RE: CHARNWOOD LOCAL PLAN REVIEW

NOTE ADVISING

1. Introductory Matters

1.1 I would refer to the advice tendered in consultation with those instructing me on divers dates during the course of the examination hearings into the draft Charnwood Local Plan 2021 to 2037 ('dCLP') – most recently on 3rd February 2023.

1.2 Following the adjournment of the first sessions of the examination hearing into the dCLP in June 2022 the Local Planning Authority ('LPA') have sought to address the Inspectors' concerns initially expressed in a letter dated 10th August 2022 and supplemented in a letter dated 18th November 2022, which followed a resumed hearing session in October 2022. In the latter correspondence the Inspectors' noted: *"Based on our findings above, an increase in supply to meet Charnwood's local housing need plus Leicester's unmet need will be necessary. However, pending further testing of the housing requirement and the soundness of the proposed site allocations, the scale of the increase is still uncertain at this stage. In these circumstances,* ***it would be prudent for the Council to consider the options for an increase in supply****, but within the context of some uncertainty about the precise figure that will be needed."* (emphasis added)

1.3 In an undated letter in response the LPA indicated that it accepted the Inspectors' interim conclusion that the minimum local housing need for the district was an uplift to 1,189 dwellings per annum. The examination hearings are due to resume on 7th February 2023 with hearing statements having been prepared and submitted some time ago.

1.4 On 2nd February 2023 the examination website was updated to include a variety of new documents, in particular:

(i) Exam 56 Charnwood Additional Housing Supply Technical Note (PDF Document, 1.2 Mb)

(ii) Exam 57 Sustainability Appraisal Addendum December 2022 (PDF Document, 1.99 Mb)

(iii) Exam 58 Housing Trajectory January 2023 (PDF Document, 0.47 Mb)

Those three documents purport to explain and evidence the LPA's revised position in respect of how it intends to meet the uplifted housing land requirement in the light of the Inspectors' recommendations. Crudely put, it is proposed that the likely plan period yield in respect of a number of the existing allocations has been significantly increased.

1.5 In the Sustainability Appraisal Addendum the authors of the document purport to 'test' alternative ways in which the additional need for housing could be met, including consideration land SW of Loughborough which is being promoted as a potential additional allocation by those instructing me as part of a reasonable alternative to the preferred strategy of the dCLP.

1.6 I have been asked to encapsulate the advice which I tendered in consultation with those instructing me as to how this addition to the dCLP is being proposed to be considered within the examination hearings.

2. Discussion

2.1 Section 19(5) of the 2004 Planning and Compulsory Purchase Act requires a LPA to carry out a sustainability appraisal ('SA') of the proposals in each development plan document. Ordinarily such an SA incorporates a Strategic Environmental Assessment ('SEA') required by the Environmental Assessment of Plans and Programmes Regulations 2004[1]. Regulation 12 of the Regulations requires a description and evaluation of reasonable alternatives. NPPG provides guidance upon the role of the SA in considering alternatives:

*"**How can the sustainability appraisal assess alternatives and identify likely significant effects?***

[1] Recognised in NPPG ID: 11-001-20190722.

The sustainability appraisal needs to consider and compare all reasonable alternatives as the plan evolves, including the preferred approach, and assess these against the baseline environmental, economic and social characteristics of the area and the likely situation if the plan were not to be adopted. In doing so it is important to:

- *outline the reasons the alternatives were selected, and identify, describe and evaluate their likely significant effects on environmental, economic and social factors using the evidence base (employing the same level of detail for each alternative option). Criteria for determining the likely significance of effects on the environment are set out in schedule 1 to the Environmental Assessment of Plans and Programmes Regulations 2004;*
- *as part of this, identify any likely significant adverse effects and measures envisaged to prevent, reduce and, as fully as possible, offset them;*
- *provide conclusions on the reasons the rejected options are not being taken forward and the reasons for selecting the preferred approach in light of the alternatives.*

Any assumptions used in assessing the significance of the effects of the plan will need to be documented. Reasonable alternatives are the different realistic options considered by the plan-maker in developing the policies in the plan. They need to be sufficiently distinct to highlight the different sustainability implications of each so that meaningful comparisons can be made.

The development and appraisal of proposals in plans needs to be an iterative process, with the proposals being revised to take account of the appraisal findings"[2]

2.2 There has been considerable jurisprudence on the correct approach to the SA/SEA process. Thus, it was held in the seminal case of Heard v Broadland DC [2012] EWHC 344 (Admin) that in adopting a Joint Core Strategy Development Plan Document indicating certain areas for major urban growth subject to a Strategic Environmental Assessment under Directive 2001/42, three authorities had failed to comply substantially with the Directive's requirements since they had not explained their reasons for selecting certain sites and further they had failed to examine what

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2 NPPG para ID: 11-018-20140306

appeared to be reasonable alternatives in the same depth as the preferred option which had emerged. Subsequent caselaw has confirmed the comment in the NPPG that the SA/SEA is an iterative process and that the original information can be supplemented and amended during the process of consideration of the plan or programme.

