WINCHFIELD ACTION GROUP

JOINT OPINION

Introduction and Summary

1 We are instructed by JB Planning Associates Ltd on behalf of the Winchfield Action Group ("WAG"), who are opposed to the concept of a possible new settlement at Winchfield. Although still at a very early stage in terms of consultation and testing of the evidence base, a new settlement at Winchfield is currently a "preferred" option of the relevant local planning authority, Hart District Council, in respect of its emerging Local Plan.

2 Winchfield is a rural settlement located to the south of Hartley Wintney and in a gap between Hook and Fleet. The settlement is fragmented due to the M3 motorway and the South Western Mainline Basingstoke to Waterloo railway. Winchfield does not have a defined settlement boundary, comprises 246 dwellings, and has a population of 664. Winchfield has very few services and facilities, and those that do exist include a church, a community hall and two pubs. There is no mains sewage or gas supply. The principal facility that Winchfield benefits from is a railway station, although we understand there are substantial concerns as to the capacity of the same. We understand that Winchfield also possesses a number of heritage assets, which is unsurprising given it is a Domesday village, and that its locally distinctive character

and surrounding landscape are highly valued both by residents and by the many who come to the area for amenity and recreational purposes.

3 Of particular concern to those instructing us, the Council has very recently purported to effect a "volte face" whereby a second regulation 18 consultation exercise, long promised in the Council's LDS (including during the course of the first regulation 18 consultation), has been scrapped, the intention now being to proceed, after "testing", straight to a regulation 19 exercise in the autumn of 2015 on the draft submission version of the Local Plan. We are asked to advise WAG whether the Council's streamlined process, omitting the previously advertised second regulation 18 consultation exercise, would be lawful, and if not whether the issue can be pursued by way of an application for a judicial review in advance of the adoption of the Local Plan and the 6 week challenge period identified in a113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").

4 In summary, for the reasons explained in more detail below, the course on which the Council has currently set itself is likely to be unlawful (and these are points which can be taken both during the examination itself, as well as by way of an application for judicial review issued prior to submission of the draft Plan) in that:

4.1 Failure to afford the opportunity for a further regulation 18 consultation exercise is likely to be unlawful because:

a. The exercise was very general and high level (for reasons developed at paragraph 22 below). Once (following "testing") there is "flesh on the

bone" as to what the various Options actually mean in practice (and what the environmental benefits and costs of each will be), it is only then that real decisions can be made regarding housing distribution. In our view, a failure to afford an opportunity for regulation 18 consultation at that stage would be a clear breach of (a) Regulation 18 of the 2012 Regulations, (b) Regulation 13 of the 2004 Regulations, and (c) paragraph 155 of the NPPF (which "must" be taken into account by the Council, per section 19 of the 2004 Act).

b. Unless the Council re-instates a further regulation 18 consultation exercise at the appropriate time, it will (a) be acting contrary to the legitimate expectation of those who either did or did not submit consultation responses in the August – October 2014 exercise, that they would have a further opportunity to make representations once the "specifics" of the plan were better developed, and will (b) constitute a breach of section 19(1) of the 2004 Act that "local development documents must be prepared in accordance with the local development scheme", which cannot in our view permit what is effectively a retrospective amendment that would prejudice consultees.

c. There was no consultation on the extent of housing need that should be met within the District. Indeed, there is no evidence that to date there has been any consideration by the Council of the "reasonable alternative[s]" of providing less than the OAN, on environmental grounds.

d. There has been no regulation 18 consultation at all on issues such as employment, retail, transport, infrastructure (or, indeed, anything other than housing distribution). It is inconceivable that a coherent and sound local plan could emerge without addressing most (at least) of these issues. Thus, the Council presently appears to be in a hopeless position if it maintains its current course. Either it will proceed with a plan that does not address fundamental matters (thereby exposing itself on the "soundness" issue), or it will incorporate matters which have indisputably not been the topic of *any* regulation 18 consultation.

e. The regulation 18 exercise was conducted at a time when the "duty to co-operate" discussions with Rushmoor and Surrey Heath were at a very early stage. So long as the Council pursues such discussions in the robust and inquisitive manner which is expected of it, it is presently unclear what additional (or reduced) proposals will emerge in terms of the District's proposed housing provision. In the event that the general position materially changed between August 2014 and the outcome of "duty to co-operate" discussions, it would be most surprising if the Council opted not to engage in public consultation on the same. In particular, the criticisms of the Council's first regulation 18 consultation exercise as misleadingly incomplete will be re-inforced if the preference for Option 4 leads to increased housing requirements in consequence of the outcome of "duty to co-operate" discussions.

