IN THE MATTER OF:

THE HART DISTRICT COUNCIL LOCAL PLAN EXAMINATION

OPINION

I. INTRODUCTION

1. I am instructed to advise Wates Developments Limited ("**Wates**") in relation to Document 'EXAM 49' which was recently by Hart District Council ("**the Council**") to the Hart District Council Local Plan Examination at which Wates is a participant.

2. EXAM49 is entitled 'Note on the Approach to the Sustainability Appraisal of the Hart Local Plan'. It purports to deal with an issue discussed on Day 1 of the Examination on 20 November 2018, and to be explored further on Day 9 of the Examination on 13 December 2018. The issue in question is whether the process of sustainability appraisal ("**SA**") undertaken by the Council is compliant with the law relating to strategic environmental assessment ("**SEA**") in circumstances where the Council has produced and relies upon a 'Post Submission Interim SA Report' dated August 2018 which was not the subject of consultation.

3. EXAM49 concludes at para. 7-8:

> "7. [T]he Post Submission Interim SA Report is not part of the Sustainability Appraisal that was consulted on under regulations 19 and 35 of the 2012 Regulations. Nor does it replace them *[sic]*. Consequently, the LPA was not obliged to consult on the document.
>
> 8. Notwithstanding the above position, following the present hearing the Plan as modified will need to be subject to and accompanied by a SA. The Analysis and conclusions expressed in the post-submission interim SA will be incorporated in the post-modification SA and consulted on through that process".

4. I consider that this analysis is wrong in law and that the process undertaken by the Council is not legally compliant.

II. LEGAL FRAMEWORK

5. The legal obligations in relation to SA derive from European Union law set out in Directive 2001/42 ("**the Directive**") which are transposed into English law by the Environmental Assessment of Plans and Programmes Regulations 2004 ("**the 2004 Regulations**"). As the Directive and the 2004 Regulations are identical in substance, I shall refer only to provisions of the former.

6. At the heart of the Directive is the requirement for certain kinds of plans (of which the Hart District Local Plan is one) to be subject to "environmental assessment" which is defined in Article 2(b) as :

> "the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9."

7. The "environmental report" ("**ER**") is defined in Article 2(c) as:

> "the part of the plan or programme documentation containing the information required in Article 5 and Annex I."

8. In England the SA of a draft plan performs the function of the ER for the purposes of the Directive and the 2004 Regulations.

9. The information required to be in an ER/SA is set out in Article 5 and Annex I includes:

   a. Identification, description and evaluation of the likely significant environmental effects both of the proposed plan policies and of the "*reasonable alternatives*": Article 5(1).

   b. "*an outline of the reasons for selecting the alternatives dealt with*" : Annex I(h)

10. The draft plan and ER/SA must be subject to public consultation at a time when there is an *"early and effective opportunity"* for the public to express their view: Article 6(2).

11. The ER/SA and the responses to the public consultation *"shall be taken into account during the preparation of the plan or programme"*: Article 8.

12. The effect of Articles 6 and 8 were discussed by Weatherup J. in ***Seaport Investments Limited's application for judicial review*** [2008] Env. L.R. 23 at para. 49:

> "the Environmental Report and the draft plan operate together and the consultees consider each in the light of the other. This must occur at a stage that is sufficiently 'early' to avoid in effect a settled outcome having been reached and to enable the responses to be capable of influencing the final form. Further this must also be 'effective' in that it does in the event actually influence the final form."

13. Subject to two important provisos, is possible in principle for compliance with the Directive and the 2004 Regulations to be achieved by the original ER/SA accompanying the submission draft plan to be supplemented by an addendum, so that what then matters for the purposes of Article 5 and Annex I is whether the totality of the original ER/SA and the addendum contain the material required by those provisions: see ***Cogent Land v. Rochford District Council*** [2013] 1 P. & C.R. 2. The two important provisos to this are that:

    a. The addendum SA must be subject to public consultation in accordance with the requirements of Article 6 of the Directive; and

    b. It cannot be an after-the-event justification of past decisions already made, for that would mean that the consultation on the addendum ER/SA would not be *"early and effective"* as required by Article 6(2) and/or it would mean that the preparation of the relevant aspect(s) of the plan would not be genuinely informed by the addendum ER/SA and

the responses to the consultation as required by Article 8. That proviso was central to the finding of Singh J. that on the particular facts of the ***Cogent*** case, which are far removed from those of the present case, the addendum ER/SA had been compliant with the Directive

