RE: EXAMINATION IN PUBLIC OF THE HART DISTRICT COUNCIL EMERGING LOCAL PLAN

ADVICE

Introduction

1. We are asked to advise Lightwood Land, Gallagher Estates and Barratt Homes in connection with the examination in public ("the Examination") by the appointed Inspector, Mr Jonathan Manning BSc (Hons) MA MRTPI, of Hart District Council's emerging local plan ("the ELP").

2. In particular, we are asked to advise on whether the analysis and conclusions contained in Hart DC's Post-Submission Interim SA Report of August 2018 (CD5c) ("the Aug 18 Report") can be included in the SA of the ELP at main modifications stage, so as to cure any defects which the Inspector identifies in the SA of the submission version of the ELP (CD5a) ("the Feb 18 SA").

3. In an Opinion dated 11 December 2018 and presented to the Examination by Wates Developments Ltd, Mr Charles Banner of Counsel has argued that the contents of the Aug 18 Report cannot be relied on in this way, even if they are consulted on at main mods stage.

4. For the reasons which follow, we are of the clear opinion that Mr Banner's analysis of the law in this regard is wrong.

Legal framework

5. The law on strategic environmental assessment ("SEA") emanates from Directive 2001/42/EC of the European Parliament and Council on the assessment of effects of certain plans and programmes on the environment ("the SEA Directive"). The SEA Directive is transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regs").

6. The leading authority on the use of addendums to cure deficiencies in the SEA process is *Cogent Land LLP v Rochford DC* [2013] 1 P&CR 2. The case concerned a s. 113 challenge

to several of housing policies in Rochford's adopted Core Strategy ("the RCS"), which identified a number of broad locations for release from the Green Belt to help meet the council's housing requirement.

7. At the time of the commencement of the RCS' examination in public, the SEA of the RCS was based on the SA of the pre-submission draft. There had also been SAs produced at the issues and options and preferred options stages, as well as a revised preferred options SA. Following the conclusion of the hearings, Rochford asked the inspector to delay the publication of her report, to enable it to prepare an addendum to its SA. The addendum was duly published, after which (following a refusal of a further adjournment request) the inspector submitted her report to the Secretary of State.

8. The Court (Singh J, as he then was) found that the revised preferred options SA was legally deficient, on the basis that it did not contain analysis or information enabling the public to understand why the preferred options had been selected over the reasonable alternatives, nor to scrutinise the evidence on which the preferred options had been identified (para 86). The Judge held that the SA "*did not set out adequately the reasons for preferring the alternatives that were selected*" (para 89).

9. He went on, however, to uphold the RCS, on the basis that the defect in the SA had been cured by the addendum. The relevant analysis arises under ground 4 of the claim, which concerned Cogent Land's submission that "*even if as a matter of fact, the Addendum did comply with the requirements of the [SEA] Regulations and the [SEA] Directive, as a matter of law it was incapable of curing the defects in the earlier stages of the process*" (para 108).

10. The Judge rejected Cogent Land's case. He held as follows (para 112):

> First, it should be noted that "Strategic Environmental Assessment" is not a single document, still less is it the same thing as the Environmental Report: it is a *process*, in the course of which the Directive and the Regulations require production of an "Environmental Report". Hence, art.2(b) of the SEA Directive defines "environmental assessment" as:
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> "the preparation of the environmental report, carrying out consultations, the taking into account of the environmental report and the results of the consultations in the decision making and the provision of information on the decision in accordance with Articles 4 to 9".
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> 113 Furthermore, although arts 4 and 8 of the Directive require an "environmental assessment" to be carried out and taken into account "during the preparation of the plan", neither article stipulates when in the process this must occur, other than to say that it must be "before [the plan's] adoption". Similarly, while art.6(2) requires the public to be given an "early and

> effective opportunity … to express their opinion on the draft plan or programme and the accompanying environmental report", art.6(2) does not prescribe what is meant by "early", other than to stipulate that it must be before adoption of the plan. The Regulations are to similar effect: reg.8 provides that a plan shall not be adopted before account has been taken of the environmental report for the plan and the consultation responses.

11. The Judge's focus, therefore, was on the need for adequate environmental information to have been produced, consulted on and considered prior to adoption. That can also be seen from para 124, where Singh J described the effect of earlier cases on SEA (emphases in the original):

> I accept Bellway's submission that the claimant's primary argument seeks to extend the principles in *Forest Heath* and *Heard* beyond their proper limit. Those were both cases where the Court was satisfied that *no* adequate assessment of alternatives had been produced prior to *adoption* of the plans in those cases. Although they comment (understandably) on the desirability of producing an Environmental Report in tandem with the draft plan, as does *Seaport*, neither is authority for the proposition that alleged defects in an Environmental Report cannot be cured by a later document.

12. The Judge concluded his analysis of ground 4 by recognising the implications which would follow from Cogent's argument:

> 125 I also consider, in agreement with the submissions by both the defendant and Bellway, that the claimant's approach would lead to absurdity, because a defect in the development plan process could never be cured. The absurdity of the claimant's position is illustrated by considering what would now happen if the present application were to succeed, with the result that Policies H1, H2 and H3 were to be quashed. In those circumstances, if the claimant is correct, it is difficult to see how the defendant could *ever* proceed with a Core Strategy which preferred West Rochford over East. Even if the defendant were to turn the clock back four years to the Preferred Options stage, and support a new Preferred Options Draft with an SA which was in similar form to the Addendum, the claimant would, if its main submission is correct, contend that this was simply a continuation of the alleged "ex post facto rationalisation" of a choice which the defendant had already made. Yet if that choice is on its merits the correct one or the best one, it must be possible for the planning authority to justify it, albeit by reference to a document which comes at a later stage of the process.

