Re: SHAPLEY HEATH GARDEN VILLAGE

OPINION

INTRODUCTION and SUMMARY

1 I am instructed by the Rural Hart Association, a voluntary, non-profit making, unincorporated association of individuals and organisations concerned with planning and development in Hart District.

2 Hart District Council's Cabinet is due to meet in early November 2019 to consider "Paper D", which sets out a number of recommendations from the Overview and Scrutiny Committee, including (a) to approve the exploration of the opportunity to deliver the Shapley Heath garden community, (b) how, if at all, to spend the £150,000 allocated by Central Government in respect of Shapley Heath, pursuant to the Garden Communities bid process, and (c) to provide a £500,000 allocation from Council resources to "*help the Council make informed choices associated with the Garden Community*" .

3 Four members of the Cabinet (Cllr Simon Ambler; Cllr Sara Kinnell; Cllr Alan Oliver; Cllr James Radley) were among the signatories to a 20 July 2019 letter to Ranil Jayawardena MP relating to the (still undecided) planning appeal (PINS ref: 3204011) by Wates Developments for up to 700 new houses and associated development at Pale Lane, Hartley Wintney. It may well be that the signatories to the letter in question presumed it would not be made public. In material part, this letter stated:

Dear Ranil:

We are contacting you, as Hart District Councillors, on behalf of our residents, regarding the impending decision on Pale Lane.

…

Recent news that Hart has been successful in its bid submission for a Garden Village at Shapley Heath – adds yet more weight to Hart's original decision. With Hart's Local Plan on track to be delivered this Autumn and 5000 more homes secured for the next planning period through Shapley Heath, there is absolutely no need for 700 houses at Pale Lane. This development is not needed, is located in the worst possible location and would have a detrimental impact on local services and infrastructure.

…

We would like to formally request your help in petitioning the Secretary of State on our behalf to uphold Hart's decision to refuse Pale Lane and reject Wates' appeal. We are sure that, as our local MP, elected to represent the will of local people, you will agree this is the only fair and democratic course of action.

We would also like to take this opportunity to thank you for supporting Hart's Garden Village bid. Shapley Heath represents a wonderful opportunity to create a thriving, sustainable plan for Hart's current and future housing needs. We congratulate you on having the courage and vision to support it. We feel sure it will become a wonderful community within Hart District Council in years to come. …

4 I am asked to advise whether the above letter – and in particular the reference to "*5000 more homes secured for the next planning period through Shapley Heath*" – is relevant to the participation of the four Councillor signatories identified above in the Cabinet's forthcoming decisions concerning Shapley Heath.

5 In my view, for reasons explained below:

a. The relevant assertion to Mr Jayawardena MP is totally misleading. There is no sense of the word in which Shapley Heath has been "*secured for the next planning period*". Quite the opposite, as matters currently stand. Nothing at all has been "*secured*" for the "*next planning period*". Further, the Local Plan Inspector's 26 February 2019 letter sends Shapley Heath back to the drawing-board, with clear findings that it

has not been justified as sound on its own merits nor is there a robust assessment of its comparative qualities as against reasonable alternatives.

b. Regrettably, the only sensible inference is that the authors of the letter have shut their minds to a fair and proper consideration of the individual and comparative merits of Shapley Heath, and have pre-determined decisions in respect of Shapley Heath, which they regard as "secured" already.

c. Absent the clearest evidence going forward that the relevant Councillors recant the misleading and pre-determined approach to Shapley Heath as "secured for the next planning period", their participation in future decision-making of the Council (including when Cabinet grapples with Paper D in early November 2019) would render such decisions susceptible to being quashed by way of application for judicial review.

d. In my view, the relevant Councillors must publicly acknowledge the misleading character of the words used in the letter and must publicly disassociate themselves from the sentiment in question (that Shapley Heath has been "secured for the next planning period"), and their future conduct in so far as they desire to have further involvement in relevant Council decision-making must (and not as mere "lip service") positively demonstrate a genuine willingness to consider matters with an open mind. Where a relevant Councillor is unable or unwilling to adhere to the foregoing, the natural inference will be that the closed minds evident from the July 2019 letter have infected the decision in question.

e. A relevant Councillor who is unable or unwilling to take the foregoing steps, must recuse themselves from Council decision-making which is related, directly or indirectly, to Shapley Heath.