4.2 As noted above, there is no evidence to date that the Council has considered the "reasonable alternative" of not providing the full OAN within its area, and setting a lower "policy on" requirement, because the environmental cost is simply too high. When this reasonable alternative has been properly considered and tested by the Council, it too should form the basis of the further regulation 18 consultation.

4.3 A judicial review raising points of procedural illegality which is issued prior to submission of the draft Local Plan for examination will not fall foul of the ouster provisions in s113 of the 2004 Act: see ***The Manydown Company Limited v Basingstoke and Deane Borough Council*** [2012] EWHC 977 and ***IM Properties Development Limited v Lichfield District Council*** [2014] EWHC 2440. Unless the Council addresses the matters set out in this Joint Opinion, the points in question can be pursued either by way of an application for judicial review (issued prior to submission, and within the 6 week period following the decision which is the subject matter of the challenge), or during the examination.

Factual background

5 Before considering the legality of the course on which the Council has recently set itself, it is important to consider the factual background against which the current issues arise.

6 The Council had an earlier attempt to adopt a Local Plan. But in 2013, this was rejected on grounds of a failure to comply with the duty to co-operate, as well as the quality of the supporting evidence base regarding housing requirements. WAG is concerned to assist the Council to ensure that the same fate does not befall the new emerging Local Plan, although there are different potential failings which are the specific subject of this Joint Opinion.

7 In May 2014 a draft updated SHMA was provided to the Council. (This has now been finalised, in December 2014, in what we understand are materially similar terms.) The SHMA covered three local authorities, Hart, Rushmoor and Surrey Heath, which were assessed as comprising a single HMA. (In due course, those instructing us will need to consider and make representations as appropriate on whether the characterisation of the three districts as a single HMA is capable of justification.) The SHMA assessed an OAN (objectively assessed need) for 24,414 new homes in the period 2011-32, with Hart's share being 7,534 (359pa). The Council's position is that, by way of existing commitments, it can accommodate about 3,500 of these new homes, leaving a balance on the full OAN for Hart of 4,000.

8 In August - October 2014, the Council conducted a regulation 18 consultation exercise on a "Housing Development Options Consultation Paper". Five Options were put forward, being (1) Settlement Focus (between 580 and 875), (2) Dispersal Strategy (up to 4,000 units), (3) Focused Growth (Strategic Urban Extensions) (up to 3,500 new homes), (4) Focused Growth (New Settlement) (at least 4,000 new homes), and (5) Focusing development away from the Thames Basin Heaths SPA Zone of Influence. Specific sites were not put forward for any of these 5 Options. In

particular, Option 4 was a consultation merely on the principle of a new settlement. It was not a consultation on Winchfield as the only such permutation under Option 4. The questions posed in the consultation exercise invited respondents to rank the various Options, to state whether Hart's smallest villages and hamlets should see some new housing, to identify where any Option 4 new settlement should be located, and to state whether there were any other possible housing development options and for any other comments.

9 The consultation exercise ran between August and October 2014. The Council prepared a paper summarising consultation responses. It showed a measure of support for each of the Options from the 550 or so respondents, although there was a preponderance in favour of Options 1 and 4. In response to the question as to where a new settlement might go, the paper indicates, at pages 22-27, a long list of identified locations / areas, of which Winchfield was but one.

10 The confusion as regards "Option 4" is evident from the lack of a consultation response of Hartley Wintney Parish Council. In a 4/11/14 letter, that body has complained to the Council that it chose not to respond to the consultation given its "high level strategic" nature, and the fact that Winchfield was not specifically identified as the option being consulted on. The letter noted that it was anticipated that the opportunity to make representations would be taken in the 2nd regulation 18 process then set out in the LDS, once specific proposals had emerged. The foregoing is also reflected in minutes of the Parish Council's 3 November 2014 meeting with which we have been provided.

