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Case No: C1/2008/3064QBACF; C1/2009/0146/QBACF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT; The Hon Mr Justice Cranston
CO8386/2008; CO8934/2008

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 25/03/2009

Before:

SIR ANTHONY MAY, PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE DYSON
LORD JUSTICE RICHARDS

Between:

1. The Queen on the application of Breckland District Council & Others **Appellant**
Claimants

- v -

The Boundary Committee **Respondent**

2. The Queen on the application of East Devon District Council **Appellant**
Claimants

- v -

The Boundary Committee for England **Respondent**

The Secretary of State for Communities and Local Government **Interested**
Party

Devon County Council **Interested**
Party

Timothy Straker QC/Andrew Sharland (instructed by Messrs Knights, Solicitors) for the Breckland DC & Others

Andrew Arden QC/Jonathan Manning (instructed by Head of Legal, Licensing and Democratic Services, East Devon District Council) for East Devon

Michael Beloff QC/Gerard Clarke/Anna Burne (instructed by Treasury Solicitor) for the Boundary Committee

James Eadie QC and Catherine Callaghan (instructed by Treasury Solicitor) for the Secretary of State

James Goudie QC and Peter Oldham for Devon County Council

Hearing dates: 18-20 February 2009

Approved Judgment

Sir Anthony May – President of Queen’s Bench Division:

1. This is the judgment of the Court.

Introduction

2. In October 2006, the Secretary of State invited councils in England to submit proposals for local government structural and boundary changes from two tiers to a single tier of local government. The invitation was in anticipation of the enactment and operation of what became the Local Government and Public Involvement in Health Act 2007.
3. The nature of such a change and the background to the 2007 Act are briefly summarised in paragraphs 1 and 2 of the judgment of Cranston J of 28th November 2008, which is the first of two decisions by Cranston J from which appeals are brought to this court. That judgment may be found at [2008] EWHC 2929 (Admin). It was in judicial review proceedings between two District Councils and one Borough Council in Norfolk as claimants and the Boundary Committee of the Electoral Commission as defendants. The judge dismissed the claim.
4. Cranston J’s second judgment was given on 8 January 2009 in judicial review proceedings between East Devon District Council and the Boundary Committee. This judgment may be found at [2009] EWHC 4 (Admin). East Devon’s claim succeeded in part on a matter which had not been raised in the Norfolk proceedings, but this afforded no remedy because the judge decided that the claim was premature. In each of the two proceedings the Secretary of State for Communities and Local Government is an interested party. The two proceedings raise largely the same issues on closely related, but not identical, facts.

The 2007 Act

5. Chapter 1 of Part 1 of the 2007 Act enacts a structure which enables, but does not require, the Secretary of State to effect changes from two tiers to a single tier of local government. Section 2 of the Act enables the Secretary of State to invite or (before 25 January 2008) to direct a County Council or a District Council in England to make a number of types of proposal for a change to a single tier of local government. Section 3(5) provides that, in responding to an invitation or complying with a direction, an authority must have regard to guidance from the Secretary of State as to what the proposal should seek to achieve and matters that should be taken into account in formulating a proposal. Having received a proposal in response to an invitation or direction, one of the statutory options available to the Secretary of State under section 7(1)(a) is to implement the proposal by Order with or without modification. But the Secretary of State may not do this unless she has consulted every authority affected by the proposal (other than those who made the proposal) and “such other persons as [she] considers appropriate” – section 7(3).
6. Another course open to the Secretary of State upon receiving a proposal is to request the Boundary Committee to advise:

“... on any matter that (a) relates to the proposal; and (b) is specified in the request” – section 4(2).

The Boundary Committee are to advise no later than a date specified in the request, but the Secretary of State can at any time substitute a later date – section 4(3). Thus, the first place to look for what the Boundary Committee are requested and, subject to an apparent discretion, expected to do, is the Secretary of State’s request.

7. Upon receipt of the Secretary of State’s request for advice, the Boundary Committee have a discretion to provide the requested advice – section 5(2). They may also recommend that the Secretary of State either does or does not implement the original proposal without modification, or they may make “an alternative proposal” – section 5(3). The meaning of “an alternative proposal” is given in section 5(5). If they do make an alternative proposal, it has to be a proposal for one or more single tiers of local government. If it were a proposal for two or more single tiers of local government, they cannot be alternatives to one another – section 5(5)(b). We understand this to mean that the Boundary Committee cannot make a proposal for two or more unitary authorities as alternative to each other; but they can make a proposal for two or more unitary authorities operating beside each other.
8. The procedure to be followed by the Boundary Committee is given in section 6. They may request a local authority to provide them with relevant information within a specified time – section 6(1). They have to have regard to guidance from the Secretary of State – section 6(2). They have to make any recommendation or alternative proposal by the date specified by the Secretary of State in her request which may be extended – section 6(3) and 6(7), referring back to section 4(2) and (3). Section 6(4) and (5), which are central to these appeals provide:

“(4) Before making an alternative proposal under section 5(3)(c) the Boundary Committee must –

- (a) publish a draft of the proposal; and
- (b) take such steps as they consider sufficient to secure that persons who may be interested are informed of -
 - (i) the draft proposal; and
 - (ii) the period within which representations about it may be made to the Boundary Committee.

(5) The Boundary Committee

- (a) must take into account any representations made to them within that period, and
- (b) if they make any proposal to the Secretary of State, must inform any person who made such representations -
 - (i) of the proposal made; and
 - (ii) that representations about the proposal may be made to the Secretary of State until the end of the relevant period.”

The relevant period in section 6(5)(b)(ii) is four weeks from the date specified by the Secretary of State for the Boundary Committee to advise.

9. The Secretary of State's implementation powers are in section 7. We have already indicated that she has power to implement an original proposal with or without modification without the intervention of the Boundary Committee. If she has asked for their advice and receives an alternative proposal from them, she may implement that alternative proposal with or without modification. She may also decide to take no action.
10. This chapter of the 2007 Act was a modification of earlier legislation, including the Local Government Act 1992 under which the Local Government Commission in England had powers to consider structural change to unitary local government in non-metropolitan areas. The Political Parties, Elections and Referendums Act 2000 transferred the functions of the Local Government Commission to the Electoral Commission and Boundary Committee for England and altered procedures by which recommendations for change to unitary authorities should be made to the Secretary of State.
11. Under the 2007 Act, the Secretary of State has no power to make a particular change from two tiers to unitary local government unilaterally; and after 25th January 2008 she cannot direct the start of a process which might lead to it. Her powers are limited to implementing with or without modification proposals put forward by existing local authorities; or, upon receiving such proposals, to inviting the independent and expert Boundary Committee to make alternative proposals. She may only implement with or without modification proposals which come to her by one of these two routes. Although the Act is concerned only with proposals for unitary local government, we are satisfied from the terms of the Secretary of State's guidance that her policy recognises that a change from two tier to single tier local government is not regarded as likely or desirable for every area or authority. We do not think, as did the judge, that there is a presumption in favour of unitary local government. Rather the Act provides the means of changing the structure of local government; and, if it is to be used to effect change, the change has to be to unitary local government.

The Secretary of State's requests to the Boundary Committee

12. There were 26 proposals submitted to the Secretary of State in response to her October 2006 invitation. We were told that she has implemented 9 of these. These proceedings arise out of two proposals which have not been implemented, one by Norwich City Council and the other by Exeter City Council. For these two proposals, the Secretary of State confirmed or judged that there was not a reasonable likelihood that, if they were implemented, they would meet or achieve her stipulated criteria. Accordingly, on 6th February 2008, she made a formal written request to the Boundary Committee under section 4 of the 2007 Act to advise. The matters on which she requested advice were whether there could be an alternative proposal for single tier local government (or, in the case of Norfolk, one of two possible alternative such proposals), which would "in aggregate ... have the capacity, if it were implemented, to deliver the outcomes specified in the five criteria as set out in Annex A to the request". If there could be such an alternative proposal, the Secretary of State requested the Boundary Committee to make that alternative proposal to her in accordance with the procedure as set out in section 6(4) and (5) of the 2007 Act. For

Norfolk, the request invited the Boundary Committee to advise which of two possible alternative proposals would better meet the criteria, if they were each judged to have the capacity to meet the criteria. The request also had attached to it, as Annex B, guidance from the Secretary of State to which the Boundary Committee were required to have regard under section 6(2) of the 2007 Act.

13. Annex A to the Secretary of State's request to the Boundary Committee for advice included the following:

- “1. Any unitary arrangements, if these were to be implemented, should be reasonably likely to deliver the following outcomes;
 - I. the change to the future local government structures is to be:
 - affordable, i.e. that the change itself both represents value for money and can be met from councils' existing resource envelope;
 - supported by a broad cross section of partners and stakeholders; and
 - II. those future unitary local government structures are to:
 - provide strong, effective and accountable strategic leadership, including that strong economic leadership recognised in the Government's Review of sub-national economic development and regeneration;
 - deliver genuine opportunities for neighbourhood flexibility and empowerment, in particular for empowering citizens and communities as envisaged in the Government's Green Paper Governance of Britain and in the Government's and the LGS's An Action Plan for Community Empowerment: building on success;
 - deliver value for money and equity on public services.”