APPLICABLE LEGAL PRINCIPLES

6 Actual or apparent bias or pre-determination renders a decision by a public authority unlawful. Whether an inference of, say, apparent bias or pre-determination (ie, a closed mind) arises is context-specific, with a difference of approach recognised as between judicial / quasi-judicial decisions (as to which, see the House of Lords' decision in ***Porter v Magill*** [2002] 2 AC 357) and scenarios (such as the present) where decision-making is entrusted to locally elected politicians. In the latter case, actual or apparent pre-determination is capable of being established (rendering affected decision-making unlawful), but there must be recognition that Councillors are entitled to have and express views on matters of local interest, and (absent clear evidence to the contrary) they are to be trusted to abide by the need to approach decision-making with an open mind.

7 Thus, in ***Persimmon Homes Teesside Limited v Lewis*** [2009] 1 WLR 83, Pill LJ said in the course of his judgment:

> *"62 There is no doubt that Councillors who have a personal interest, as defined in the authorities, must not participate in Council decisions. No question of personal interest arises in this case. The Committee which granted planning permission consisted of elected members who would be entitled, and indeed expected, to have, and to have expressed, views on planning issues. When taking a decision Councillors must have regard to material considerations and only to material considerations, and to give fair consideration to points raised, whether in an Officer's report to them or in representations made to them at a meeting of the Planning Committee. Sufficient attention to the contents of the proposal, which on occasions will involve consideration of detail, must be given. They are not, however, required to cast aside views on planning policy they will have formed when seeking election or when acting as Councillors. The test is a*

very different one from that to be applied to those in a judicial or quasi-judicial position.

"63 *Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence. Given the role of Councillors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision.*

"…

"69 *Central to such a consideration, however, must be a recognition that Councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies. Members of a Planning Committee would be entitled, and indeed expected, to have and to have expressed views on planning issues."*

8 Subsequently, Parliament enacted section 25 of the Localism Act 2011, headed "Prior indications of view of a matter not to amount to predetermination etc", which so far as material provides as follows:

"(1) *Subsection (2) applies if:*

(a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and

(b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.

"(2) *A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because:*

(a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and

(b) *the matter was relevant to the decision."*

9 Section 25 of the Localism Act 2011 was considered by Patterson J in ***IM Properties v Lichfield Council*** [2014] EWHC 2440 (Admin). The relevant challenge focused on an email written by one Councillor to colleagues referring to a "*three line whip*" and stating (inter alia) "*in plain terms group members either vote in favour of the report I will be giving regarding the local plan or abstain*". Patterson J found that section 25 of the Localism Act 2011 did not only apply to public statements: see paragraph 85. She rejected the challenge, reasoning "*I do not find that the tenor of the email was so strident as to remove the discretion on the part of the recipient as to how he or she would vote*" and observing "*the debate shows a far reaching discussion between members and displays no evidence of closed minds in relation to the decisions that had to be taken*".

10 In large measure, section 25 of the Localism Act 2011 is a statutory expression of the position which the Courts had already reached (as most clearly adumbrated in the above-cited ***Persimmon Homes*** decision) on the assessment of predetermination as it affects politicians and political decision-making. Thus, while politicians are <u>not immune</u> from a responsibility not to close their minds to the consideration and weighing of factors because of a decision already reached, they enjoy very considerable latitude to express views in advance of a decision which will not per se be regarded as "crossing the predetermination line".

11 In this regard, the key words of section 25 of the Localism Act 2011 are "*just because*" in sub-section (2). This formulation does not preclude an earlier expression of view being one factor which, alongside other evidence, supports an allegation that there is a real possibility of pre-determination. The nature and extent of the other evidence required to establish actual or apparent pre-determination will vary based on particular individual circumstances. In general, the more strident and closed-minded the earlier statement, the less additional evidence will be required for an inference to be fairly drawn that,

overall, the decision has not been approached with an open or apparently open mind.

APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS HERE

12 The starting-point is that the relevant assertion in the July 2019 letter to Mr Jayawardena MP is, indisputably, totally misleading. There is no sense of the word in which Shapley Heath has been "*secured for the next planning period*". Quite the opposite, as matters currently stand. Nothing at all has been "*secured*" for the "*next planning period*" (presumably, a reference to the period following expiry of the emerging Hart Local Plan, in April 2032).

13 Moreover, the Local Plan Inspector's 26 February 2019 letter sends Shapley Heath back to the drawing-board, with clear findings that it has not been justified as sound on its own merits nor is there a robust assessment of its comparative qualities as against reasonable alternatives. Thus:

a. The Inspector's letter sets out numerous respects in which the Council's "Post Submission Interim Sustainability Appraisal Report" had failed to conduct a proper or fair comparative assessment of Shapley Heath as against reasonable alternatives: see DL21-32. The Inspector concluded that "*on the currently available evidence, it cannot be determined that it represents the most appropriate long-term growth strategy*", describing the post submission Sustainability Appraisal as "*not robust*".

b. The Inspector also concluded that there was "*little evidence to demonstrate that a site can actually be delivered in terms of infrastructure, viability and landownership*": DL33.

c. He found that "*a significant level of further supporting work*" would be necessary to find the relevant strategy "*sound*": DL35, and concluded at DL36:

> "*I am of the view that there needs to be sufficient evidence now to support the proposed new settlement [area of search], to allow a robust comparison to be undertaken with reasonable alternative long-term growth strategies and to allow me to take a view that there is a real likelihood that a site could come forward in the [area of search] that would not have unacceptable impacts. For the reasons set out above, at the current time, I do not consider this to be the case.*"

14 Regrettably, the only sensible inference is that the authors of the letter have shut their minds to a fair and proper consideration of the individual and comparative merits of Shapley Heath, and have pre-determined decisions in respect of Shapley Heath, which they regard as "*secured*" already.

15 Absent the clearest evidence going forward that the relevant Councillors recant the misleading and pre-determined approach to Shapley Heath as "*secured for the next planning period*", their participation in future decision-making of the Council (including when Cabinet grapples with Paper D in early November 2019) would render such decisions susceptible to being quashed by way of application for judicial review.

16 In my view, the relevant Councillors must publicly acknowledge the misleading character of the words used in the letter and must publicly disassociate themselves from the sentiment in question (that Shapley Heath has been "*secured for the next planning period*"), and their future conduct in so far as they desire to have further involvement in relevant Council decision-making must (and not as mere "lip service") positively demonstrate a genuine willingness to consider matters with an open mind. Where a relevant Councillor is unable or unwilling to adhere to the foregoing, the natural

inference will be that the closed minds evident from the July 2019 letter have infected the decision in question.

17 A relevant Councillor who is unable or unwilling to take the foregoing steps, must recuse themselves from Council decision-making which is related, directly or indirectly, to Shapley Heath.

18 This approach is entirely consistent with section 25 of the Localism Act 2011 and the case-law set out above because it is not founded exclusively on the July 2019 letter (hence the importance of "*just because*"), but a combination of the letter and any subsequent failure credibly to acknowledge the inaccuracies of the letter and establish distance from the expressed sentiments. The matter can be tested this way. Assume a Councillor writes that a particular matter is a "done deal" and commits to voting a certain way before seeing the relevant evidence or assessment documents or hearing the committee debate, and then sits through the debate without saying a word before voting in accordance with earlier pronouncements. Taken together, the preceding document and the failure credibly to distance oneself from it thereafter are clear evidence of actual or apparent pre-determination.

CONCLUSION

19 My views on the key questions arising are summarised at paragraph 5 above. I shall of course be delighted to assist further, as necessary.

ANDREW TABACHNIK QC

39 ESSEX CHAMBERS

LONDON

31 OCTOBER 2019