11 At its meeting on 27/11/14, the Council resolved that its "preferred housing distribution, subject to testing" envisaged c750 dwelling on brownfield sites, 100-650 dwellings on sites adjoining settlement boundaries, 0-600 dwellings on "strategic urban extensions (no individual site identified)" and 1,800 – 2,400 dwellings at a "new settlement at Winchfield". Amendments to remove the specific identification of Winchfield were voted down. The "preferred housing distribution" adopted thus envisages contributions from each of Options 1 – 4 from the Housing Development Options Consultation Paper, although the most significant single contribution is from Winchfield.

12 The report to the 27/11/14 meeting contended (paragraph 1.3) that Winchfield was "the only area that has sufficient land identified and promoted for development that would create the critical mass needed to support a sustainable new settlement". The 27/11/14 report also noted, at paragraph 3.4, that the 4,000 dwelling "balance" takes no account of the potential for accommodating a share of the assessed OAN of Rushmoor and Surrey Heath. It noted that both authorities had requested Hart to accept a proportion of their needs (1,700 and 1,400 respectively), but the result of any detailed "duty to co-operate" discussions were not presently known. On any view, this issue introduces a very considerable uncertainty as to the emerging contents of the draft Local Plan.

13 At a subsequent Council meeting on 8/1/15, the Council noted the emergence of a new SHLAA site at Murrell Green (proposing 1,800 units), and agreed the approach to the testing of sites (which was to include proposed or newly emerging "strategic development opportunities"). It was also resolved that the Chief Executive should

"ensure that the Council engages constructively, actively and on an ongoing basis, with local parish councils on the testing of the new settlement and strategic development options".

14 On 16/2/15, an updated LDS (the fourth) was published. The version replaced (which dated from April 2014) had made provision for a second regulation 18 consultation exercise in March 2015. The new LDS scraps that step, and indicates a present intention to proceed straight to regulation 19 consultation on a pre-submission version in the autumn of 2015. It can be noted that, quite apart from potential legal flaws considered below, there is a clear tension between the resolution of the Council on 8/1/15 cited above, and the amendment to the LDS to remove such a step.

15 It appears to be the case that removing the proposed second regulation 18 consultation was an idea that emerged from the Council's meeting with a PINS Inspector who was advising informally on the emerging Local Plan. A note of the relevant meeting, which has been supplied by the Council in response to a FOIA request, records (p3) the Inspector's advice as being: "Keep consultation to a minimum in accordance with Regs. Don't need a draft plan consultation, but make sure the SA work is done properly, with options tested. If substantial changes are needed, then need to reconsult rather than proceed straight to submission". As the note is apparently in draft, it is presently unclear if the Inspector agrees that this fully and accurately reflects his advice.

Legal and policy context

16 There are a number of relevant statutory requirements set out in sections 19 and 20 of the 2004 Act, including:

16.1 That "local development documents must be prepared in accordance with the local development scheme": section 19(1).

16.2 That in preparing the document, the local planning authority "must have regard to" inter alia "national policies and advice contained in guidance issued by the Secretary of State": section 19(2)(a). This would include the NPPF and PPG.

16.3 A sustainability appraisal must be conducted and reported on: section 19(5).

16.4 The purpose of the examination is to assess, inter alia, whether the submitted draft plan (a) has complied with the requirements of the Town and Country Planning (Local Planning) (England) Regulations 2012 [SI 2012/767] ("the 2012 Regulations") and of the Environmental Assessment of Plans and Programmes Regulations 2004 [SI 2004/1633] ("the 2004 Regulations"), and (b) whether it is "sound": section 20.

17 <u>The 2012 Regulations</u>. Regulation 18 of the 2012 Regulations provides that a local planning authority "must" (a) notify various persons including affected residents "of the subject of a local plan which the local planning authority propose to prepare", (b) invite representations "about what a local plan with that subject ought to contain", and

(c) "must take into account" any such representations when preparing the local plan. Regulation 18 does not preclude more than one round of public consultation, and it is very common for local planning authorities to engage in two or more such exercises. Although additional consultation exercises introduce a further step into the process, they are capable of reducing time overall if thereby obviating the need for, or merit in, procedural objections as to inadequate consultation. They also create public confidence in the process and its outcomes.

18 Regulation 19 of the 2012 Regulations provides for the provision of an opportunity to make representations on the proposed submission version of the plan. Such representations are then, in the usual course, considered during the examination of the submitted version of the plan.

