

## HART DISTRICT DRAFT LOCAL PLAN

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### OPINION

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1. The purpose of this opinion is to express my view about the lawfulness and soundness of the approach adopted by Hart District Council towards the promotion of the Local Plan and, in particular, the adequacy of the approach toward Policies SC2 and 18 of the Strategy and Sites document.
2. Public authorities will always carry out their duties against the shadow of litigation. It is inevitable that a disappointed landowner, or any other malcontent, will wish to examine possible avenues of attack in the Courts. Such parties may then threaten public authorities with litigation in order to force them to alter their intended approach to better suit the preferences of those making the threats.
3. If this opinion achieves nothing else, it should assure the Council that the approach they have adopted will not be the subject of a successful challenge in the High Court.
4. The most important matter for the Council to understand is that the approach of the High Court towards a review of administrative action is benign and supportive and the Court heavily discourages legal actions

brought against Councils based on a disguised complaint about merits or an over-pedantic examination of the law. This point has been perfectly illustrated in the last month by Laidblom LJ in Barwood Strategic Land v East Staffordshire B.C. [2017] EWCA 893 at paragraph 50 as follows:

“I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over-complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law (see paragraphs 8 to 14, 22 and 35 above). I would endorse, and emphasize, the observations to the same effect made by Holgate J. in paragraphs 140 to 143 of his judgment in *Trustees of the Barker Mill Estate*”.

5. I am also aware that the principle has been forcefully re-stated in the High Court within the last week in a case I am not yet at liberty to discuss and it will follow this opinion when it is published.
6. The function of the statutory authority when promoting a Local Plan is to make a series of broad judgments about the amount and distribution of development of different types throughout their administrative area across the time horizon of the plan. Plan making is therefore carried out on a broad brush basis and against the background of an imperfect state of knowledge. The Law recognises and accommodates the breadth of this process and the uncertainties inherent within it. The only obligations must be strictly adhered to is that, in making their judgments and assessments, the Council must adopt a fair procedure and must act lawfully and rationally
7. NPPF 182 provides the framework against which the Council must assess the evidence base and make a series of judgments. This is a specific obligation derived from European jurisprudence which requires a fair and balanced comparison of alternatives which is captured by the obligation in policy that the plan must be “justified”.
8. In the case of the Hart District Draft Local Plan in my opinion the Council have done a first class job of meeting the legal requirements discussed above. I have read the Housing Chapter of the plan which explains with admirable clarity the policy approach which underlies the identification of both the quantum and distribution of housing to be

provided in the plan period. This indicates that the plan has been positively prepared and is effective and consistent with national policy. In addition, I have read the Sustainability Appraisal which indicates that the reasonable alternatives have been assessed against a proportionate and comparative evidential base and a series of judgments have been formed which rationally proceed from the evidence therein described

9. It is only necessary to consider the matter at this broad structural level because that is the only level against which the Court will consider the plan in the event a challenge is made. For the reasons discussed above, any challenge brought against this plan would not succeed.

10. The Council is now at a cross roads. Some landowners and promoters are obviously disappointed and they can see the opportunity for beneficial development of their sites slipping away. They will become increasingly vigorous in their attempts to persuade the Council to change course either by submitting new evidence (perhaps in the form of draft schemes) which seem to encourage or persuade the Council to reverse decisions already made or to threaten the Council with litigation in the High Court. Sometimes both are tried simultaneously.

11. As against that the Council must have regard to NPPF 12 which provides:

“It is highly desirable that local planning authorities should have an up to date plan in place”

12. The Council have already undertaken a substantial, comprehensive and evidentially proportionate process of public consultation. I have seen nothing to suggest the sum of evidence available to the Council would be materially improved by embarking on a yet further round of consultation whereas I can see that such a process would defer the point at which an up to date plan is in place contrary to the central objective of national planning policy. It is a matter for the Council but I can see no reason why this plan should not now proceed to examination.

**Anthony Crean QC**

31 July 2017