The “outcomes” are then described in more detail. Under the heading “Affordability” is the following:

- “3. The change to a unitary structure should deliver value for money and be self-financing so that:
 - a) transitional costs overall must be more than offset over a period (“the payback period”) by savings;

- b) the “payback period” must be no more than 5 years;
 - c) in each year, capital transitional costs incurred are to be financed through revenue resources, or the normal process of prudential borrowing or the use of capital receipts;
 - d) in each year, other (i.e. revenue) transitional costs incurred are to be financed through a combination of the following:
 - in year revenue savings arising as a result of restructuring;
 - other in year specified revenue savings that are additional to annual efficiencies (e.g. Gershon savings) which local authorities are expected to make;
 - drawing on available revenue reserves, subject to ensuring that satisfactory amounts remain to meet unforeseen pressures or other potential calls on reserves. Use of revenue reserves should be the final option considered, both because of the need to preserve a contingency to meet future pressures and because use of reserves adversely affects the fiscal aggregates in a given year, increasing spending but not receipts and so placing further pressure on the Government’s fiscal rules;
 - e) the use of capital resources to meet revenue costs will not be permitted.
4. All costs incurred as a result of reorganisation must be met locally without increasing council tax.
5. Central Government will accept no liability for any miscalculation or cost overrun in the final outturn. The Government will not accept that any additional, unforeseen costs of restructuring should be recovered from council tax payers and that, therefore, any unforeseen costs will need to be financed from other sources.”

Facts

14. As we say, the facts and course of events for each of the Norfolk and East Devon cases are closely related, but not identical. They are set out at some length in paragraphs 5 to 27 of the judge’s Norfolk judgment and paragraphs 3 to 17 of the judge’s East Devon judgment to which reference may be made. The following brief summary applies to both cases unless we indicate otherwise.

15. A Government White Paper on local Government entitled *Strong and Prosperous Communities* (Cmd 6939-1) was published in October 2006. The Secretary of State invited proposals for unitary government from primary authorities. She received proposals from Norwich City Council and Exeter City Council in early 2007. On 25th July 2007 and 5th December 2007, the Secretary of State announced in Parliament that she would request the Boundary Committee to advise whether there might be alternative unitary solutions for Norfolk and Devon respectively. Part 1 of the 2007 Act came into force on 31 October 2007. At a meeting between the Boundary Committee and the Secretary of State on 12th December 2007, the Boundary Committee were assured that any review carried out by them would not need to compare the merits of existing two tier government with alternative proposals for single tier government. The Secretary of State formally requested the Boundary Committee to advise on 6th February 2008.
16. On 3rd March 2008, the Committee started the first stage of its review, publishing material on its website which included a section of Frequently Asked Questions. By this date, the relevant existing authorities (including the present claimants) knew that the Boundary Committee were intending to publish draft proposals in stages; that the first stage would not contain a detailed assessment of affordability; that the Boundary Committee were not intending to compare any alternative proposal that they might formulate with the existing two tier system; and that the Boundary Committee were not intending to recommend the Secretary of State to implement either of the original Norwich or Exeter proposals.
17. The relevant Frequently Asked Questions and their answers in these respects were:

“What will be the draft proposals?”

The Committee intends consulting on one or more draft proposals for a pattern of unitary local government for each county area. It will indicate which of these is its preferred option for each county. The draft proposals would be identified on the basis that, subject to public consultation and a detailed assessment of their affordability, they are likely to have the capacity to meet the criteria that the Secretary of State has asked the Committee to have regard [to] in reaching its conclusions. The Committee will take a view on what it considers is likely to provide the best overall pattern of unitary alternative proposals within any county in deciding what draft proposals to publish.

Is the status quo/existing two-tier system an option?

The existing two-tier system will only remain if we are unable to identify an alternative proposal or if the Secretary of State does not choose to implement an alternative proposal.

Could you recommend to the Secretary of State that the Exeter and Norwich bids be accepted?

It would not be in the interests of either local government or council tax payers for the Committee to advise the Secretary of State to implement a bid that has already been demonstrated not to have met the affordability test.”

There had been earlier communications and meetings at which these intentions of the Boundary Committee had been made known.

18. By July 2008, the Boundary Committee had received legal advice to the effect that the 2007 Act and the Secretary of State’s request to them for advice disabled them from publishing more than one draft alternative proposal or from making more than one alternative proposal to the Secretary of State.
19. In July 2008, the Boundary Committee published Draft Proposals for Unitary Local Government for Norfolk and Devon. Geographically, the proposal for Norfolk would comprise the County of Norfolk and the Lowestoft and Waveney District in Suffolk. The proposal for Devon comprised the entire County including Exeter and Exmouth, but excluding Plymouth and Torbay.
20. The documents set out the stages of the review (paragraph 1.7). Stage 3 was to run from 7th July to 26th September 2008 during which the Committee invited representations on its draft proposals. Stage 4 was to run from 29th September to 31st December 2008 during which the Committee were to consider representations, reach conclusions and submit advice to the Secretary of State. The Committee recorded that they had invited each of the County Councils and the District Councils to develop broad concepts outlining their preferred pattern of unitary authorities. They took the view that it would be a waste of resources to ask the Councils to test the affordability of every one of these concepts (paragraph 2.4). But they asked the principal authorities to be reasonably satisfied that each would meet the affordability test if the Committee were to adopt any of them as their draft proposal (paragraph 2.8).
21. The document for Norfolk describes seven concepts submitted to the Committee (paragraphs 3.1 to 3.8) and refers to a number of others (paragraphs 3.9 to 3.17). Likewise for Devon, the document describes seven submitted concepts (paragraphs 3.3 to 3.12) and refers to a number of others (paragraphs 3.13 to 3.16). The Norfolk document indicated that the legislation constrained the Committee to publish a single proposal only (paragraphs 2.20 and 2.22). The Devon document stated in terms that the 2007 Act made clear that the Committee should set out a single draft proposal and invite views about that proposal (paragraph 2.22). Each document stated that the Committee had no power to seek views on a range of potential options (paragraph 2.22). Paragraph 2.21 of each document stated that the Committee had no power to recommend alterations to the existing two-tier local government structure; and that the Committee could not recommend the retention of a two-tier structure in preference to a unitary pattern. The status quo would only result if the Committee were unable to identify any unitary pattern that met the criteria or if the Secretary of State decided not to implement the Committee’s proposals.
22. Paragraph 2.56 of each document stated that the Committee had not sought at that stage to assess the affordability of their draft proposals. Given the number of unitary patterns suggested to them and the cost of providing the necessary information, the Committee had decided to assess affordability only when they had reached a

conclusion on their draft proposals and once they had published them for public comment. Local authorities would provide financial information on the alternative proposals by 5th September 2008. This information would help inform the Committee's view in assessing the affordability of any new unitary authorities. Thus we read the text of each of the two draft proposals as saying that the Committee did not expect then to publish for public comment the financial information needed to assess the affordability of their draft alternative proposals. Representations on the draft proposals were invited between 7th July and 26th September 2008 when stage 3 would end. The financial information from the local authorities on the proposed alternative only was to be provided by 5th September 2008 and there was no stated intention to publish this or any other financial information on affordability for public comment.

23. The Committee plainly felt constrained by the legal advice that they could only publish one draft alternative proposal. It is evident, and Mr Michael Beloff QC for the Committee accepted, that, absent that legal advice, the Committee may well have published more than one draft alternative proposal in each case. He further accepted that, if the legal advice were wrong, the Committee's draft proposals each proceeded on an error of law.
24. In the face of the legal advice, paragraph 5.32 of the Norfolk Report expressed the belief that there was merit in two other patterns. The first of these would have entailed two unitary authorities comprising rural Norfolk on the one hand and Norwich, Great Yarmouth and Lowestoft on the other. The second would have entailed two different unitary authorities comprising Norwich and its surrounding area on the one hand and the rest of Norfolk and Lowestoft on the other. For Devon, paragraph 5.1 expressed the belief that there was merit in a different pattern of two unitary authorities comprising Exeter and Exmouth on the one hand and the rest of Devon excluding Plymouth and Torbay on the other. In each case, the Committee said that interested parties might wish to bear these patterns in mind in commenting on their draft proposals.
25. The three Norfolk claimant authorities and East Devon each wrote letters before action to the Committee on 14th July and 7th August 2008 respectively. The Norfolk letter cited a passage from *R v Camden ex parte Cran* (1996) 94 LGR 8 to the effect that the kind and amount of consultation required in a particular case must depend on the circumstances; that the process of consultation must be effective and fair; that consultation must take place while the proposals are still at a formative stage; and that those consulted must be provided with accurate and sufficient information and be given adequate time to respond. In summary, the letter complained that the Committee had not generally provided accurate and sufficient information and specifically that they had not consulted on affordability. The letter further complained of the Committee's decision to have no regard to the status quo. It was said that the Committee's statutory powers necessarily required a comparison of the draft proposal with the status quo. The letter required the Committee to call a halt to the consultation period until the flaws in the Committee's process had been rectified.
26. The East Devon letter, in addition to asserting at some length that the Secretary of State's original request to the Boundary Committee was unlawful (on grounds subsequently withdrawn), also complained about the Committee's stance on affordability and comparison with the status quo. On affordability, it was said that the

current consultation process was the only opportunity which consultees would have to influence the Boundary Committee's thinking. Yet they could not meaningfully respond to the consultation on the issue of affordability without being aware of the financial information relevant to the affordability of the Boundary Committee's draft alternative proposal. The timescale set for providing the information and for responses made clear that the Boundary Committee had consciously decided to exclude this aspect of the draft proposal from consultation. This was said to be unlawful and procedurally unfair.