19 The 2004 Regulations. In a case such as the present, regulation 12(2) requires the preparation of an "environmental report" to "identify, describe and evaluate the likely significant effects on the environment of (a) implementing the plan or programme, and (b) reasonable alternatives taking into account the objectives and geographical scope of the plan or programme". Regulation 13 requires "effective consultation" on the environmental report and draft plan together. There is a live issue as to whether the 2004 Regulations have accurately and fully transposed, at least by themselves, the provisions of Article 6(2) of the SEA Directive requiring "an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure".

20 The NPPF and PPG. There are numerous provisions within these documents which are relevant to the plan-making process and the assessment of soundness. For present purposes, these include the following provisions within the NPPF:

20.1 Paragraph 47 of the NPPF requires local planning authorities to use their evidence base to meet the full objectively assessed housing needs of their district "as far as is consistent with the policies set out in this Framework". Similarly, paragraph 14 of the NPPF provides that for plan-making the full OAN should be met unless the adverse impacts of doing so "substantially and demonstrably" outweigh the benefits, or specific policies in the NPPF indicate that development should be restricted. Thus, while it is necessary to assess by way of starting point what the OAN is within a District, there is a second stage of the process whereby the extent to which the OAN can be met in a manner "consistent with the policies" of the NPPF requires to be assessed. This new two-stage exercise, potentially resulting in a "policy on" figure which is below the OAN was confirmed by the Court of Appeal in ***City and District of St Albans v Hunston Properties Limited*** [2013] EWCA Civ 1610 and ***Solihull Metropolitan Borough Council v Gallagher Estates Ltd*** [2014] EWCA Civ 1610.

20.2 Paragraph 155 of the NPPF requires "early and meaningful engagement and collaboration" in respect of the preparation of local plans.

20.3 The elements of "soundness" are described at paragraph 182 of the NPPF. They include that the plan should be positively prepared (ie, meeting the OAN

together with unmet requirements of neighbouring authorities, when this is reasonable), justified (ie, "the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence"), effective, and consistent with national policy.

Analysis

21 In our view, it is likely that progressing the emerging local plan straight to a regulation 19 exercise in the autumn of 2015 pursuant to the most recent version of the LDS, and without a further regulation 18 consultation exercise, will render the process unlawful, and thereby susceptible to an appropriately timed judicial review, or to challenge during the examination process. Our reasons are as follows.

22 First, we are struck by the generalised, high level nature of the August 2014 consultation exercise. This is a point that goes well beyond the fact that Winchfield was not specifically identified as the sole candidate for Option 4 purposes. In addition, no specific site was identified for any of the other Options, in particular Option 3. The Council is currently engaged on what will (presumably) be rigorous testing, duly informed by the instruction of external experts as appropriate, of the key sites / opportunities under Options 1 – 4, pursuant to the mandate contained in the 8/1/15 resolutions. It is self-evident that the whole landscape of the issue of housing distribution will look completely different once this testing process has been carried out. It cannot be predicted what sites or Options will be essentially ruled out (whether as undeliverable, or because of the environmental harm the specific proposal would cause), or what realistic sites or strategies will emerge as coherent and sustainable proposals. For example, we understand there are representations that the realistic

capacity of brownfield sites is not the 750 assumed by the Council's preferred strategy, but something nearer to 3,500. If this were correct (or even if it were only partially correct) that would itself significantly change the extent to which other Options were required to be called upon. Further, if coherent SUE proposals emerge (ie, if the sites at Murrell Green and/or Lodge Farm and/or any other comparable proposal are assessed as realistic candidates for development), it is plain that the need for an Option 4 may well evaporate. The same approach applies in respect of the numerous alternative candidate locations for an Option 4 new settlement set out in the Summary of the Consultation Responses paper (or, indeed, any subsequent proposals). In short, once (following "testing") there is "flesh on the bone" as to what the various Options actually mean in practice (and what the environmental benefits and costs of each will be), it is only then that real decisions can be made regarding housing distribution. In our view, a failure to afford an opportunity for regulation 18 consultation at that stage would be a clear breach of (a) Regulation 18 of the 2012 Regulations, (b) Regulation 13 of the 2004 Regulations, and (c) paragraph 155 of the NPPF (which "must" be taken into account by the Council, per section 19 of the 2004 Act). As regards the draft note of Inspector Holland's (see paragraph 15 above), we do not agree that the brief advice recorded fully explains the circumstances in which a further regulation 18 consultation exercise will be required, but it suffices for present purposes to observe that it is here self-evident that, once "flesh is on the bones" following detailed analysis, the planning landscape will be substantially different from that which was the subject of the Autumn 2014 consultation exercise.