2.3 There is therefore no difficulty in law with an initial SA/SEA being supplemented or amended by further information such as that contained within the Supplementary SA provided to this examination hearing.

2.4 In this case, those instructing me are extremely concerned at the timing of the Supplementary SA which provides no opportunity for the objector's consultant team to assess, and meaningfully comment upon conclusions within the document. In particular information and reasoning relating to the rejection of the option that would have included land promoted by those instructing me located at SW Loughborough. Furthermore there has been no opportunity to interrogate the information relating to other sites where development yields have been significantly increased. I am instructed that in a number of respects inaccuracies have been identified within the short timescale of days that has been afforded for consideration of this information.

2.5 It is well established that even in the setting of an informal hearing that an Inspector is obligated to adopt a procedure which is fair to all parties (see Dyason v Secretary of State for the Environment [1998] 2 PLR 54). In that case Pill LJ stressed that there was an inquisitorial burden upon the Inspector which underscored the need to ensure fairness as between the parties. The same approach must by extension also have application in a local plan examination.

2.6 Further it is well established that where consultation takes place upon documentation which will inform administrative decisions, then such consultation has to be both meaningful and fair. Thus in the case of R v N and E Devon Health Authority ex p Coughlan [2001] QB 213 @108 the Court held that for a lawful consultation to take place, adequate time must be given for the response by a consultee, and the response conscientiously must then be taken into account.

2.7 In R (Moseley) v Haringey LBC [2014] 1 WLR 3947, Lord Wilson said;

"25 In R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189:

> *'Mr. Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content.*
>
> - *First, that consultation must be at a time when proposals are still at a formative stage.*
> - *Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.*
> - *Third … that adequate time must be given for consideration and response and, finally,*
> - *fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'*

Clearly Hodgson J accepted Mr. Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly [has]. The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts (2012) 126 BMLR 134, para 9, 'a prescription for fairness'."

2.8 Those principles have become known as the Gunning Principles and are central to the law with regard to a fair process of consultation. It is accepted that the extent of a duty to consult will depend upon the nature of the consultation exercise and the statutory regime governing it, as Lord Reed also pointed out in Moseley at [40]. However, giving a person who is responding to a consultation access to the relevant information which has informed that choices which have been made in the formulation of the proposals so that they can understand the information and the resultant choices and test both that information and those judgments, must be a basic requirement if consultation is to be fair and useful. The same must be true of the process of examining a local plan and the publication of the evidence base which underpins it.

2.9 It is no fault of the objectors that a fundamental element of the Council's evidence base has been produced and made public at the last minute, providing no opportunity for proper scrutiny. That self-evidently undermines the ability of those attending the examination to subject the justification for the LPA's revised strategy to proper scrutiny, giving rise to a self evidently unfair process.

2.10 Nonetheless that does not mean that the appropriate course of action would be for the examination hearings to be adjourned yet again. It is a matter for the Inspectors to consider whether or not the process is a fair one and that involves balancing a number of factors including the expediency of the process. Provided that a meaningful opportunity is afforded to the objectors who are directly affected by the production of this late evidence to address it in a consideration manner and to facilitate a means by which their observations are able to be drawn to the attention of the Inspectors then an arguably fair process will have been followed.

2.11 Such a process could involve the provisional views of the parties upon the new evidence to be provided at the imminent examination hearings but with the opportunity to provide more considered comments in writing thereafter within a clear timetable.

2.12 Were that process not to be followed and the Inspectors to arrive at their conclusions as to necessary modifications to make the plan sound without receipt of that information then the Gunning principles would undoubtedly be breached and any subsequent adoption of the plan would be liable to challenge under s.113 of the 2004 Act. That is because, whilst superficially it might be said that representations could be made to such modifications, that will not be at a time when the policies are still at the "formative stage" in the process, but rather at an advanced stage where consultation would be limited only to the modifications then proposed not the soundness of the plan generally.

2.13 I would therefore strongly advise that the obvious unfairness of simply pressing on is drawn to the attention of the examination hearing immediately; and that the Inspectors are expressly invited to consider how such unfairness can be addressed. At the least it seems to me an opportunity should be provided to give sufficient time to address this

new and fundamental evidence in writing within a specified timescale. Not to do so risks undermining the integrity of the examination process and renders the plan liable to be challenged under s.113 if it is adopted thereafter.

3. Conclusions

3.1 I advise accordingly. Should anything else arise please do not hesitate to contact me further.

Kings Chambers
Manchester, Birmingham, Leeds

Paul G Tucker KC
6th February 2023