27. The claimants issued their claims for judicial review on 4th September 2008 (Norfolk) and 19th September 2008 (East Devon). It was claimed in each case that the Boundary Committee were proceeding unlawfully or irrationally in the respects identified in the letters before action.
28. Meanwhile, the local authorities' officers were gathering and collating financial information in the form of workbooks. We were shown briefly, but not asked to consider the detail of, such workbooks. They are a compilation by the County Council of detailed information provided by Borough and District Councils. They are no doubt intended to be an assessment of the cost of changing from two tier to unitary local government in accordance with the Boundary Committee's draft proposals; of how the transitional costs would be financed locally without increasing council tax; and of how those transitional costs would be more than repaid within no more than 5 years – see paragraph 3 of Annex A to the Secretary of State's request for advice. No party to these appeals invited us to conclude that these workbooks were other than work in progress. They were made available in the middle and towards the end of September 2008. They were put on the Boundary Committee's website, without, so we understand, steps being otherwise taken to alert the public to their presence there.
29. The Committee, being unable themselves to address complicated matters of local authority finance unaided, instructed independent financial consultants to advise. Their very substantial reports were placed on the Committee's website on 21st November 2008. The Committee initially extended the time for representations on these matters to 5th December 2008, later to be extended to 24th December 2008. There is an issue as to the extent (if any) to which the public were alerted to the presence of the consultants' reports on the website. We need not address this issue in detail since (a) the initial stipulated time period for a consultation on affordability which required consideration of the consultants' reports (if such consultation was required) was plainly too short, and (b) things have moved on since the end of November 2008.
30. On 5th December 2008, the Secretary of State published further advice on the meaning of the words "in aggregate" in her original request of the Boundary Committee for advice. The meaning of these words had historically caused some difficulty, but issues relating to them no longer arise in this appeal. The Secretary of State also extended the time for the Boundary Committee to advise to the 13th February 2009.
31. The judge gave his judgment in the Norfolk case on 28th November 2008. He knew of, but had not seen, the financial consultants' reports.
32. By the time of his East Devon judgment, the report for Devon was available to him, the date for observations had been extended to 19th December 2008 and, in the light of

the judge's Norfolk decision, the Secretary of State had extended the time for the Boundary Committee to report to her to 13th February 2009. At the time the report became available, the Boundary Committee published on their website a release which said they would not automatically adopt the financial consultants' conclusions, but would arrive at their own assessment on affordability.

33. By the time of the hearing before this court, the date for the Boundary Committee to report to the Secretary of State had been yet further extended to 15th July 2009; and, in the light of the judge's East Devon judgment, the Boundary Committee stated in a letter from the Treasury Solicitor of 13th February 2009, that it would follow an adapted process. The essence of this was that the Committee would reassess concepts for unitary local government which had been submitted to it, but which had not become the single alternative proposal in the July 2008 reports; that it would publish as draft alternative proposals solutions for unitary government which it judged would be likely to meet the five criteria; that it would publish any relevant assessments by the independent financial consultants; and that persons who might be interested would be able to make representations which would be taken into account if they were submitted by 14th May 2009. The decision to proceed in this way was contingent on the judge's judgment not being disturbed by this court, and it was notable that the start of the adapted process was to take place on the very day of the hearing of these expedited appeals.
34. Thus the court is in the unsatisfactory position of being expected to consider in short order challenges to the Boundary Committee's historic process which was incomplete when it was challenged and which has now moved on, so that some parts of the challenge are academic only. It was for this reason that, during the hearing, the court indicated a strong disinclination from deciding anything other than points of law which remained relevant, and from spending time and money on points which had become academic simply to bolster arguments which the parties might have about costs. We were not inclined to act as a consultative clinic to assist the parties' future conduct of these incomplete matters. In this context, the main purpose of judicial review proceedings is for the court to review decisions by public authorities which have been made, rather than to guide decision makers along a path towards decisions which have yet to be made and where the process towards those decisions is incomplete. One very obvious reason for this is that, until a decision is made, the court cannot be sure what the decision will be, nor by what process it will be arrived at. One matter which this court does not propose to address is the meaning of the phrase "in aggregate" in the Secretary of State's request for advice, since (a) the Secretary of State gave new guidance on this topic in December 2008, and (b) the circumstances in which the phrase as now explained might be relevant did not arise with the draft alternative proposals under consideration following the July 2008 proposals.

Consultation

35. The judge in his Norfolk judgment considered whether, and, if so, to what extent the Boundary Commission were obliged to consult on a draft proposal. Section 6(4) and (5) oblige the Boundary Committee to publish a draft alternative proposal before making such a proposal to the Secretary of State, and to take such steps as they consider sufficient to enable interested persons to make representations. The Boundary Committee must take account of any such representations. The claimants'

case before the judge was that this statutory provision requires public consultation of the kind described by Lord Woolf MR in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at paragraph 108, where he said:

“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168.”

36. It is submitted that the requirements for public consultation described in paragraph 108 of *Coughlan* should apply in this case and that the court’s task was to consider whether they have been. In addition to paragraph 108, our attention was drawn to paragraphs 55 to 57 of *Coughlan* on the subject of legitimate expectation but in a rather different context from the present.
37. In the alternative, the claimants said that the actions of the Boundary Committee had given rise to a legitimate expectation that they would consult to the extent indicated in paragraph 108 of *Coughlan*. The judge summarised the actions and representations which the claimants relied on in paragraph 36 of his judgment. The Boundary Committee contended that the statute only required them to take such steps as they considered sufficient; that this did not extend to a duty to consult; and that this was fair because the Boundary Committee are advisors, not decision makers, and the statute, by section 6(5)(b)(ii), enables interested persons to make representations to the Secretary of State.
38. The judge decided that the statute imposes a duty on the Boundary Committee to consult. “Publishing a draft proposal, informing interested persons about it, receiving their representations and then taking those representations into account – all this is redolent of public law consultation” (paragraph 38). The duty to consult was underscored by the terms of paragraph 9 of the Secretary of State’s Guidance which spoke of ensuring that “all interested parties will have the opportunity to contribute to the Committee’s formulation of any alternative proposal”. The Boundary Committee letters, relied on by the claimants, showed that the Boundary Committee properly understood its statutory duty and also generated a procedural legitimate expectation that it would fulfil it. In his East Devon judgment, the judge described the obligation as one of meaningful consultation. For the reasons given in paragraph 39 of his Norfolk judgment, the judge considered that the court’s function in reviewing the adequacy of the consultation was to be characterised as “enhanced scrutiny”. He said, somewhat enigmatically, that, because of this, the boundary between “usual back-stop review” and being first judge of these aspects of the consultation exercise became blurred. Considering the question of consultation in his East Devon judgment, the judge noted at paragraph 20 that, under the 2007 Act, structural change could still be brought about if at least some of the elected local representatives in an area proposed change, or the independent and expert Boundary Committee put something forward.

He accepted East Devon's submission that, although consultation by the Secretary of State under section 7(3)(b) need only be with local authorities and "such other persons as [she] considers appropriate", consultation by the Boundary Committee must be with the wider group of persons interested (section 6(4)(b)). Thus consultation by the Boundary Committee should not be narrowly limited and should not be confined to those who somehow qualify as expert. It must extend to the public as a whole, given the importance of the issue at stake, even regarding relatively complex matters. Within the community, there will always be people who have an expertise in such matters. Ordinary members of the public may well be able to express a view on what appear to be complex matters, when they are simplified – as this court accepts may be necessary.

39. The judge further in general accepted the submission that those consulted must be given enough time to respond. Otherwise, they would be deprived of the opportunity to assess and comment on the issue. "While consultation at too early a stage is insufficient to discharge the obligation to consult, if matters have not been formulated with sufficient detail to enable meaningful responses, by the same token consultation by the end of the process is unacceptable, where there is insufficient time to comment or where the impact of any response on the body consulting is likely to be minimal since it will already have formulated its views." In particular the judge considered that the public must be given an adequate opportunity to express their views on affordability in a way which has meaningful impact.
40. Mr Beloff, for the Boundary Committee, submits that the Boundary Committee's statutory duties were more limited and were defined precisely by the language of section 6(4)(b) so that there was no statutory duty to consult in the conventional public law sense. Section 6(4) contemplates, not generalised public consultation, but a precise statutory process of information gathering. Section 6(4) has a close resemblance to section 15(3) of the 1992 Act, which the Court of Appeal in *R v Local Government Commission ex parte North Yorkshire* (20.12.94) recognised imposed no duty of consultation. The word "consultation" is not used, in contrast with the statutory language of sections 7(3) and 9(2) where the language of consultation is used. On this point, Mr Arden convincingly showed in a schedule (prepared by Mr Manning) listing a number of other statutory provisions that the word "consult" is used when those to be consulted are identified or identifiable, in contrast with provisions where representations are sought from people generally.
41. Mr Beloff submits that the full duties described in paragraph 108 of *Coughlan* do not arise. The Committee did not in correspondence engender a legitimate expectation of full consultation because it used the term "consultation" in relation to the more limited section 6(4) procedure. Mr Beloff, however, accepts (paragraph 65 of his skeleton argument) that the duty to publish a draft proposal extended to ensuring that potentially interested persons are informed of the fact of the publication and of their ability to make representations which the Boundary Committee must take into account. This, he accepts, applies to at least representations on affordability upon which the Boundary Committee have to make a judgment before they recommend an alternative proposal (paragraph 66). It is submitted that the Boundary Committee adequately discharged this duty.
42. As we understand it, no party before this court seeks to uphold the judge's view, so far as it went, that the court should apply "enhanced scrutiny" to the question whether

the Boundary Committee had sufficiently consulted. Such scrutiny may be appropriate where fundamental human rights are in issue, which is not this case. Mr Beloff, who maintains that the statutory duty did not extend to full public consultation, but required the Boundary Committee to take such steps “as they considered sufficient”, says that a successful challenge could only be mounted if the court considered the Committee had proceeded unreasonably in a *Wednesbury* sense. The same test should also be applied if the court considered that the judge was correct that there was a wide common law duty to consult. The first judgment as to the sufficiency of the consultation lay with the Committee. The court should not, submits Mr Beloff, in any event use the *Coughlan* criteria as a check list. He submits that the Boundary Committee did take such steps as it considered sufficient and that, if it is necessary to go further, it fulfilled any common law duty to consult. The judge was best placed to decide whether in detail the public were adequately consulted and he reached a proper conclusion. He submits that the sufficiency of consultation can only properly be judged in the context of the legislation and its application taken as a whole.

