IN THE MATTER OF:-

THE HART DISTRICT LOCAL PLAN EXAMINATION

REPLY BY THE LOCAL PLANNING AUTHORITY
TO THE OPINION OF
MR CHARLES BANNER OF COUNSEL
ON BEHALF OF WATES DEVELOPMENT LIMITED

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1 I am instructed by Hart District Council to reply to an Opinion prepared by Charles Banner of Counsel dated 11th December 2018, which has been submitted to the inspector appointed to examine the Hart District Local Plan in support of an objection made by Wates Developments Limited to policy SS3 of the Plan.

2 In essence, Mr Banner contends as follows:-

(1) The "Post Submission Interim SA Report" ("the Interim Report") dated August 2018 was, and is, intended to supplement and be relied upon as contributing to the Council's performance of its obligations under Directive 2001/42 and the Environmental Assessment of Plans and Programmes Regulations 2004.

(2) Article 6 of the Directive required the Council to publish the Interim Report for consultation.

(3) No formal consultation having been carried out, the Interim Report may not lawfully be taken into account in assessing whether the Council has complied with its obligations under the Directive and the 2004 Regulations.

(4) Should the Interim Report be taken into account, the Plan is liable to be quashed on a challenge under section 113 of the Planning and Compulsory Purchase Act 2004.

(5) Underpinning each of these arguments is the key assertion that the decision of Singh J in *Cogent Land v Rochford District Council [2013] 1 P. & C.R. 2* is authority for the proposition that an "Addendum" to a sustainability report may

not lawfully support the case for the earlier decisions made in the past preparation of that plan.

(6) Finally, it is suggested that if the Interim Report is disregarded in determining whether the Council has complied with its obligations under the Directive and the 2004 Regulations, the SA Report would itself be unlawful because it would have failed to assess "reasonable alternatives".

The obligation to prepare a sustainability report: relevant legal principles

3 The council's preparation of the local plan triggered an obligation under regulation 5 of the 2004 Regulations to:-

"…carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure."

4 That obligation must be discharged by the preparation of an "environmental report": regulation 12(1). The report is required to identify, describe and evaluate the likely significant effects on the environment of the plan and its reasonable alternatives: regulation 12(2). Regulation 13 requires the draft plan and the environmental report to be made available for consultation for a period of such length as is needed to allow "consultation bodies" and the public an effective opportunity to express their opinions on the documents.

5 The Planning and Compulsory Purchase Act 2004 and the Town and Country Planning (Local Planning) (England) Regulations 2012, lay down the legislative procedure for the implementation of the 2004 Regulations (and the equivalent provisions of the Directive) in plan-making.

6 Section 19(5) of the Act requires a local planning authority to carry out a sustainability appraisal of the local plan and prepare a report on its findings. Section 20(3) requires that when a plan is submitted to the Secretary of State for examination it must be accompanied by such other documents as may be prescribed. Regulations 17 and

22(1)(a) of the 2012 Regulations require prescribe a "sustainability appraisal report". : The local authority must then invite representations on the plan and the sustainability report for period of at least 6 weeks: see regulations 17 and 20(2).

7 The overall effect of the 2004 and 2012 Regulations and the relevant sections of the 2004 Act is to require a sustainability appraisal report to be prepared, consulted upon and then submitted to the Secretary of State with a draft plan. However, that does not mean that if a report is not adequate when it is submitted for examination it cannot be supplemented or improved before the adoption of the plan. This principle is firmly established by *Cogent Land*, in which Singh J held that the proposition any alleged defects in an environmental report cannot be cured "would lead to absurdity": see paragraphs 111 to 113; and 125 to 127. Nor is there any rule against producing an addendum to a sustainability appraisal which is intended (in the words of Mr Banner at paragraph 20):

"…to support the case for the earlier decisions undertaken in the past preparation of the submission draft plan…"

8 To the contrary, Singh J held [at 125]:-

"…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."