III. ANALYSIS

14. The first point made in the conclusions of EXAM49, namely that the August 2018 'Post Submission Interim SA Report' did not form part of, nor was indented to replace, the original February 2018 SA, misses the point. What matters is that if this document was (and is) to be relied upon as contributing to the Council's performance of its obligations under the Directive and the 2004 Regulations, as supplementing the previous SA work, then it should have been consulted upon pursuant to Article 6 of the Directive.

15. On any fair reading of the August 2018 'Post Submission Interim SA Report', it was intended to – and purported to – contribute to the environmental assessment of the Local Plan and thus contribute to the Council's performance of its obligations under the Directive and 2004 Regulations. There is no other tenable way of reading it.

16. It is equally plain that the Council relies upon the August 2018 'Post Submission Interim SA Report' in seeking to persuade the Inspector that the obligations under the Directive and 2004 Regulations, in particular relating to the assessment of reasonable alternatives, have been complied with. Put another way: if the August 2018 'Post Submission Interim SA Report' were ignored (as it must be given the manifest non-compliance with Article 6 and thus Article 8 of the Directive), and if as a consequence compliance with the obligations relating to assessment of reasonable alternatives were to stand or fall by reference to the February 2018 SA, it would be irrefutable that those obligations have not been complied with. To take just one example, which was raised by Gleeson on Day 1 of the Examination, the Rye Common site was not assessed as a reasonable alternative in the February

2018 SA but the Council now accepts that it is a reasonable alternative and relies upon the subsequent assessment of it as such in the August 2018 'Post Submission Interim SA Report'. Thus on the Council's own case, if this document is ignored there has been non-compliance in relation to the obligations associated with the SEA of reasonable alternatives.

17. The simple and short point is that as the August 2018 'Post Submission Interim SA Report' was and is non-compliant with Articles 6 and 8 of the Directive, it cannot lawfully be taken into account in assessing whether the Council has complied with its obligations under the Directive (and thus under the 2004 Regulations). Otherwise, the adoption of the plan would be unlawful and liable to be quashed following challenge under s.113 of the Planning and Compulsory Purchase Act 2004.

18. There is also no merit in the second point made in the conclusions of EXAM49, namely that the August 2018 'Post Submission Interim SA Report' can be repackaged within a further Addendum ER/SA that the Council intends to subject to public consultation following the examination hearings.

19. The principal purpose of this future Addendum ER/SA is to deal with current proposed modifications to the Local Plan that have arisen post-submission / during the course of the examination. Plainly, the SA/ER *of those proposed modifications* could not have been undertaken earlier, and therefore its consultation at this stage is capable of being *"early and effective"* as required by Article 6(2) and of coming at a time when there is still full scope for consultation responses to influence the decision on whether those modifications should be accepted.

20. The purpose of the August 2018 'Post Submission Interim SA Report' was, however, different. It was intended to support the case for the earlier decisions undertaken in the past preparation of the submission draft plan, including in particular in relation to Murrell Green. It was expressly intended to *"inform the*

local plan examination" (para. 1.2.3) in considering the soundness of those past decisions. Yet the Council's proposed approach would lead to the analysis in this report being subject to consultation (i) many months after the document was first produced, (ii) still more months after the preparation of the submission plan version of the plan which this document is intended to support, and (iii) after the local plan examination hearings which the document is intended to inform have concluded. In these circumstances, on no sensible view can public consultation on the analysis within the August 2018 'Post Submission Interim SA Report' be said to provide an "*early and effective opportunity"* for the public to express their views and/or to enable those views to have an effective influence on the preparation of the aspects of the plan to which this document relates.

IV. CONCLUSION

21. Contrary to what is suggested in EXAM49, the proper conclusion is that there is non-compliance with the legal obligations under the Directive and the 2004 Regulations and that the Council's proposal to consult after the conclusion of the examination hearings on the analysis August 2018 'Post Submission Interim SA Report' would not cure that non-compliance.

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11 December 2018