Consultation – Discussion

43. In our judgment, the judge was correct to decide, essentially for the reasons he gave, that the statute obliges the Boundary Committee to carry out a process of public consultation. It is not necessary to consider whether additionally they so acted in this case as to raise a legitimate expectation of consultation. They did, however, in July 2008 embark upon a process of consultation and, in accordance with paragraph 108 of *Coughlan*, that consultation must be carried out properly. We consider later in this judgment what that should entail. But we accept generally Mr Beloff’s submission that the Boundary Committee has a degree of flexibility as to how consultation should be carried out and that the court should not place them in a rigid straightjacket beyond that which the statute necessitates. The flexibility derives from the nature of the subject matter and the words “take such steps as they consider sufficient” in section 6(4)(b). Those words do not, however, diminish the consultation requirement to the extent that Mr Beloff suggests. There is no persuasive contrast here with sections 7(3) and 9(2) for the reasons, among others, advanced by Mr Arden with reference to his schedule.
44. The critical parts of section 6(4) are the requirement to publish a draft of the alternative proposal and the requirement to enable “persons who may be interested” to be informed of the draft proposal so that they may make representations about it. This is not simply a process of gathering information. Nor is it sufficient, as Mr Beloff submitted, for the Boundary Committee simply to put up a target to shoot at. In order to enable effective representations to be made, it is necessary to publish not just “the proposal” in a narrow sense, that is *what* is proposed by way of structural change, but also a summary of the reasons *why* that change is proposed and in particular, in this case, why the proposed change is considered to meet the Secretary of State’s criteria. We further reject his submission, in so far as he maintained it, that there was no duty to consult on affordability. The Secretary of State required advice on affordability, if there were to be an alternative proposal, and a draft of that proposal had to be published for consultation.
45. We deal later in this judgment with the question of consultation in stages. But it is explicitly clear that what has to be published is a draft of the proposal which may be

recommended to the Secretary of State under section 5(3). It is a matter for the Boundary Committee how they structure the proposal which they recommend. But what has to be published is a draft of the whole proposal, not just part of it. It is also abundantly clear that, given the nature of the subject matter, “persons who may be interested” include the public as a whole. These two elements, that is the requirement to publish a draft of the whole proposal and the requirement to enable the public as a whole to make representations, mean that the statute requires public consultation.

46. The nature of the subject matter means that “persons who may be interested” may need for purposes of analysis to be divided into two groups, that is the public generally on the one hand and local authorities on the other. We have the strong impression that the Boundary Committee in 2008 over-concentrated on local authorities and under-concentrated on the public generally. No doubt local authorities are better able and more inclined to examine financial detail than most members of the public generally. But in our view, consultation under section 6(4) includes publishing enough material to enable all those interested to respond intelligently. This in turn requires the information to be published in a form which members of the public may understand.

Consultation in stages

47. The judge had indicated in his Norfolk judgment that consultation could proceed in stages. East Devon claimed that this was wrong. The process envisaged by the 2007 Act was a single consultation exercise. There could be no draft alternative proposal unless it was provisionally considered by the Boundary Committee to be capable of meeting the five criteria. By leaving out affordability in the July draft proposals, those consulted were unable to make representations about it. The judge maintained paragraph 44 of his Norfolk judgment which we summarise later in our section about affordability. He said that it was open to the Committee to choose to defer consideration of affordability until after the publication of its draft proposals. It had then published the financial information. The crucial issue was whether the Boundary Committee had been able to consult adequately on affordability by staging consideration of the criteria in this way.
48. The appellant councils in each case appeal against the judge’s decision that consultation could properly be carried out in stages. Mr Arden’s submission restates the case that a proposal that does not cover a key area, namely affordability, is not “a draft of the proposal”. The statute suggests a single consultation exercise. Those consulted cannot make a judgment, or make representations, about a proposal which is incomplete. It was necessary for the Committee to form and state a view about affordability and to include sufficient material about it in the draft of their proposal for the public to make informed representations.

Consultation in stages – discussion

49. In our judgment, the judge was correct to decide that consultation could be in stages and that the crucial question was whether the Boundary Committee had consulted adequately on affordability by publishing material in stages. What section 6(4) requires is that, before making an alternative proposal to the Secretary of State, the Boundary Committee have to publish a draft of the proposal which is sufficient to enable the parties to make representations about it. Although a first reading of section

6(4) might suggest that the draft of the full proposal would be the subject of a single publication, the section does not compel that rigid interpretation. The Boundary Committee's publication obligation will be met provided that a draft of the complete proposal has been published – in stages, it may be – and the public has been sufficiently enabled to make representations about the full proposal. Of course the draft may be amended upon receipt of representations. But if publication is to be in stages, the full package must be sufficiently identified as part of the final stage of publication, and there must be adequate time after the publication of the final part of the package for the package to be considered as a whole and for representations to be made. By such a process, the Boundary Committee will have eventually published a draft of the proposal, even if at an earlier stage they have published parts of it which were then incomplete. They would, we think, also have a more general common law power to publish material and invite representations on it in addition to their statutory obligation under section 6(4).

Affordability

50. Affordability derives from the first of the five criteria which required that any unitary arrangements should be reasonably likely to result in the change to the proposed local government structure being:

“Affordable, i.e. that the change itself both represents value for money and can be met from the council's existing resource envelope.”

The subsequent explanation of this in paragraphs 3 to 5 of Annex A, which we have set out in paragraph 13 of this judgment, shows that the essential requirement was that the cost of the change had to be met from the councils' existing revenue or capital resources without increasing council tax and so that savings over a 5 year period were greater than the transitional costs. The requirement that the change itself had to represent “value for money” is in this context cryptic. But the use of the same phrase at the beginning of paragraph 3 appears to indicate that “value for money” was seen as an element of the considerations elaborated in paragraph 3.

51. In his Norfolk judgment, the judge recorded the claimants' case as being, first, that the Boundary Committee failed to have regard to the Secretary of State's Guidance; second, that they failed to bring affordability into account; and, third, that consultees had not been given enough information or time to consider it.
52. The claimants' essential complaint was that the Boundary Committee had rejected a number of proposed concepts without considering their affordability; and had published their draft proposal in July 2008 expressly saying that they would consider its affordability at a later stage and after they had received representations. The draft alternative proposal had to meet the five criteria, one of which was affordability. It could not properly be published as a draft alternative proposal if its affordability had not been addressed.
53. The judge observed that having regard to guidance did not mean that it had to be followed slavishly. Neither the guidance nor the request for advice specified the time at which the assessments of the five criteria had to be made, and the Boundary Committee should have a discretion as to the phasing of the different aspects of its

inquiries provided that everything that was required was done by the time that an alternative proposal was made to the Secretary of State. That time had not yet been reached. The guidance did not require every proposed concept to be fully tested against the criteria – only the eventual alternative proposal. The guidance said that the request to local authorities for information should not generate excessive expenditure. The Boundary Committee did not have to require the authorities to determine that their own concepts met the affordability criterion.

54. As to the draft alternative proposal, it was uncontentious that the Boundary Committee should consider and be sufficiently satisfied about affordability before formulating their advice to the Secretary of State. There was an issue about timing, but nothing in the suggestion that affordability had been left out of account. As to consultation, the claimants' case was that there were no details relevant to affordability in the July 2008 draft proposals. The workbooks were insufficient and were only supplied after the consultation had closed. The financial consultants' advice was only available around the time of the judge's hearing of the Norfolk claim.
55. The judge decided that, by publishing the workbooks and other financial information, the Boundary Committee had met its duty to afford those interested in the draft alternative proposal sufficient information to make representations on affordability. There was enough expertise on both sides to resolve uncertainties quickly. We note that this ignores people other than the parties to the litigation and other interested local authorities. The judge said, however, that the issue of timing was crucial. He was not persuaded that any failure of consultation could be remedied by consultation undertaken by the Secretary of State. Nor was it determinative that it is the Secretary of State who makes the decision whether a proposal is implemented. The question was whether the Boundary Committee had properly consulted. The Cabinet Office Code of Practice stated as best practice that public consultation should be for a period of 12 weeks, which was the period given for consultation in the July proposals. It was artificial to take any specific date as the starting point for consultation on affordability because it was a bilateral, iterative process. The judge amplified this in his East Devon judgment by saying that the consultation process could be staged so that consultation on the affordability of a proposal did not have to be undertaken simultaneously with consultation on the other relevant criteria. The Boundary Committee were making workbook information available from mid to late September 2008 enabling interested parties to make representations. Adding a short period for final reflection, it would not be possible for the Boundary Committee to comply with its duty to consult on affordability, if it intended to report by 31st December 2008. At the time of the judge's Norfolk judgment, it was premature to consider whether the Boundary Committee had complied with its consultation duty, since the period for consultation could easily be extended. By the time of the judge's East Devon judgment, the deadline of 31st December 2008 had been extended.
56. East Devon submitted that in practice the public had not been given sufficient information or opportunity to comment on affordability. The workbooks and the financial consultants' report were indigestible and ill-directed. The information had not been converted into a format which would make it easily accessible to an ordinary member of the public or many consultees. The public had not been adequately notified that the information was available. Putting complicated and ill-digested

information on a website with a willingness to listen to representations did not properly constitute consultation.

