage would be avoided with central government. Shared agreements with other Oxfordshire authorities e.g., the funding for infrastructure to support the development in the Plan through the Housing & Growth Deal and the Housing and Infrastructure Fund

(HIF) (which the Council has previously publicly acknowledged its support for) would not be jeopardised along with any future funding opportunities.

AND

- b. The risks of taking a decision not to adopt the Local Plan are high. The SoS [for HCLG] has power himself to step in and approve the Local Plan, or to pass that decision of approval to Oxfordshire County Council. The County Council has previously agreed, in the event of an invitation by the Secretary of State, to progress our Local Plan, subject to the recovery of its costs. The consequences of non-adoption are potentially serious and wide ranging, not just in respect of planning powers but also in regard to wider ramifications for the Council.

These statements would appear to be encouraging councillors voting on that day to vote the plan through based on these grounds.

Ground 3 – Duty to consult Natural England

(a) Procedural defects

71. STRAT13 relates to the site allocation referred to in the Plan as 'Land North of Bayswater Brook' ("the site"). The site was released from the Green Belt after the Council found that exceptional circumstances existed. These exceptional circumstances consisted of the site's proximity to employment locations and public transport as well as the prospect of meeting some of Oxford City's unmet housing need in an area adjacent to that LPA's eastern boundary. The allocation in the Plan states that around 1,100 homes will be delivered at the site. The boundary of the site comes close to Sydlings Copse and College Pond Site of Special Scientific Interest ("the SSSI")
72. Owing to this proximity and the scale of development, STRAT13 is likely to have a significant impact on the SSSI. The Local Plan to which STRAT13 relates is a plan or programme for the purposes of Directive 2001/42/EC ('the SEA Directive) concerning the assessment of the effects of certain plans and programmes on the environment. Relevant plans or programmes must be accompanied, at each relevant stage, by environmental reports. The SEA Directive is implemented domestically by The Environmental Assessment of Plans and Programmes Regulations 2004. Regulations 8(2) and (3) therein provide:

(2) A plan or programme for which an environmental assessment is required by any provision of this Part shall not be adopted or submitted to the legislative procedure for the purpose of its adoption before–

(a);

(b) in any other case, the requirements of paragraph (3) below, and such requirements of Part 3 as apply in relation to the plan or programme, have been met.

(3) The requirements of this paragraph are that account shall be taken of–

(a) the environmental report for the plan or programme;

(b) opinions expressed in response to the invitation referred to in regulation 13(2)(d);

(c) opinions expressed in response to action taken by the responsible authority in accordance with regulation 13(4); and

(d) the outcome of any consultations under regulation 14(4)."

73. Regulation 13(2)(d) specifies that certain "consultation bodies" and affected persons must be given an opportunity to express their opinion on the relevant plan or programme and an accompanying environmental assessment. Taken together, Regulations 8 and 13 provide that the responsible authority is under a procedural obligation to take account of the opinions expressed by consultation bodies. Regulation 4 provides that Natural England is one of four relevant 'consultation bodies'. NE responded to SODC's Regulation 19 Planning Consultation on 15 February 2019. Commenting on the Plan as a whole, NE stated:

Natural England is of the opinion that as it stands this Local Plan is not legally compliant and currently does not meet all of the tests of soundness, namely, whether it is justified and whether it is consistent with national policy. However, some of Natural England's concerns centre around the need for further evidence; once this evidence is available we would be happy to review our advice with regards to soundness of the plan.

It is clear that NE are asking SODC to engage by providing further evidence to allow NE to revisit their view as to the soundness of the plan.

74. NE then commented on the Sustainability Appraisal:

"In section 8.3.22 it is stated that "STRAT8, STRAT9 and STRAT13 are all considered to have a significant negative effect on SA Objective 7 'Biodiversity' due to their close proximity to a designated biodiversity asset(s). However, it is acknowledged that the policies include sufficient provisions to avoid such effects occurring". Whilst we have indeed agreed that this is the case for STRAT8 and STRAT9 at Culham (which are near to Culham Brake SSSI), we disagree with this statement in relation to STRAT13 and consider that evidence is required to demonstrate that an impact on Sidlings Copse and Pond SSSI can be avoided."

75. NE goes on to comment on the STRAT13 allocation in particular:

"North of Bayswater Brook allocation: Natural England consider this allocation to be unsound, an assessment would be needed to demonstrate that 1,100 homes can be allocated here without impacts on the SSSI from hydrological changes or recreational pressure.

...