(Emphasis supplied)

9 What is plainly important is that any document which purports to be a sustainability appraisal report should be subject to public consultation and that any representations should be considered by the local planning authority to provide it with as full a picture as possible *before a plan is adopted*. The publicity and consultation process thereby enables a local authority to identify and correct any deficiencies in an environmental statement (and any prejudice within the meaning of section 113 of the 2004 Act,

arising from a failure to comply with a procedural requirement). The result is that cases where a document which purports to be an sustainability appraisal report but could not reasonably be described as such as defined by the Regulations "are likely to be few and far between": *Cogent Land* [at 126], citing Sullivan J in *R (Blewett) v Derbyshire County Council [2004] Env LR 29 [at 41].*

The status of the "Interim Report"

10 The Council submitted a Sustainability Appraisal with the draft Local Plan. In is dated February 2018 (see CD5a and the non-technical Summary, CD5b). In August 2018 the Council published the "Sustainability Appraisal Post-submission Interim Report" (the "interim Report") and a "Non-Technical Summary, which are designated CD5c and CD5d respectively.

11 Paragraphs 1.2.3 and 1.2.4 of the Interim Report describe its purpose and scope in the following terms:-

"1.2.3 The aim of this Post Submission Interim SA Report is to present an appraisal of spatial strategy alternatives, with a view to informing the Local Plan examination.

1.2.4 In order to achieve this aim, this report answers three questions in turn (as per the SA Report):

1 What has plan-making/ SA involved **up to this point?**

2 What are the SA findings **at this stage?**

3 What happens **next?**

NB This is an 'interim' report on the basis it focuses on a specific matter – namely the appraisal of spatial strategy alternatives – as opposed to the Plan as a whole (the remit of the SA Report) or Proposed Modifications (the remit of SA Report Addenda). This report does not seek to replace the Hart Local Plan SA Report, which was published alongside the Proposed Submission Plan in 2018, but instead provides supplementary information."

(My underlining)

12 On a fair reading of these introductory paragraphs it is clear that the purpose of the Interim Report was limited to better illuminating the Sustainability Appraisal. It comprises supplementary evidence akin to that introduced by the Council and other parties in response to various matters raised by the inspector. It is intended to contribute to the *understanding* of the environmental assessment and to *better evidence* the Council's performance of its obligations under the Directive and the 2004 Regulations. However, it is not expressed to be incorporated into the SA. Nor does it replace the SA. Thus as a matter of fact it is not part of the SA or (by extension) the *statutory SA process* at all. Consequently, it did not need to be exposed to public consultation. I draw comfort for this conclusion from Wates' approach to the Interim Report. The company does not allege it was unaware of the publication of the document in August 2018. I am instructed that at that time it did not complain that the Council should have consulted on the document. This issue only emerged in the company's response to matters raised by the inspector in November 2018. Thus its complaint appears to be an afterthought rather than a serious and obvious objection on a point of principle.

13 The Council's stance on the Interim Report does not mean it regards the SA process as closed. The Interim Report actually contemplates the preparation of a *formal* SA Report Addenda to support main modifications. That would be part of the statutory SA process. It may be that some of the information that is contained in the Interim Report will find its way into the Addendum Report. It will be consulted on as part of the statutory SA process. In the light of *Cogent Land,* that would be wholly unobjectionable.

The risk of a successful challenge to the plan under section 113 of the 2004 Act

14 If the Interim Report is properly to be regarded as evidence which better illuminates the Sustainability Appraisal rather than forming part of it, the Council was not obliged to consult on it. That being the case, there can be no objection to it being taken into account in determining whether a spatial strategy which includes an "Area of Search" is part of the most appropriate spatial strategy, having regard to reasonable alternatives.

