WROUGHTON NEIGHBOURHOOD PLAN
(2014 - 2026) SEA

LEGAL SUBMISSIONS

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1. The purpose of this Submission is to provide a legal context to the submissions made by Turley dated 16th December 2015 in respect of the draft Wroughton Neighbourhood Plan. This Submission concerns itself with the Strategic Environmental Assessment submitted with the Plan. The SEA was prepared at the request of the Local Planning Authority following the initial submission of the Plan. It has not resulted in any changes to the Plan as originally submitted.

2. SEA - Key Legal Propositions:

- The SEA Directive provides inter alia:

"*Article 4*

General obligations

1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before

its adoption or submission to the legislative procedure …

Article 5

Environmental report

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

An SEA, therefore, is to be prepared "during" the preparation of a Plan. The SEA in the instant case was carried out after the preparation of the Plan and following its initial submission. It has not resulted in any change to the Plan. The consideration of reasonable alternatives is mandatory.

- The European Commission guidance on the SEA Directive (2001/42) provides inter alia:

> "5.12. In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the draft plan or programme and for the alternatives [footnote: Compare Article 5(3) and Annex IV of the EIA Directive which require the develop to provide an outline of the main alternatives studied and an indication of the main reasons for his choice taking into account the environmental effects]. The essential thing is that the likely significant effects of the plan or programme and the

alternatives are identified, describe and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in Annex 1 should thus be provided for the alternatives chosen. This includes for example the information for Annex I(b) on the likely evolution of the current state of the environment without the implementation of the alternative. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects.

5.13. The text of the Directive does not say what is meant by a reasonable alternative to a plan or programme. The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (eg different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes covering long time frames, especially those covering the very distant future, alternative scenario development is a

way of exploring alternatives and their effects. As an example, the Regional Development Plans for the county of Stockholm have for a long time been elaborated on such a scenario model."

- The Directive is incorporated into UK legislation by the Environmental Assessment of Plans and Programmes Regulations 2004.

- UK case law establishes the following:

  (i) There is a positive obligation to consider reasonable alternatives and it will be very rare that no reasonable alternatives exist (see *Ashdown Forest Economic Development LLP v. Wealden DC* [2014] EWHC 406 (Admin). At Paragraph 97 Sales J noted:

> "97. A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: see *Heard v. Broadland DC* at [71]). The court will be alert to scrutinise its choices regarding reasonable alternatives to ensure that it is not seeking to avoid that obligation by saying that there are no reasonable alternatives or by improperly limiting the range of such alternatives which is identified. However, the Directive does not require the authority to embark on an artificial exercise of selecting as putative 'reasonable alternatives, for full strategic assessment alongside its preferred option, alternatives which can clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan

> and for good planning reasons, as not in reality being viable candidates for adoption."

(ii) If reasonable alternatives are to be rejected, very clear reasons must be given. In *Save Historic Newmarket Ltd v. Forest Heath DC* [2011] JPL 1233 Collins J noted:

> "40. In my judgment, Mr Elvin is correct to submit that the final report accompanying the proposed Core Strategy to be put to the inspector was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements of the Directive and so relief must be given to the claimants."

(iii) An SEA and the Plan should be produced in parallel with the former informing the evolution of the latter in a meaningful way. A late SEA which is in reality no more than an ex post facto justification of a Plan prepared without SEA input will be unlawful. In *Seaports Investments Ltd Re Application for Judicial Review* [2008] Env LR 23 the headnote summarises the position as follows:

> "5. The scheme of the Directive and the Regulations clearly envisaged the parallel development of the environmental report and the draft plan with the former impacting on the development of the later throughout the periods before, during and after the public

> consultation. In the period before public consultation the developing environmental report would influence the developing plan and there would be engagement with the consultation body on the contests of the report. Where the latter became largely settled before the development of even a draft of the former, then the fulfilment of the scheme of the Directive and the Regulations could be placed in jeopardy. The later public consultation on the environmental report and draft plan might not be capable of exerting the appropriate influence on the contents of the draft plan. With regard to the public consultation process, whilst the scheme did not demand simultaneous publication of the draft plan and the environmental report it clearly contemplated the opportunity for concurrent consultation on both documents. One of the draft plans at issue had reached an advanced stage before the commencement of an environmental report, so that there had been no opportunity for the latter to inform the former. In the other case the environmental report had been issued for consultation some time after consultation on the draft plan so that there had been no parallel consultation. Accordingly, neither was in accordance with Arts 4 and 5 of the Directive and Regulations."

(iv) As a matter of trite law, an SEA, as with any document, which is based upon a fundamental error which, in its absence, may have resulted in a different outcome, is vitiated by error.

3. The SEA lodged in support of the Wroughton Neighbourhood Plan is flawed and unlawful on multiple layers:

(a) It was produced after the Plan had been initially submitted. It has had no influence on the developing Plan and its preparation breached

Article 4 ibid. Consultation on the SEA was incapable of informing the Plan making process as it was all but complete before the SEA was undertaken. The approach to the SEA and the Plan clearly offends the procedure envisaged in *Seaport* ibid.

(b) No alternative policy options were considered within the SEA and no credible explanation is given for this approach which would require a compelling justification (see Article 5; *Ashdown Forest* ibid and *Save Historic Newmarket* ibid). It is simply not credible that no reasonable alternatives existed and yet no transparent of credible reasons are advanced for not assessing them. This means that the "chosen" site allocations, for example, are not the outcome of any open and transparent process whereby a range of potential alternatives are tested on the same basis of the "chosen" sites.

(c) Site DP2 is persistently treated as a PDL site which, in terms of the approach of the Plan, gives it a preferred status. In fact, in planning policy terms it is not a PDL site as confirmed by the agent for the site owners at my client's recent Section 78 Public Inquiry. The mischaracterisation of the site has skewed the whole SEA and site selection process. Such an error results in the Plan and the SEA being objectionable (see, for example, the Inspector's Interim Conclusions re the Stratford-on-Avon LP here the errors in the SEA in respect of the Long Marston Airfield site were sufficient to place the whole approach to site selection in jeopardy).

4. The Plan is a flawed document resting, as it does, on a deeply flawed SEA. The Plan is unlawful and liable to be rejected by its examining Inspector or quashed if adopted.

KINGS CHAMBERS
36 Young Street
MANCHESTER
M3 3FT
DX 718188 (MCH 3)

DAVID MANLEY QC

5 Park Square East
LEEDS
LS1 2NE
DX 713113 (LEEDS PK SQ)

Embassy House
60 Church Street
BIRMINGHAM
B3 2DJ
DX 13023 BIRMINGHAM

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