We have concerns about the potential increase in recreational pressure on Sidlings Copse and Pond SSSI; an increase in recreational pressure would be likely to impact on the SSSI ... Our concern relates to both the potential for the 1,100 homes to increase recreational pressure on the SSSI, as well as the potential effect of increased accessibility of the SSSI to existing residents of Oxford as a result of the development ... An assessment of likely recreational pressure is needed”

It is clear that, at this point, NE regarded both the Sustainability Appraisal and the STRAT13 allocation of the site to be unsound and that NE urged SODC to respond with further evidence so that NE could revisit their view on the soundness of the plan.

76. In March 2019, SODC commissioned an Ecological Assessment of the SSSI titled ‘NAT14 Ecological Assessment of Sydling’s Copse & College Pond SSSI’ (“the Assessment”). The Assessment stated:

Air quality

In order to avoid any net increase in atmospheric pollution from vehicle exhaust emissions any new roads should be located at least 200m away from the SSSI. It is considered that this would also be a suitable minimum buffer distance to separate any built development from the SSSI.

...

Recreational Pressure

...

Access from the west

It is also strongly recommended that a buffer zone separating built development from the SSSI is included in master planning for the site to maintain the open setting of the SSSI. AECOM recommends that a 200m ‘no build’ zone would provide appropriate separation; however the precise distance would need to be agreed with Natural England. (emphasis added)

...

Conclusion and Recommendations

For ‘Phase 2’ of this investigation it is not anticipated that additional evidence with regards to recreational pressure is required. There will be fine details to be worked out for any planning application but with regard to the principle of delivery of a new settlement at this site (which is what we are talking about at Local Plan allocation stage), we consider that prior to the examination a site masterplan should be produced which illustrates the scale and location of the park and the aforementioned design features. This will provide sufficient confidence that it would be possible to

avoid any significant increase risk in recreational pressure on the SSSI from the residents of the strategic site allocation.

The Assessment recommends further dialogue with NE. It is not clear whether SODC engaged with NE any further in relation to the objections raised in the NE letter of 15 February 2019 or whether SODC submitted the evidence of the Assessment to NE for evaluation.

77. The Main Modifications to the Plan only show two relevant changes in relation to the site:

3 (x) [new]

72

Add new criterion: x) a net gain in biodiversity through the protection and enhancement of habitats along the Bayswater Brook, new habitats to the north buffering the Sidlings Copse and College Pond SSSI and offsite biodiversity enhancements.

....

Explanatory Text

4.111

69

Sidlings copse and college Pond SSSI and Wick copse ancient Woodland are located directly to the north of the site. These are fragile sites comprising rare habitats which could suffer under increased visitor pressure. Other potential indirect impacts of development, such as impacts on hydrology and air pollution and nutrient deposition, also need to be considered and managed. The master planning of any development here should take into account the recommendations of the Council's Ecological Assessment and a detailed hydrological assessment to understand the developments effects on the SSSI must be completed prior to master planning.

78. The Sustainability Appraisal Addendum of September 2020 ("the Addendum"), commenting on the changes made by the Main Modifications, states:

3.8.21 MM17 proposes changes to STRAT13: Land north of Bayswater Brook to policy wording on listed buildings at Wick Farm, archaeological evaluation, biodiversity net gain, low carbon elements, density, primary school provision, specific requirements on walking and cycling routes, upgrades to road infrastructure and air quality mitigation measures. A number of changes have been made to the appraisal commentary but no changes have been identified to the appraisal scoring (see Appendix D).

79. Appendix D of the Addendum shows that the following words are added to the commentary on Objective 7 (Biodiversity):

These matters require more detailed ecological appraisal associated with a planning application for the site.

STRAT13 also requires a net gain in biodiversity through the protection and enhancement of habitats along the Bayswater Brook, new habitats to the north buffering the Sidlings Copse and College Pond SSSI and offsite biodiversity enhancements. This would support positive outcomes and potentially mitigate negative impacts.

It does not appear that these changes to the Sustainability Appraisal adequately address the concerns raised by NE in their letter of 15th February.

80. Our position is supported by the comments of Dr Tony Juniper, the Chair of NE, in a letter to Oliver de Soissons, a resident of South Oxfordshire near to the site, dated 21 December 2020, in which Dr Juniper states:

Natural England (NE) have been engaging with South Oxfordshire District Council over its Local Plan for some time and were formally consulted on the draft Plan in January 2019. NE's response to that consultation of 15 February 2019 is a matter of public record and you have seen a copy. You will therefore be aware that we raised a number of concerns, including in relation to the proposed allocation of the site known as 'Land north of Bayswater Brook' which is situated very close to Sidlings Copse and College Pond SSSI. Our concerns relate to the potential hydrological impacts and recreational disturbance and we therefore requested further assessments be carried out to investigate these in more detail. These assessments have not been provided to our satisfaction and so our view that the draft Plan is unsound still stands. We submitted statements to the recent Examination in Public which reiterated our concerns.