23 Second, it is striking to note that the LDS was altered *after* the August 2014 consultation exercise. It is clear that this has led to concerns by residents that a

misleading impression was given to them given (a) the generalised scope of the consultation exercise, and (b) the important background consideration that, at the relevant time, residents were being promised (per the April 2014 version of the LDS then extant) a further opportunity to make representations. This is the complaint advanced by Hartley Wintney Parish Council, and it would appear to be a complaint of substance. Moreover, in our view, unless the Council re-instates a further regulation 18 consultation exercise at the appropriate time, it will (a) be acting contrary to the legitimate expectation of those who either did or did not submit consultation responses in the August – October 2014 exercise, that they would have a further opportunity to make representations once the "specifics" of the plan were better developed, and will (b) constitute a breach of section 19(1) of the 2004 Act that "local development documents must be prepared in accordance with the local development scheme". As to the latter point, it would make a nonsense of section 19(1) if a council could (with what amounts to retrospective effect) alter an LDS, to the manifest prejudice of consultees. Here, having held a consultation exercise at a time when it was being represented that a further opportunity would later be afforded, it is contrary to the purpose of section 19(1) for the Council to change that, after the first consultation exercise is concluded. We strongly doubt that Inspector Holland was aware of the full picture explained above at the time of his 20/10/14 meeting with the Council.

24 Third, we note that the August - October 2014 exercise consulted only on matters relating to housing distribution. This results in two compelling and free-standing objections to the Council's current proposal of scrapping a second regulation 18 consultation exercise, namely:

24.1 There was no consultation on the extent of need that should be met within the District. Indeed, there is no evidence that to date there has been any consideration by the Council of the "reasonable alternative[s]" of providing less than the OAN, on environmental grounds. In our view, it is elementary, and consistent with the 2004 and 2012 Regulations and the NPPF, that such an issue must be properly assessed in the SA/SEA and thereafter the subject of proper consultation (at a time when responses are capable of influencing the contents of the emerging plan).

24.2 There has been no regulation 18 consultation at all on issues such as employment, retail, transport, infrastructure (or, indeed, anything other than housing distribution). It is inconceivable that a coherent and sound local plan could emerge without addressing most (at least) of these issues, to which the "duty to co-operate" is likely to apply as well. Indeed, there is a clear link between these topics and housing provision / distribution. We note also that the current evidence base on these matters is, in many instances, significantly out of date. Regulation 18 of the 2012 Regulations plainly requires consultation on the "subject" of a proposed local plan. Thus, the Council presently appears to be in a hopeless position if it maintains its current course. Either it will proceed with a plan that does not address fundamental matters (thereby exposing itself on the "soundness" issue), or it will incorporate matters which have indisputably not been the topic of *any* regulation 18 consultation.

25 Fourth, we note also that the regulation 18 exercise was conducted at a time when the "duty to co-operate" discussions with Rushmoor and Surrey Heath are at a very early stage. So long as the Council pursues such discussions in the robust and inquisitive manner which is expected of it, it is presently unclear what additional (or reduced) proposals will emerge in terms of the District's proposed housing provision. In the event that the general position materially changed between August 2014 and the outcome of "duty to co-operate" discussions, it would be most surprising if the Council opted not to engage in public consultation on the same. In particular, the criticisms of the Council's first regulation 18 consultation exercise as misleadingly incomplete will be re-inforced if the preference for Option 4 leads to increased housing requirements in consequence of the outcome of "duty to co-operate" discussions.

26 Finally, we address the issue as to when the contentions explored above can be pursued. Clearly, the points can be taken during the examination process as objections to the soundness and/or lawfulness of the emerging plan.

27 In addition, so long as a judicial review is issued prior to submission of the document for examination, it will not be barred by the ouster provisions in s113 of the 2004 Act: see ***The Manydown Company Limited v Basingstoke and Deane Borough Council*** [2012] EWHC 977 and ***IM Properties Development Limited v Lichfield District Council*** [2014] EWHC 2440.

28 It is to be hoped that the Council will re-consider their recent "volte face" on a second regulation 18 consultation exercise once the outcome of further testing is available. A

refusal to do so at that time would comprise the decision that is susceptible to a judicial review.

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