57. The judge applied the test of enhanced scrutiny which he had expressed in his Norfolk judgment. He considered that the Boundary Committee had met their statutory obligation to consult on affordability. He said that the consultation may be tangled and untidy – a standard which the appellants criticise as insufficient. It encompasses a multitude of parties with a range of expertise and interest. Ideas are mediated through opinion leaders, typically councils and the local press. The mediation process will usually result in a “bottom line”, possibly a figure such as the £29m. which Devon County Council had initially attached to their proposal. It will be to that stripped down version of what is in fact a complex issue that the general public will react. The law must recognise the realities and imperfections of our democratic process.
58. We have to say that we were not shown any such stripped down version of the financial assessment of either the Norfolk or Devon alternative proposal which emerged from the mediation of opinion makers, nor any “bottom line”. If there is such in the mass of papers before us, we were not directed to it. Nor do we think that some of those consulted, however expert, should be left to inform the less expert part of the public what they believe a mass of complicated and indigestible data may show. Intrinsicly we should have thought that what the general public needed from the Boundary Committee themselves was something fairly simple along these lines: “The best estimate of the cost of the proposed change is £xm. (see Appendix A at page p). We estimate that this may be covered transitionally from the resources shown in Appendix B; and that it may be more than recovered over 5 years by annual savings of £ym. (see Appendix B page q). These savings will not diminish the services provided to the public for the reasons given in Appendix C; and it will not be necessary to increase council tax”.
59. The essence of the judge’s decision that there had been sufficient consultation on affordability was that the workbooks and the financial consultants’ reports had been put on the Boundary Committee’s website and that information in the press by means of press releases and otherwise gave those interested and able sufficient opportunity to acquire the data and make such representations as they were able on it. He considered that, if, as he held, there had been consultation in accordance with the statute, there could be no successful separate rationality challenge.
60. The appellant councils in each case appeal against the decision that the Boundary Committee had sufficiently consulted on affordability. They also challenge the judge’s approach that the question should be subjected to enhanced scrutiny, rather than considering whether the Boundary Committee had achieved the requirements of consultation. East Devon appeal against the decision that the practical means of bringing parts of the fragmented consultation to the public attention had been sufficient.
61. The Norfolk appellants challenge the judge’s conclusion that adequate information on affordability had been made available with the website publication of workbooks in mid to late September 2008. The Boundary Committee had then expressed no view as to the affordability of the draft alternative proposal, nor given any financial material about the possible proposals. It is said that those consulted were unable to

form a view on that information. Not even a provisional assessment of the cost of implementing the draft proposal was provided. An apparently reasoned view was first expressed in the consultants' financial reports on 21st November 2008, at which date inadequate time was available for representations by 5th December 2008, the then stated date. The subsequent short extension to a later date, but still in December 2008, still did not provide adequate time. It was said that 12 weeks was needed for KPMG, instructed by the Norfolk appellants, to analyse the lengthy report and to respond. If the judge had seen the report, he would have decided this matter differently. It is also submitted that, by November 2008 at least, the Boundary Committee had progressed beyond the formative stage in considering their draft proposal.

62. Another matter of which the Norfolk appellants complain is that the Boundary Committee did not properly assess whether the unitary concepts which they considered but put aside met the affordability criteria. It is also said that it is not clear why the Boundary Committee rejected one or more of those other concepts. It is accepted that the authorities that put forward these concepts were asked to consider their affordability, but this did not apply to the draft alternative proposal which the Boundary Committee did put forward. It is suggested that failure to consider affordability before discarding most of the other suggested unitary structures was a fundamental departure from the Secretary of State's Guidance.
63. For East Devon, Mr Arden submits that there was no sufficient consultation with the public on affordability. The closing date for the consultation period was 26th September 2008, and on 3rd October 2008, the Boundary Committee issued a news release saying that the consultation was over. The Boundary Committee did not intend to begin their consideration of financial information until after that period had ended. The workbook information was not published until October 2008. The workbooks were not digestible and contained no conclusions. The consultants' reports were mentioned in a news release and put on the Committee's website on about 21st November 2008. This was insufficient to draw them to the attention to the public as being available to enable them to make representations. A random selection of newspaper articles did not mend this deficiency.
64. Mr Beloff submits that the Boundary Committee properly and sufficiently considered whether the various concepts which they received were likely to meet the affordability criteria. The councils themselves were asked to do this as part of propounding their concepts and the evidence was that the Boundary Committee themselves gave these concepts the same degree of consideration. A fully worked financial appraisal of every concept was not necessary or proportionate. The draft alternative proposal had been assessed in this way, but had not been assessed in detail. The Secretary of State's Guidance did not have to be followed slavishly. Nowhere does it require that every initial concept should be fully assessed against the five criteria. In any event, the appellants' main complaint is that affordability was not considered, or not sufficiently considered, when the draft alternative proposals were published.
65. Mr Beloff submits that there is no statutory obligation to consider or assess affordability at any particular stage. If affordability had to be assessed at the outset, that would require expenditure by the present local authorities in working up proposals which the Secretary of State's Guidance positively discouraged.

66. Mr Beloff submits that the appellants' main submission is based on the judge's conclusion that the Boundary Committee were obliged to consult interested parties on affordability. The Boundary Committee's first position is that this was wrong and that there was no duty to consult on affordability. If that is not accepted, Mr Beloff supports the judge's conclusion that sufficient information was provided by mid September 2008 at the latest. That was a finding of fact which should not be disturbed. As to sufficiency of time, the point is no longer material because further time has been and will be allowed. Taking the decision making process as a whole, sufficient time was afforded to interested persons. The appellants were well placed to make representations. Further, if the Boundary Committee submit advice to the Secretary of State, there is a further period of 4 weeks during which representations may be made to her. The draft proposals published in July 2008 remain formative until the Committee decides what, if any, advice to give.
67. Mr Eadie QC, for the Secretary of State, supports the submission that the judge was correct to hold that the financial information provided by the workbooks was sufficient for a process which he regarded as bilateral. He submits that the judge was correct to hold that the statute and the Guidance do not stipulate the stage at which the Boundary Committee has to reach a judgment on affordability, provided of course that it is reached by the time advice is given to the Secretary of State. The necessary process of gathering financial information from the local authorities themselves required a developing process. The Boundary Committee were not in a position to consult on or reach a view about affordability before publishing a draft proposal in a form which would enable local authorities to provide them with sufficient relevant information.

Affordability – discussion

68. It follows from our discussion earlier in this judgment about consultation in stages that the mere fact that the July 2008 draft proposals did not address affordability did not put them outside the statutory structure. On the other hand, the full package, if it were to be recommended to the Secretary of State, had to address affordability and the Boundary Committee had at some stage to publish for consultation sufficient information explaining the full package. They had, therefore, at some stage, to consult on affordability. In so far as the July 2008 draft proposals had a timetable for representations which ended in September 2008 and asserted that the Boundary Committee would consider affordability after the date for representations had passed, we consider that the Committee went down a mistaken path. They did subsequently publish the workbooks and later hurriedly published the consultants' reports on their website. They were therefore able to make a case that, by November or December 2008, they had consulted on affordability. But they did not apparently start off on that course intending to consult on affordability; and, when the time came and in the rush to get the financial information into usable shape, they were more intent on covering the ground with the local authorities than with the public generally. They were after all at that stage themselves under what had become an impossibly short time constraint.
69. There is, we think, much to be said in favour of the proposition that the financial information was complicated and indigestible. No party to this appeal attempted to persuade us that publication of the workbooks alone constituted sufficient consultation on affordability. We do not consider that it did. We were not directed to

anything that might qualify as what the judge referred to as the bottom line. The need to obtain and publish the consultants' reports belies the contention that the publication of the workbooks alone was adequate. The need to explain the financial side of the draft proposals to the public in an understandable way was lost sight of or not understood. We do not agree with the judge that mediation by opinion makers is a proper supplement which was capable of turning inadequate consultation on affordability into adequate consultation. The Boundary Committee were obliged to do it themselves, not least when a variety of opinion makers will have had a variety of widely differing views on a potentially contentious subject.

