

IN THE MATTER OF:-

THE DRAFT HAVANT BOROUGH LOCAL PLAN

ADVICE

- 1 The draft Havant Borough Local Plan was submitted for examination on 12th February 2021. The first stage of the examination in public concluded on 16th July. The Council provided the examining inspectors with further information on 26th July 30th , 6th August and 16th September. It has now received their interim findings. They focus on two matters. The first is concerned with whether the Plan is and can be made sound. The second questions whether the Plan complies with the requirements of section 19 of the Planning and Compulsory Purchase Act 2004 (“legal compliance”).

- 2 In relation to legal compliance, the inspectors’ concern is that the method of consulting the public on “submission draft” version of the Plan prepared under regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012 was conducted within the framework of a Statement of Community Involvement (SCI) that was adopted by the Council in 2013 (“SCI, 2013”). The inspectors note that the SCI, 2013 contains a statement that:-

“The main methods the Council will use to involve the community in the planning process are set out in Table 1 at the end of this section”

- 3 The inspectors observe that Table 1 of the SCI, 2013 identifies the following methods of consultation:-

- “Leaflets: published on the website and distributed in libraries.
- Exhibitions/ displays: Provided at key stages in the production of Local Plan documents at the Public Service Plaza, libraries, community centres, shopping centres and other public buildings as appropriate.
- Local Plan newsletter: produced quarterly or more frequently as necessary – email to everyone with an email contact on [the] local plan database, all Councillors, Skills and Employability Partnership Board, community teams and on the Council website and social media feeds.”

4 In that context, the inspectors record:-

“The Council accepted at the hearing session that leaflets and exhibitions/ displays were not provided at libraries. Further, the Council also conceded that a Local Plan newsletter was not produced quarterly”.

5 That being so, the inspectors express the view:-

“The Council has suggested that the use of ‘main methods’ in the SCI, 2013 means that not every method had to be used. However, on a fair reading the use of the word ‘will’ rather than ‘may’ or ‘could’ has set up a reasonable expectation that these methods would have been used. Further, we consider that reference to ‘main methods’ suggests that others could be used in addition, but not instead”.

- 6 The inspectors acknowledge the Council’s contention that no prejudice was caused to any party by what they perceive to be a departure from the SCI. However, they state:-

“...Section 19(3) of the Act is clear in that it requires compliance with the SCI. We appreciate that the Council considers there has been no prejudice, however the simple truth is that it is very difficult to be certain of that. There might conceivably have been prejudice at the time to those who do not use the internet and rely on libraries to keep informed about news and events in the area.”

- 7 The inspectors reject the proposition that the mischief they describe was remedied by a second regulation 19 consultation under a SCI which was adopted in 2019 (“SCI, 2019”) on the ground that “it would not have been clear to consultees that comments were allowed on all aspects of the Plan”. On that basis they conclude:-

“Consequently, there is a risk that the Plan could be vulnerable to legal challenge at adoption. The way to lessen this risk, by reducing the risk of prejudice, would be to carry out a further full consultation in compliance with the Council’s SCI, 2019 (as the Act requires). However, we would still be obliged to conclude that the preparation of the Plan, which ends on submission, was not legally compliant and therefore would be at risk of challenge.”

- 8 Therefore, they recommend:-

“...it would be better to withdraw the Plan, undertake the additional work [on soundness matters] and consult on it in line with the SCI, 2019 and then resubmit the Plan for examination. It is highly likely that this would prove a more expedient route to adopting a sound plan...It would also avoid the

potential of a legal challenge relating to the consultation procedure and the time and expense associated with such court proceedings. Crucially, in relation to the latter point, it would remove the uncertainty about legal compliance of the Plan's preparation and allow the Council to move forward with confidence."

- 9 In the circumstances, I am asked whether the issue of legal compliance identified by the inspectors compels the Council to withdraw the Plan and start again, or whether they must, if requested, recommend modifications that will make the Plan sound and permit the Council to accept the risk of a legal challenge on adoption. If I conclude the Council is entitled to accept the risk of a legal challenge, I am asked to advise on the magnitude of that risk.

May the Council require the examination to continue?

- 12 Section 19(3) of the Planning and Compulsory Purchase Act 2004 ("the Act") states (as relevant):-

"In preparing the local development documents (other than their statement of community involvement) the authority must also comply with their statement of community involvement."

- 13 Section 20 of the Act then makes provision for the independent examination of a development plan document (which includes a local plan). Subsections (5) and (7) are relevant to the issues addressed by this advice and state as follows:-

- "(5) The purpose of an independent examination is to determine in respect of the development plan document—
- (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under

section 36 relating to the preparation of development plan documents;

- (b) whether it is sound; and
- (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation...

...(7) Where the person appointed to carry out the examination—

- (a) has carried it out, and
- (b) considers that, in all the circumstances, it would be reasonable to conclude—
 - (i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and
 - (ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,

the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination—

- (a) has carried it out, and
- (b) is not required by subsection (7) to recommend that the document is adopted,

the person must recommend non-adoption of the document and give reasons for the recommendation.

(7B) Subsection (7C) applies where the person appointed to carry out the examination—

- (a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the

requirements mentioned in subsection (5)(a) and is sound,
but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

(a) satisfies the requirements mentioned in subsection (5)(a),
and

(b) is sound...”