15 However, if I am wrong, and the Interim Report is to be treated as part of the *statutory* SA process, any prejudice that might have been caused to Wates or any other party has been cured by their manifest ability to make repeated, well informed and considered representations on the likely significant effects on the environment of the plan and its reasonable alternatives. The point can be illustrated by posing the question, "If the

examination were to be paused to enable third parties to formally consult on the Interim Report, what more might each add to what they have said"? Realistically, the answer is probably "nothing". That said, if Mr Banner or any other person can identify any merit in consulting on the Interim Report (rather than an SA Report Addenda) the inspector could suspend the examination to allow that to take place.

16 Finally under this head, it may not reasonably be objected that the use of the Interim Report is an exercise in justifying what had already been decided. The document supplements and explains what is contained in the Sustainability Appraisal rather than the Plan. Moreover, to the extent it might be said to *"support the case for past decisions", Cogent Land* [at 125] establishes that this both permissible and to be expected if (as is the case in Hart) they were correct on their merits.

17 Therefore, even if (which is not the case) the Council should have consulted on the Interim Report, its failure to do so has not caused prejudice to any putative claimant. Consequently a claim under section 113 of the 2004 Act would fail.

Is the Sustainability Appraisal so deficient it is not in law a sustainability appraisal at all?

18 At the heart of the contention the Sustainability Appraisal is so defective it is not a sustainability appraisal at all is the allegation that if the Interim Report must be disregarded "it would be irrefutable that [the obligations under Articles 6 and 8 of the Directive] have not been complied with". Mr Banner barely develops this point. His critique is limited to an assertion that:-

"…the Rye Common site was not assessed as a reasonable alternative in the February 2018 SA…"

19 That is a surprising statement. Appendix III of the February SA states:-

"…in late 2017, as a stand-alone piece of work to inform the development of the Proposed Submission Plan (as opposed to a piece of work deemed strictly necessary as part of the SA process, in order to discharge the requirement to appraise reasonable alternatives), the decision was taken to appraise alternatives in relation to the matter of identifying a broad area of search for a new settlement….

…Consideration was given as to whether a new settlement at Rye Common can be considered a 'reasonable alternative' to a new settlement in the MG/W AoS."

20 Pages 96 to 112 of the SA then set out the detailed reasons why Rye Common was not considered to be a reasonable alternative. Wates may disagree with the assessment as a matter of planning judgment. However, the assertion that the Rye Common site was not assessed as a reasonable alternative is simply wrong. The contention which flows from this error, which is that the Sustainability Appraisal is, in substance, unlawful is likewise incorrect: as a matter of form and substance it undoubtedly complies with the 2004 Regulations.

Conclusion

21 The Interim Report is not part of the statutory Sustainability Assessment process. It is a free standing document which is intended to supplement and illuminate, not change by becoming part of, the Sustainability Appraisal. That obviated the need to consult on it. Consequently, regard may be had to the material it contains. However, if this were to be wrong, the examination process has cured any prejudice that might otherwise have been suffered by third parties. Further, if there is any doubt about that, any remaining prejudice could be removed by pausing the examination to permit further consultation (running the sustainability appraisal process alongside the plan making process as Mr Banner suggest). The decision of Singh J in *Cogent Land* establishes that it is lawful to cure any past defect in the development plan process by means of an SA Addendum provided it is subject to consultation. However, in this case, it would be more apt to incorporate such further assessment as might be thought necessary in a formal Sustainability Appraisal Addendum when main modifications are proposed.

22 The Sustainability Appraisal that was published in February 2018 is, in substance a lawful assessment.

23 It follows that a challenge under section 113 of the 2004 Act on the grounds that are outlined by Mr Banner would have no reasonable prospect of success.

TIMOTHY LEADER

St John's Chambers
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Dated Thursday 19th December 2018

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THE HART DISTRICT LOCAL PLAN EXAMINATION

REPLY BY THE LOCAL PLANNING AUTHORITY TO THE OPINION OF MR CHARLES BANNER OF COUNSEL ON BEHALF OF WATES DEVELOPMENT LIMITED

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