70. We decline to say whether the publication of the consultants' reports repaired the deficiency which we perceive in the workbooks alone. The reports were not before the judge at the time of his Norfolk judgment, and we doubt whether he was in a position to conclude that there had been adequate consultation on affordability without seeing them. We were not invited to look at the reports in detail. Neither claimant set about persuading us that they were not adequate for local authority purposes, provided that they had adequate time to respond. No other party set about persuading us that they were adequate for the purposes of the public. We decline to go further than to wonder whether providing, without a short synopsis, several hundred pages of dense material from which the critical summary conclusions may not leap off the page should be regarded as adequately informing the public of the bones of the financial conclusions – as to which see paragraph 58 above.
71. What is clear is that the judge was correct to conclude that at the time of his Norfolk judgment the Boundary Committee had allowed insufficient time for those interested to respond on affordability and financial matters generally. They had not published sufficient information about affordability earlier than 21st November 2008, and they had not therefore published a (full) draft of the alternative proposals before then. Requiring responses by 5th December 2008 or the later dates in December cannot be regarded as adequate given the nature of the published material. That, however, is history. Time has passed and things have moved on. Taking time alone, there will no doubt have by now been enough time for those who may be able to do so to deal with the November 2008 reports. The lapse of time alone, however, may or may not be enough.
72. We also decline to say – for it is no longer material – whether the information that was published in the Autumn of 2008 and the means whereby it was brought to the attention of the public was adequate. No doubt publication of dense material on the internet will sufficiently alert local authorities who are waiting for it that it is there. Given time, they can, we imagine, deal with it when much of the data came from them in the first place. It must at best be an open question whether such publication alone would constitute sufficient consultation of the public, who (a) need to know that it is there, (b) need to know that it is the final stage of a larger consultation and to know where to find the earlier material of which it is part, and (c) probably need a synopsis of its headline conclusions and to be told where to find the supporting material if they want to look at it – see again paragraph 58 above. It is, however, for the Committee to decide, subject to what we have said in paragraphs 43 to 46 above, how and what to publish as part of their adapted process.

More than one proposal

73. It was contended in the East Devon case that the Boundary Committee had been wrongly advised that the legislation and the Secretary of State's request for advice constrained them to publish and subsequently to recommend a single alternative proposal only. Paragraph 9 of the judge's East Devon judgment has material indicating some of the difficulties which the Boundary Committee themselves perceived arose from this advice – see also paragraph 34. We have set out earlier in this judgment how the Committee dealt with this dilemma in its July 2008 proposals.
74. The Boundary Committee submitted to the judge that, on the construction of the statute, only a single draft proposal was possible. This submission, which we consider in more detail below, was based on the use of the word “proposal” and the phrase “alternative proposal” in the singular throughout the statute, the guidance and the request for advice (except in section 5(5)(b), which, it was said, supported the argument). The judge was initially attracted to this submission, but on reflection rejected it. He did so with reference to section 6(c) of the Interpretation Act 1978, by which, in any Act, words in the singular include the plural “unless the contrary intention appears”. He held that section 5(5)(b) did not indicate a contrary intention for the reasons given in paragraph 37 of his East Devon judgment. He then said at paragraph 38:

“Moreover, in my view, the context of the 2007 legislation points towards the singular including the plural. If the Boundary Committee's interpretation were correct it would confine it to advancing one alternative proposal when, in its expert judgment, more than one alternative proposal might have the merit of matching the five criteria, albeit in different ways. Potentially it would also mean serial consultation as each alternative proposal was advanced and, after the expense and disruption of consideration and consultation, rejected. A final factor is that in particular circumstances the Boundary Committee might decide that the calculation of the overall benefit of various alternative proposals would only be clear once possible associated arrangements have been more fully developed. Since that occurs at a later stage in the process, the sensible course in some circumstances might be to place more than one proposal before the Secretary of State so she could make a final judgment, in the light of what transpires in respect of associated arrangements. In summary the legislative purpose points in the direction of the Boundary Committee being able to advance more than one alternative proposal if, in its expert view, these meet the criteria.”

It appears that this paragraph of his judgment constituted the acceptance by the judge of the substance of written submissions put before him by Mr Eadie on behalf of the Secretary of State which have been provided to this court. The judge added that the request for advice and guidance were subordinate to the statute and could not cut down powers conferred by primary legislation.

75. Upon this finding, the Boundary Committee had misdirected themselves. East Devon submitted that the whole Devon exercise should be quashed, thus requiring the Boundary Committee to start all over again. The judge considered that this was not appropriate. There had been considerable time, effort and expense. If matters began again, the public would be satiated and new consultation would be unproductive. The judge then said in paragraph 41 of his judgment:

“In my judgment what must happen is that the Boundary Committee should consider with care whether it would be right to make further alternative proposals for Devon. If it were to decide that that course were appropriate, it would need to comply with the statutory requirements, including that under section 6(4) of consulting on such further proposals. However, the nature of complying with that obligation would be conditioned by what has already occurred. The Boundary Committee could decide, in its discretion, that responses already received were such that a more limited further consultation was all that was necessary.” (see also the judge’s paragraph 45)

It is, we understand, in part at least in the light of this that the Boundary Committee has embarked on its adapted process. The Boundary Committee’s position in this court is that it would be content for the court to uphold the judge’s ruling, but Mr Beloff draws attention to the legal instruments which could lead to a different conclusion.

76. The case in support of the contention that the 2007 Act confines the Boundary Committee to publishing a single draft alternative proposal, and thereafter recommending, if they so decide, the implementation of a single draft proposal, is most enthusiastically advanced by Mr Goudie QC, for Devon County Council, who were joined as an interested party to enable them to promote this case in the face of dwindling enthusiasm elsewhere.
77. The submission is as follows. The Secretary of State’s request for Devon asked whether there could be “an alternative proposal”. All relevant references in the 2007 Act and the Guidance are to a proposal in the singular. Section 6 of the Interpretation Act provides that words in the singular include the plural “unless the contrary intention appears”; and the contrary intention does appear when the statute is read in context. The word “alternative” in the phrase “alternative proposal” should be read as importing its classical meaning referring to a second of two possibilities, so that an alternative proposal must be a singular proposal. Section 5(5)(b) would not have been expressed as it is if “alternative proposal” in section 5(5) itself could embrace more than one proposal. The word “alternatives” in the plural at the end of section 5(5)(b) is used as a noun, not an adjective, and refers back to “two or more proposals” earlier in the subsection. In context, there is nothing surprising if the Boundary Committee are able to make one proposal only. The originating local authority can only make one proposal on which the Secretary of State has power to request advice. It would be odd if that could generate several different “alternative” proposals. The favoured construction does not unduly fetter the Secretary of State’s discretion.

78. Mr Eadie, for the Secretary of State, is the chief protagonist for the alternative view (properly so called). He submits that there is no apparent contrary intention to indicate that section 6 of the Interpretation Act does not apply. No such contrary intention appears from section 5(5)(b). This would apply to a single composite proposal for two or more unitary authorities existing side by side in separate parts of the single local authority area under consideration – as if there were a proposal for Devon to be split in two and to have a unitary authority in each of the resulting two parts. The unclassical use of the word “alternatives” here in the plural is peculiar to that possibility and does not indicate an intention contrary to section 6 of the Interpretation Act. Mr Eadie further submits that there are compelling purposive reasons for the Interpretation Act to apply, which the judge had accepted and summarised in paragraph 38 of his East Devon judgment.

More than one proposal – discussion

79. In our judgment, on reflection, Mr Eadie’s submission is correct for the reasons he gives. We reject Mr Goudie’s submissions. We say “on reflection” because an initial impression is that both the statute and the request for advice are firmly expressed in the singular, and initially appear to lead to Mr Goudie’s conclusion. The Secretary of State’s requests for advice do not have the benefit of section 6 of the 1978 Act and, taken alone, may perhaps be read as a request under section 4(2) to consider making a singular alternative proposal. But the request cannot derogate from the Boundary Committee’s statutory powers.
80. Section 6(4) of the Act does not, in our view, need assistance from the Interpretation Act for a conclusion that the Boundary Committee can consult on more than one draft proposal. All that that section says is that the Boundary Committee must publish a draft alternative proposal and receive representations on it before making that alternative proposal to the Secretary of State. There is nothing there to say that they cannot consult on more than one draft proposal. The Secretary of State cannot of course implement more than one alternative proposal, but the use of the words “that alternative proposal” in section 7(1)(b) does no more than recognise that necessity. They do not compel a conclusion that the Secretary of State cannot receive more than one alternative proposal. We suppose that, fifty or more years ago, no one would have drafted a statute using the word “alternative” as referring to more than two possibilities. But (a) each of several alternative proposals may be properly so called when they are each properly alternative to an original proposal, and (b) the use of “alternatives” – admittedly as a noun – in section 5(5)(b) is not fastidiously classical at least on one view. Mr Eadie is correct that section 5(5)(b) does not indicate a contrary intention within section 6(c) of the 1978 Act. He is also correct to point out the parliamentary context, summarised by the judge, in support of an indicative legislative purpose.

Status Quo

81. The Norfolk claimants submitted that the Boundary Committee were wrong to exclude a comparison of any proposed unitary scheme with the benefits of the present two tier structure. The Boundary Committee had made clear that this was to be their approach. They stated that the status quo would only become an option if they were unable to identify an alternative proposal or the Secretary of State did not choose to implement an alternative unitary proposal. The Committee’s position was that they

had to take account of representations in support of retaining the existing structure when they came to make their decision whether to provide advice to the Secretary of State – they were bound to do so under section 6(5)(a) of the 2007 Act. Such representations were also relevant to an assessment whether a proposed change to unitary local government was supported by a broad cross section of the community – the second of the criteria in Annex A. The claimants’ submission was that a request for advice as to an alternative proposal necessarily required a comparison of that proposal with the existing structure. It was also inherent in the requirement to assess affordability, which included considering whether the change itself represented value for money.