14 The Havant Local Plan is a development plan document.¹ Therefore, when the authority prepared the Plan, it was required to comply with the adopted SCI, which was the SCI, 2013.² The inspectors conclude that the Plan did not comply with that document. However, they do not suggest that this prevents (a) the resumption of the examination in public, (b) their being able to recommend modifications that will make the Plan sound, or (c) the Plan’s adoption. That is unsurprising. Section 20(5)(a) of the Act requires the examination to determine whether the Plan “satisfies the requirements” of section 19. Thus, the question that arises is whether any non-compliance with section 19(3) prevents the Plan being found sound and adopted. That question is answered by a careful reading of section 20, especially subsections (5), (7), (7A), (7B) and (7C). It is to be observed:-

(1) The inspectors conclude the Plan does not comply with the requirements of section 19.

¹ See sections 17 and 37 of the 2004 Act and regulation 5 of the Town and Country Planning (Local Planning) (England) Regulations 2012

² Section 19(3) of the 2004 Act

- (2) If a plan does not comply with section 19, it will not comply with section 20(7)(b)(i). In those circumstances an examiner would not be required to recommend a plan be adopted. subsection
- (3) Instead, section 20(7B) would require an examiner to consider whether the plan making body has discharged the duty to cooperate. If the plan maker has complied with that duty, and it requests the examiner to make recommendations that would comply with the requirements of section 20(5)(a) and make it sound, section 20(7C) states they “must” do so.
- (4) Applying those rules in this case, the inspectors do not suggest the Council has failed to comply with the duty to cooperate. Therefore, even if their concerns about its non-compliance with the SCI, 2013 are well founded, if asked to do so by the Council the inspectors must make recommendations that satisfy the requirement the Plan be prepared in accordance with section 20(5)(a) and is sound.
- (5) The inspectors state “that the preparation of the Plan, which ends on submission, was not legally compliant and therefore would be at risk of challenge”. That does not mean they may avoid the duty imposed on them by section 20(7C).
 - (a) If Parliament had intended non-compliance with the SCI to be irremediable it could have legislated to the effect. It did not. The only irremediable category of procedural error is non-compliance with the duty to cooperate: see section 20(7B)(b).
 - (b) The preparation of the Plan does not end on submission. It ends when an examiner has discharged their duty (if it is engaged) under section 20(7C).

- (c) The inspectors fairly acknowledge (a) and (b) at paragraph 50 of their Interim Findings, wherein they state, "...there is a risk that the Plan could be vulnerable to legal challenge at adoption. The way to lessen this risk, by reducing the risk of prejudice, would be to carry out a further full consultation in compliance with the Council's SCI, 2019 (as the Act requires)." The key point to note is that the proposed remedy is indeed required by the Act because its effect will be to secure compliance with section 20(5)(a) by ensuring that the whole Plan is indeed prepared and assessed under, and complies with, the SCI, 2019.

- 15 Therefore, I conclude the Council may require the examination to continue notwithstanding the inspectors' concerns about the potential non-compliance with the SCI, 2013.

The risk of a legal challenge on adoption

- 16 Section 113 of the 2004 Act regulates challenges to local plans. The relevant subsections provide:-

"...(3) A person aggrieved by a relevant document may make an application to the High Court on the ground that—

- (a) the document is not within the appropriate power;
- (b) a procedural requirement has not been complied with.

(6) Subsection (7) applies if the High Court is satisfied—

- (a) that a relevant document is to any extent outside the appropriate power;

(b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.

(7) The High Court may—

(a) quash the relevant document;

(b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval...”

17 In this case, the inspectors contemplate a challenge under section 113(3)(b). However, it is not sufficient for a claimant to demonstrate a procedural error. They must also show that error actually caused them to be “substantially prejudiced” (not merely that they might have suffered some prejudice). However, provided the Council invites representations on the whole Plan under the SCI, 2019 before the examination resumes, third parties will have an opportunity to comment on the draft plan in accordance with the adopted SCI. That would overcome the inspectors concern that prejudice might have been caused to people who wished to make representations on elements of the original plan during the last round of consultation but concluded they were unable to do so. It would also remedy any earlier non-compliance with section 20(5)(a). I stress the word “any” because it is proper to argue the SCI, 2013 should be interpreted purposively rather than literally. The purpose of the SCI is to provide a reasonable opportunity to comment on and shape a development plan document. That is something about which the Council is best placed to judge, and it is to be particularly observed the SCI, 2019 omits the steps in the SCI, 2013 which the Council judged to be unnecessary. Moreover, the difficulty with the inspectors’ approach is that even trivial non-compliance with the menu of measures they regard as mandatory would vitiate the plan making process. That would be so absent evidence of any actual let alone substantial prejudice to an individual’s right to be consulted. I doubt the court would concur with that construction.

18 Although a challenge is unlikely to succeed, that does not mean the risk of a challenge may be discounted. On the contrary, the inspectors' interim findings may make a challenge more likely by sign-posting a potential ground of claim. However, it should be borne in mind:-

- (1) A claimant requires the court's permission to proceed with a claim. That procedural step sifts out unmeritorious claims cheaply and quickly.
- (2) A claim under section 113 is made after a Plan has been adopted, and it will continue to have effect pending the determination of a challenge unless the court grants an interim order in respect of a whole or a part of it under section 113(5).

Conclusion

19 I conclude:-

- (1) The Council may request the inspectors to make recommendations that remedy the perceived breach of the SCI, 2013 and section 20(5)(a) of the 2004 Act. If it makes that request the inspectors must comply with it.
- (2) The inspectors contemplate (1) may be achieved by reconsulting the public on the whole Plan under the SCI, 2019. I respectfully agree with that approach.

- (3) Provided the Council consults the public on the whole Plan in accordance with the SCI, 2019 the risk of a successful legal challenge on the ground it failed to comply with the SCI, 2013 will be low.

TIMOTHY LEADER

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Dated Saturday 23rd October 2021

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ADVICE

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