13. *Cogent Land* was considered, and upheld, by the Court of Appeal in *No Adastral New Town Ltd v Suffolk Coastal DC* [2015] Env LR 28. The case concerned a housing allocation policy in Suffolk Coastal's adopted Core Strategy. At first instance, the Planning Court (Patterson J) found that there had been a number of breaches in the SA process, but that the flaws had been remedied before the CS was adopted. The claimant appealed to the

Court of Appeal, contending (amongst other things) that as a matter of law, earlier deficiencies in the SA process were incapable of being cured later in the process (para 5).

14. The Court of Appeal rejected that argument, preferring Suffolk Coastal's submission that "*each of [the] deficiencies was subsequently cured and that the requirements of the SEA Directive and implementing regulations had been complied with by the time of the adoption of the CS …*" (para 46). The Court held (para 53) that "*the conclusion reached by Singh J [in Cogent Land] on the issue of principle was correct for the reasons he gave.*" The Court went on to record, without demur, an obiter comment by Sales J (as he then was) in *Ashdown Forest Economic Development Llp v SSCLG* [2014] EWHC 406 (Admin)[1], as follows (para 53):

> In Sales J's view the correct focus for analysis under the SEA Directive was the Core Strategy documents submitted for independent examination by the inspector: "[the] procedures involved in independent examination of a plan by an inspector, including by examination in public, appear to me to be a consultation process which is capable of fulfilling the consultation requirement under Article 6 of the Directive".

15. The Court of Appeal went on to reject the claimant's suggestion that *Cogent Land* was limited to failures of reasoning, rather than deficiencies of process. There was, the Court held, no relevant distinction between the two cases (para 54).

Analysis

16. In his Opinion, Mr Banner identifies two reasons why, in his view, the Aug 18 Report cannot be taken into account by the Inspector in deciding whether the ELP has been lawfully assessed for SEA purposes. In summary, these are as follows:

    a. The Aug 18 Report has not been consulted on (para 14); and

    b. The inclusion of the Aug 18 Report's analysis and conclusions in the main mods SA would not render it a lawful part of the SA either, because the contents of the Aug 18 Report related back to decisions taken in the submission draft of the ELP, and the main mods SA will occur after the conclusion of the EiP's public hearings. Such a consultation would not, in Mr Banner's view, be an "*early and effective opportunity*" for public engagement, and would not enable the

[1] Sales J was subsequently overturned by the Court of Appeal ([2016] PTSR 78), though this aspect of his reasoning was not criticised.

consultation responses to have an effective influence on the preparation of the ELP

17. In our opinion, neither of Mr Banner's conclusions is correct. We will address them in turn.

18. As to the first point, it is notable that Mr Banner's Opinion makes no mention of the *No Adastral New Town* case, in which the Court of Appeal recorded, without demur, the view of Sales J that the examination process (including the public hearings) was itself a form of consultation for the purposes of the SEA Directive and SEA Regulations. It is notable, in this regard, that the contents of the Aug 18 Report have been subject to extensive and detailed consideration (both orally and in writing) in the course of the Examination so far. In those circumstances it cannot realistically be argued that any party to the Examination (including Wates) has been prejudiced in any way by the absence of a pre-Examination consultation on the Aug 18 Report.

19. As to the second point, Mr Banner's analysis is in our view wholly inconsistent with both *Cogent Land* and *No Adastral New Town.* Mr Banner focuses on the fact that the main mods SA consultation will occur after Hart DC's decision to include Policy SS3 in the ELP. That, however, was equally true in *Cogent Land*. Indeed, the position in *Cogent Land* was considerably starker than in the present case: in *Cogent Land* the SA addendum was produced after the examination hearings had concluded, and related to the revised preferred options stage, which had been published almost three years earlier. That sequence of events did not render the adoption of the RCS unlawful; the same is true *a fortiori* in the present case.

20. Mr Banner's analysis is also contrary to the clear findings, in both *Cogent Land* and *No Adastral New Town*, that the requirement for early and effective consultation is to be measured by reference to the adoption of the ELP. What matters is that an adequate SEA assessment has been undertaken prior to the adoption of the ELP by Hart DC. Mr Banner has not suggested that the SA and the Aug 18 Report are inadequate for SEA purposes when taken together, and Hart DC has already committed (EXAM49 at para 8) to ensuring that the contents of the Aug 18 Report are subject to consultation prior to the adoption of the ELP. The proposed process is in our view clearly sufficient to enable the contents of the Aug 18 Report to be relied on to cure any defects which are identified in the Feb 18 SA (or indeed in the wider SEA process).

21. Finally, we note that on Mr Banner's view it is now effectively impossible for Hart DC ever to proceed with a plan which includes Policy SS3, however strong the justification for doing so, because any such inclusion would be justified by documents produced after the decision to include SS3 was first taken (para 20 of his Opinion). Mr Banner's analysis in this regard gives rise to precisely the same absurdity that Singh J identified in *Cogent Land* at para 12 (see above), and is incorrect for the same reasons.

Conclusion

22. For the reasons given above, we have concluded that the process proposed to be adopted by Hart DC in respect of the August 18 Report are lawful, and will enable its contents to form part of the SEA assessment of the ELP. The Examination itself is a form of consultation on the Aug 18 Report. Even if it is not, Hart DC has committed to consulting on the contents of the Aug 18 Report before the adoption of the ELP. That is all that the law requires.

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