82. The judge considered that no such comparison was required. Neither the statute nor the request for advice expressly or implicitly required the Boundary Committee to measure any proposal against the existing two tier structure either when the Boundary Committee decide to provide advice or when they decide what advice to provide. Neither point had yet been reached.
83. The judge further considered that the Boundary Committee had made clear almost from the outset that they would not make any comparison with the existing two tier structure. Under normal principles the claimants’ delay in bringing proceedings would bar them from raising the issue. But given the importance of the matters the judge considered that any delay was to be excused.
84. In his East Devon judgment, the judge maintained his view that the Boundary Committee were not required to make a comparison with the status quo, again noting that the criterion requiring the Boundary Committee to consider whether the draft proposal enjoys a broad cross section of support meant that views about the merits of the two tier system had not been shut out.
85. The appellant councils in each case appeal against the judge’s decision that the Boundary Committee were not obliged to make a comparison with the existing two tier system. It is contended that a need for comparison is implicit in a requirement to recommend a change and in a requirement to make a judgment between recommending or not recommending the original proposal, making an alternative proposal or making no recommendation. How do you decide something is worth doing instead of something else, asks Mr Straker, if you do not compare the two? In particular, it is submitted that one of the Boundary Committee’s statutory options under section 5(3) would be to make no recommendation. This could implicitly be the product of a decision that the status quo was preferable to any alternative proposal for unitary local government. It was accordingly necessary to make the comparison. An equivalent argument is said to follow from the terms of the Secretary of State’s request for advice. It is further said that the Boundary Committee should have consulted on the comparative merits of the status quo.
86. It is also suggested and, we think, shown that the Secretary of State’s attitude to this has not been entirely consistent. The details are in Appendix A to Mr Straker’s written submission. Highlights are that on 13th December 2007 the Boundary Committee recorded a ministerial assurance that the Boundary Committee would not be drawn into expressing a view on the merits of two tier versus unitary structures. The Committee regarded this as a policy matter for the Government. But paragraph 22 of a letter dated 13th August 2008 from Mr Rowsell of the Department to the

Director of the Boundary Committee can be read as saying that a comparison of the relative merits of the status quo with a single tier of local government was required, but that it would be most constructive if it were made after a draft alternative proposal had been formulated – see also paragraphs 115 and 116 of Mr Gall’s witness statement and paragraph 46 of the Secretary of State’s grounds of resistance.

87. Mr Arden for East Devon adopts Mr Straker’s submission. East Devon do not contend that the Boundary Committee are under an obligation to conduct a comprehensive or formal comparative analysis of the merits of the draft proposal against the status quo. But without some comparison, the Committee would be unable properly to judge whether an alternative proposal should be made. Further, the Committee did not properly consult about the criterion of support by a broad cross section of those consulted, since dismissing the status quo would depress responses on that aspect.
88. Mr Beloff submits that neither the 2007 Act nor the terms of the Secretary of State’s request for advice expressly or impliedly required comparison of any unitary structure with the status quo. The 2007 Act contains a presumption in favour of unitary local government. Any proposal put forward under the Act has to be for a single tier structure. The 2007 Act, unlike its predecessor, does not require the Boundary Committee to consider whether there should be structural change. Even under the 1992 Act, the Court of Appeal took the view in the *North Yorkshire* case that the Local Government Commission was not obliged to consult on the merits of the then present system of local government. There was a number of possible circumstances in which the Boundary Committee might decide to make no recommendation which did not predicate a judgment that the existing system was preferable. The Boundary Committee has, it is submitted, a discretion to consider the status quo, but are not obliged to do so.
89. Mr Eadie submits that the 2007 Act does not require a comparison with the status quo. It contains a presumption in favour of unitary solutions, and any alternative proposal has to be for a single tier of local government. The request for advice does not ask the Boundary Committee to consider the merits of the existing two tier system. It asks whether there might be an alternative proposal for a single tier of local government capable of meeting the five criteria or, in the case of Norfolk, which of two unitary solutions would better meet the criteria. If so, the Secretary of State requests the Boundary Committee to make such a proposal. These questions do not require a comparison with the status quo. The Boundary Committee were correct to say that the status quo only assumed relevance if they were unable to formulate and recommend an alternative unitary proposal which met the criteria. But that would not require a comparative judgment. The Boundary Committee were however obliged to take account of representations in support of the status quo, if they received them, but in any event when they addressed the criterion whether a unitary proposal had a broad cross section of support.

Status quo – discussion

90. In our view, the parties’ submissions on this topic tend to over-simplify its subject matter. Comparison between an existing two tier structure and one or more proposed unitary structures cannot easily be boxed into a small single subject parcel. People may prefer one or other structure for broad organisational, cultural, political or

systemic reasons; or because they prefer the main council offices to be within 10 miles of their home rather than 40 miles away across the county; or because of cost, believing that large bureaucracies tend to be more expensive than smaller ones; or again because of cost, believing that unitary arrangements tend to result in economies of scale; or in the belief that a larger unit will withdraw the personal approach to local authority services which a smaller unit may more sympathetically provide; and so on.

91. The Boundary Committee do have to consider some of these matters, not only because section 6(5)(a) requires them to take account of material representations made to them – which they will not sufficiently do simply by receiving them and putting them to one side; and because the second of the five criteria requires them to be satisfied that there is reasonably likely to be a broad cross section of support of partners and stakeholders; but also because other comparisons are embedded in other parts of Annex A.
92. One such implicit comparison is that of “value for money” in the first criterion and paragraph 3 of Annex A. This phrase in the first criterion does not demand a comparison wider than its use in its context in paragraph 3. But it does embrace an exercise such as paragraph 3 requires. This includes, for instance, determining “revenue savings as a result of restructuring”, which requires a direct comparison with the status quo; and the fifth criterion “value for money and equity in public services” with the prose in paragraphs 11 and 12 in effect require that the services under a proposed unitary structure are to be as good as or better than those presently provided and at less cost. Such comparisons, and perhaps others, are at least implicitly required.
93. However, in our judgment, a separate blanket comparative judgment is not required and the judge was correct so to decide. The request for advice does not ask for such comparison beyond those which are required by section 6(5)(a) and the Annex. The request asks only whether there could be an alternative proposal which would achieve the five criteria. Section 4 of the Act permits, but does not require, a comparison. Section 5 requires a degree of consideration of the original proposal – see below – but not of the status quo. The context in which the Boundary Committee have to decide which course to follow of those which are available to them under section 5 does not demand a comparison, when the Boundary Committee are giving advice, not making the eventual decision. In so far as a comparison may be required which is not implicit in section 6(5)(a) and the Annex, that is appropriately for the Secretary of State under section 7.

Original proposal

94. It was contended in the East Devon case that the Boundary Committee were obliged to compare any alternative proposal with the original Exeter proposal submitted to the Secretary of State, and that they had not done so. It was accepted that there was no need for the Boundary Committee to consult on this original proposal, but it had to be considered as a possibility and the Committee needed to have regard to the narrow basis on which the Secretary of State’s decision on affordability had been reached. It had however been treated as beyond the scope of the Committee’s consideration.
95. The judge decided that the Boundary Committee had gone as far as was necessary. He accepted evidence to the effect that the Committee had considered the matter and

he saw no evidence to the effect that the Committee did not reach their own decision on the matter (paragraph 33).

96. East Devon appeal against the judge's decision that the Committee had in fact sufficiently considered this matter. The Norfolk appellants advanced a coat tails appeal to equivalent effect. Mr Straker's written skeleton contends that the Frequently Asked Questions document shows that the Boundary Committee had decided not to consider the original Norwich proposal and that there was no evidence to show that they did consider it. Subsequent to the judge's Norfolk judgment, the third witness statement of Mr Gall contained material to the effect that the committee members had considered the original Norwich proposal, but had decided against recommending its implementation, accepting the Secretary of State's judgment about it. In the face of this, Mr Straker did not persist in the submission.
97. For East Devon, Mr Arden shows that in March 2008, the Minister had indicated that, although the Secretary of State had concluded that the original proposals were not reasonably likely to meet the five criteria, no decision had been taken to reject the original proposals and it remained open to the Boundary Committee to recommend the original Exeter proposal. Mr Gall's evidence was that the Committee reached the view at an earlier stage that its process should not involve further investigation into the Exeter proposal and they proceeded accordingly. Mr Arden takes the very narrow point that there is no minute recording any such consideration by the Committee, and he invites the conclusion that the Committee in truth gave no consideration to the original Exeter proposal.
98. In a further witness statement of 21st January 2009 in the Norfolk case, Mr Gall referred to a Committee meeting in August 2007 at which it was minuted that the Committee would need to take into account the same considerations as had the Secretary of State in reaching conclusions on the original bid. Mr Arden says that it is all the more surprising that no minute shows that this was done for Exeter. He further submits that the Boundary Committee must put their own minds to the merits of the Exeter proposal and could not simply adopt the view of the Secretary of State, which had been reached in different circumstances and which had not been subjected to as extensive consultation as that which the Boundary Committee should hold.
99. Mr Beloff submits that the legislation does not require scrutiny of or consultation about the original proposals to the extent suggested before the Boundary Committee makes an alternative proposal or at all. He accepts, perhaps, that the Committee have to consider whether to recommend the implementation of an original proposal without modification, because that is one of their powers upon receiving a request for advice in section 5 of the 2007 Act, another power being that the Committee should recommend that the Secretary of State does not implement an original proposal. But Mr Beloff supports the judge's decision that the Boundary Committee gave adequate consideration to this, and as a matter of fact took decisions not to proceed with either of the original proposals. The Secretary of State's request for advice did not positively ask for advice on the original proposals.