This letter demonstrates that NE still consider the Plan to be unsound, particularly in respect of the STRAT13 allocation and its impact on the SSSI, despite NE reiterating their concerns during the Examinations in Public.

(b) Consequences of procedural defects

81. It is submitted that NE's objection to STRAT13 has two legal consequences. The first consequence is uncontroversial: it was necessary at both examination and adoption stages for the Council to take account of NE's concerns about hydrological impact on the whole. In addition to this obligation to consider the objection, the second consequence is that the Council ought to have considered that the possibility that Local Plan would be unsound if such impact was to be measured only at the planning application stage. This is the true character of NE's opinion. Their comments go further than indicating that hydrological impacts must be assessed. Their response specifies that a suitable assessment must occur *prior* to adoption.
82. There is no evidence that the Council or the Planning Inspector considered NE's opinion as required by the 2004 Regulations. References to the need for hydrological assessment are not clearly related to NE's objection, but could instead refer to the Council's commissioned ecological assessment. The assessment and NE's objection, though both concerned with hydrology, are different considerations. The natural conclusion is that this failure to consider a relevant consideration mandated by statute amounts to an error of law.

(b) Failure to implement the Sedley principles

83. In addition to the failure to consider the opinion of a statutory consultee, it is apparent that the consultation as carried out fails to adhere to the spirit of the Sedley principles endorsed by the Supreme Court in R (*Moseley*) v *Haringey LBC* [2014] 1 WLR 394. There is no evidence that the consultation on STRAT13 considered its own product, namely the objections of NE.
84. It is clear that where a public consultee submits evidence, their response must be taken into account. A fortiori, the rule for statutory consultees such as NE must be at least as stringent.

Relief sought

85. We invite the proposed defendant to exercise the power it has under section 26 PCPA to revise the Local Plan and undertake to revise the Local Plan so that it includes measures that will actually be effective in achieving a meaningful reduction in carbon emissions.
86. If any of our grounds are made out, we anticipate asking for a quashing order in relation to relevant documents and, in the alternative, for the remittal of any such documents to the examination or adoption stage in accordance with section 113(7)(b).
87. Both a quashing order and an order for remittal are likely to alter the outcomes of the examination and/or adoption process. It is not inevitable that the same decisions will be reached if new evidence must be considered.

Details of any documents or information considered relevant and necessary

88. We request that SODC discloses any information or documents that relate to the assertion made by Councillor Leigh Rawlins (noted at paragraph 20) that councillors may have felt threatened that their home would be under threat as a result of their vote on the motion to adopt the SO Local Plan on 10th December.
89. We also request that SODC disclose any information or documents that are relevant to the suggestion that councillors felt pressured, threatened or bullied in relation to their decision of whether or not to vote to adopt the SO Local Plan.
90. As noted in (paragraph xx) we request information on how SODC considers it has discharged its obligation under section 19(1A) PCPA 2004.

Alternative Dispute Resolution

91. We do not consider that this matter is suitable for Alternative Dispute Resolution, although if you disagree, we would be pleased to hear from you about your suggestions in relation to this.

Costs

92. We consider that, should it be necessary to proceed to litigation, any claim would be within the Aarhus Convention and that accordingly the costs limits that are set out in Civil Procedure Rule 45.3 should apply. If the proposed defendant disagrees with us about this, we invite them to state in their reply their position in relation to costs and set out their reasons why they disagree with the applicability of the Aarhus Convention and the associated costs limits.

Service of Documents

93. We are willing to accept correspondence and service of documents by email to BrightonLegalClinic@Brighton.ac.uk

94. We will also accept service in hard copy to Brighton Legal Clinic, Room 150, Mithras House, Lewes Road, Brighton, Sussex, BN2 4AT.

95. Please confirm if you are also willing to accept correspondence and accept service by email.

Proposed Reply Date

96. The usual period for responding to a Pre-Action Protocol letter is 14 days. Given that the deadlines applicable to planning challenges are shorter than in standard claims for judicial review we request a response no later than 20th January 2021.

Acknowledgement of Service

97. We would be grateful if you could acknowledge receipt of this letter and confirm that you intend to respond before the proposed reply date.