Original Proposal - discussion

100. This is a very narrow point which we deal with shortly. The Boundary Committee did have to consider the original proposals because their powers under section 5(3)

included recommending their implementation or recommending that they should not be implemented. Since, however, in each case the Secretary of State had given a strong indication that she was not likely to decide to implement either of them on affordability grounds, so long as consideration was in fact given by the Boundary Committee, it need not have been extensive. In these circumstances, the only question is whether they did in fact do this, and the evidence is sufficient to establish that they did.

Delay and prematurity

101. Before this court the Boundary Committee took the uncomfortably inconsistent stance that, on the one hand, the claims for judicial review should not have been entertained because of the claimants' delay in bringing them; and, on the other hand, that the court should grant no remedy, as the judge did not in the East Devon case, because the claims were premature. We have more sympathy with the prematurity argument than with the delay argument.
102. As to delay, Mr Beloff submits that the appellants were well aware at stages much earlier than July 2008 of the Boundary Committee's intended approach on the main matters of which they have complained in these proceedings. We have indicated that we broadly accept that this was so by 3rd March 2008, if not earlier. Mr Beloff refers to *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1 WLR 1593 in which lower courts had refused to entertain, on the ground of delay, an application for judicial review of a resolution that outline planning permission should be conditionally granted. The House of Lords allowed an appeal, holding that the grounds for judicial review first arose on a later date when planning permission was actually granted.
103. Lord Steyn considered the interpretation and application of the relevant rules of court, which provided that claims for judicial review should be made promptly and in any event within 3 months of the date when the grounds for the application first arose. Lord Steyn said, at paragraph 38, that for substantive judicial review purposes the decision challenged does not have to be absolutely final. Where there is a statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights. On one view, until planning permission was actually granted, the resolution had no legal effect. A contrary argument was that it is disruptive of good administration for a citizen to delay his application until the actual grant of planning permission (paragraph 40).
104. Mr Beloff relies here also on section 31(6) of the Supreme Court Act 1981 by which, where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant leave or relief if, among other things, it considers that to do so would be detrimental to good administration. Mr Beloff says the challenge should have been made much earlier, when much time, effort and expense would have been saved. We were not entirely clear what Mr Beloff suggested would have happened if the claimants had started proceedings in March 2008. We rather think that the Boundary Committee would have complained more loudly that the claimants were acting prematurely. Mr Beloff stresses that the public interest in good administration requires that public authorities should not be

kept in suspense as to the validity of their decisions longer than is absolutely necessary.

105. Lord Steyn said at paragraphs 42 and 43 in *Burkett*:

“The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he *must* apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort.

At this stage it is necessary to return to the point that the rule of court applies across the board to judicial review applications. If a decision-maker indicates that, subject to hearing further representations, he is provisionally minded to make a decision adverse to a citizen, is it to be said that time runs against the citizen from the moment of the provisional expression of view? That would plainly not be sensible and would involve waste of time and money. Let me give a more concrete example. A licensing authority expresses a provisional view that a licence should be cancelled but indicates a willingness to hear further argument. The citizen contends that the proposed decision would be unlawful. Surely, a court might as a matter of discretion take the view that it would be premature to apply for judicial review as soon as the provisional decision is announced. And it would certainly be contrary to principle to require the citizen to take such premature legal action.”

Lord Steyn considered that the arguments in that case in favour of time running from the date of the resolution had been given undue weight. There was a number of countervailing policy considerations which he considered in paragraphs 45ff.

106. In our judgment, the case for delay is not made out. Indeed we think that the case that the proceedings were premature is in some respects stronger than the case that they were started late. Although the Boundary Committee had stated the ways in which it intended to proceed, there was, until July 2008 at least, no decision available to be challenged. There is a case for saying that there was no decision amenable to challenge even in July 2008, but for the purposes of Mr Beloff’s delay argument it is not necessary to go that far. At least until the publication of the draft proposals in July 2008, it was quite possible that the Boundary Committee’s approach would change. Soon after July 2008, the appellants made clear what the main lines of their challenge would be and started their proceedings in due time soon after that. The Boundary Committee proceeded as they did in part in face of these challenges.

107. Mr Beloff also has a muted submission that the Norfolk appellants should not be allowed on account of delay to amend their grounds of appeal to adopt submissions, in part successful before the judge, which were advanced by East Devon in their claim. We are clear that all proper submissions made by East Devon should be

available to the Norfolk claimants also. In a matter of such importance such as this, it would be absurd if East Devon were to succeed on a submission which was capable of applying to Norfolk, but Norfolk were not allowed to make the same submission.

108. As to prematurity, there are perhaps two questions: first, whether the claims were prematurely brought in the first place; second, whether to the extent that legal arguments may succeed, the court should do more than enunciate that success. The appellants seek an order quashing the entire Boundary Committee process back to and including the publishing of the draft alternative proposal in July 2008, thus requiring the Boundary Committee to start the consultative process all over again. That would be a radical and most unusual course for the court to take, when the Boundary Committee has yet to take any decision of the kind which is commonly amenable to judicial review. Therein lies the argument that the court should not grant substantive relief, because it remains open to the Boundary Committee to take steps to correct errors which it may have made in a way which would produce lawful advice and recommendation to the Secretary of State. The appellants' position is that the process heretofore has been so fractured that only a fresh start can produce a lawful outcome. That embraces the proposition that, whatever the Boundary Committee do between now and 15th July 2009 or any later yet further extended date, a lawful outcome can never be built on this fractured base.
109. The appellants submit that they did not bring their proceedings prematurely. At the time when the Boundary Committee published their draft alternative proposals in July 2008, it was sufficiently clear that they were intending to proceed (and they did in fact proceed) on lines which did not accord with their statutory powers and obligations and it was not premature to ask the court to say so. As was said in *R v Secretary of State for Transport ex parte London Borough of Richmond upon Thames* [1995] Env.L.R. 409 at 412, if it is arguable that a consultation is proceeding on a false basis which is justiciable in law, there is every reason to lean in favour of deciding the issue sooner rather than later. Indeed, in the real world, if proceedings were postponed until the Boundary Committee had made an alternative proposal to the Secretary of State which did not adopt representations which the appellants had been able to make, the possibility of persuading the Secretary of State not to adopt the Boundary Committee's recommendations would have been seriously prejudiced. Further, the proceedings taken together were successful in (a) achieving a decision that the Boundary Committee could lawfully promote more than one alternative proposal, thereby establishing that the publishing of the original draft proposal was made under a material mistake of law, and (b) in effecting an extension to the period of consultation on affordability and of the time by which the Boundary Committee were to advise.
110. Mr Beloff maintains the position that any challenge to the consultation process is premature because it is incomplete. The intervention of the court is inappropriate before a substantive decision is made. This applies in particular to the question whether the Boundary Committee can publish and recommend more than one draft proposal, because the revised timetable would enable them to do so. He maintains further that, even if some of the appellants' legal submissions are upheld, the court should not grant relief because the process taken as a whole is capable of being put right.

111. In our judgment, the appellants' partial success before the judge and in this court shows that their claims were not brought prematurely in the first place. They have duly established that the Boundary Committee were proceeding under a mistake of law and, apparently, carried other parties except Devon County Council with them. They have also shown in this court that the Boundary Committee would not have carried out a sufficient consultation, if they had proceeded as they did and reported to the Secretary of State by or before the end of 2008 – this because they gave too little time for representations on affordability. Beyond that, the subject of prematurity merges with that of relief, to which we now turn.

Relief

112. For the reasons given in this judgment, the appellants have succeeded in establishing in these proceedings (a) that the Boundary Committee promoted their original draft proposals for Norfolk and Devon upon the mistaken legal basis that it was only open to them to consult upon and recommend a single proposal; and (b) that their consultation in the Autumn of 2008 on affordability was not then adequate because it did not give those consulted adequate time to consider and make representations about duly formulated financial materials. The appellants say that these errors were so fundamental that the Boundary Committee should be required by the court to start all over again. The judge, they say, was wrong to decline to require them to do so; wrong to suppose that a fractured process can be mended; wrong to say that the public would be fed up with a yet further process starting from the beginning. Mr Arden submits that local authorities should not be abolished upon advice given by the Boundary Committee which is, as he would say, tainted with illegality.
113. We are not persuaded by these submissions. It would be most unusual for the court to “quash” part of an incomplete process. We could, we suppose, in theory declare that, unless the Boundary Committee were to start all over again, any decision which they eventually came to by whatever process would be bound to be unlawful. But we are far from being persuaded that we should do this. We say nothing about whether the Boundary Committee will succeed in concluding the process for Norfolk and Devon lawfully. That is all in the future. But we do not see that what they have done so far is broken beyond repair. It will be clear from this judgment that two of the main matters which need to be addressed are (a) consideration of further possible alternative proposals, with proper consultation if any of them is to be recommended as an alternative proposal; and (b) adequate time for local authorities and the public to make representations on the affordability of the existing alternative proposals after appropriate publication of financial information in a sufficiently digestible form. Beyond that we decline to give consultative advice as to how the Committee should proceed.
114. We are not at the time of writing this judgment persuaded to grant substantive relief, since we trust that the judgment itself sufficiently informs the parties as to our decisions of law and (in a limited sense) of fact. We will, if necessary, entertain brief written submissions on this topic when the judgment is given.