ST ALBANS STRATEGIC LOCAL PLAN 2011-31 EXAMINATION

SUBMISSIONS ON BEHALF OF COMMERCIAL ESTATES GROUP ("CEG") IN RELATION TO ISSUE 1: THE DUTY TO CO-OPERATE

Preliminary

1 These submissions are made on behalf of CEG which is promoting land at Ambrose Lane, north-west Harpenden. They are submitted by agreement with the Inspector following the hearing on 26th October 2016. They address the issue of whether St Albans City and District Council ("SACDC") has complied with the duty to co-operate ("DtC") under s33A of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") in relation to its Strategic Local Plan 2011-31 ("the SLP"). SACDC has not succeeded in adopting a local plan since 1994. The SLP was submitted to the Secretary of State by SACDC for examination on 2 August 2016. The land at Ambrose Lane is within the broad location identified by draft policy SLP13(c) for an urban extension accommodating (inter alia) c500 dwellings.

2 While a number of neighbouring and nearby LPAs were supportive of the SLP in their consultation comments, a number have since raised concerns as to legal compliance with DtC. This caused the examining Inspector to convene an Initial Hearing Session to consider such compliance as a preliminary issue, "particularly but not exclusively with regard to overall housing provision" [ID-1, §2]. CEG sought to engage with this

preliminary issue at an earlier stage and submitted a Joint Opinion from counsel (Peter Village QC and Andrew Tabachnik of 39 Essex Chambers) which considered the concerns raised by those asserting that SACDC had failed to comply with DtC. To this end, CEG submitted that Joint Opinion to the Programme Officer through its solicitors Walton & Co and planning consultant Nathaniel Lichfield & Partners within the time given by the Inspector for the provision of hearing statements (7th October 2016 deadline). However, for reasons which in light of subsequent events are unclear, the Inspector declined to accept the Joint Opinion in advance of the session following an exchange of correspondence on the issue between the Programme Officer and Walton & Co. The advice provided within that joint opinion is incorporated within these submissions.

3 At the hearing on 26th October the Inspector limited the round table participants to representatives of SACDC and Hertfordshire County Council, North Herts DC, Welwyn Hatfield Borough Council, the HBF and a group of four neighbouring local planning authorities (Dacorum, Hertsmere, Three River and Watford), all of whom had representatives around the table and in addition were represented by Robert Jameson, a Solicitor from Attwaters Jameson Hill. Central Beds and Luton Borough Councils were also invited to participate but did not attend.

4 At the conclusion of the hearing the Inspector invited comments from the public gallery. The penultimate representation was made by Mrs Joanne Whitehead, practicing under the style and title Joanne Wicks QC. Mrs Whitehead has already submitted a number of representations to the Examination and has provided Opinions to the Harpenden Green Belt Association (which have been published on the internet) where she quite correctly has been at pains to point out that her “Advice” was put

forward in a private capacity and could not be relied upon by anyone in terms of the correctness of the legal propositions contained therein.

5 At the conclusion of Mrs Whitehead's lengthy submissions at the preliminary hearing, the Inspector requested a copy of the notes from which she was reading. Mrs Whitehead agreed with alacrity to provide those notes. Given the Inspector's refusal to accept the CEG counsel's written Opinion several weeks earlier, such a course was, to say the least, surprising and disturbing. Nevertheless, when the Inspector turned to hear submissions from me, on behalf of CEG, I at least persuaded the Inspector that he should afford CEG the same courtesy to make our submissions in writing. The issue before the Inspector is exceedingly serious given that a finding of a failure in DtC would set the plan and provision of much needed housing back several years.

6 These are those submissions.

7 Even with the capacity to submit these Submissions, it will become clear that the preliminary hearing was based on misconceptions as to the law. In the event that the Inspector was minded to find that the DtC had not been complied with, CEG would request a further hearing where it is afforded a proper opportunity to participate in the discussion. Further, CEG reserves the right to make further submissions by way of response in the event that new points are made in response to these submissions or in relation to its interests at Ambrose Lane following the Inspector's invitation at the initial session.

The Legal Test

8 The purpose of an independent examination, so far as relates to DtC, is to determine in respect of the development plan document whether the LPA complied with any

duty imposed on the authority by section 33A in relation to its preparation: see section 20(5)(c) of the 2004 Act. The issue for the Inspector is whether it would be "reasonable to conclude" [section 20(7)(b)(ii) of the 2004 Act] that SACDC has, on analysis, discharged any duty imposed on the authority. Use of the word "any" in the context of "any duty" is relevant because the DtC will only arise in very limited circumstances, as described below.

9 DtC is a statutory requirement and whether DtC has been complied with will depend on application of the relevant statutory provisions. Although there is a considerable amount of policy and guidance which has been issued with respect to DtC (especially, eg, in the PPG), this cannot override or add additional requirements which do not exist within the terms of the statutory provisions.

10 The issue of DtC is also an issue which goes to soundness of the plan, and in that sense issues of policy can be relevant in determining whether the plan has been soundly prepared. Such was acknowledged at first instance in *R (SSOBT) v Selby District Council [2014] EWHC 3441* by Ouseley J, see para 47. However, at this stage of the examination the only relevant consideration is whether there has been compliance with the strict terms of s.33A of the 2004 Act.

11 Section 33A of the 2004 Act was introduced by the Localism Act 2011, and came into force on 15th November 2011. It provides in material part:

"(1) Each person who is:

(a) a local planning authority,

(b) a county council in England that is not a local planning authority, or

(c) a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c) … in maximising the effectiveness with which activities within subsection (3) are undertaken.

"(2) In particular, the duty imposed on a person by subsection (1) requires the person:

(a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken ….

"(3) The activities within this subsection are:

(a) the preparation of development plan documents …

…

(d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c) that are, or could be, contemplated, and

(e) activities that support activities within any of paragraphs (a) to (c),

so far as relating to a strategic matter.

"(4) For the purposes of subsection (3), each of **the following is a "strategic matter":**

(a) sustainable **development or use of land** that has or would have a **significant impact on at least two planning areas**, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas ….

"(7) A person subject to the duty under subsection (1) must have regard to any guidance given by the Secretary of State about how the duty is to be complied with".

(emphasis provided**, in bold).**

12 It is essential properly to understand the foregoing provisions and then apply intellectual rigour in applying the facts to the provisions of the Act. Unfortunately it is pellucid from the submissions that were made by objectors at the preliminary examination hearing that there was a wholesale failure properly to understand the statutory scheme underpinning DtC.

13 The fundamental starting point is to determine the scope of any "strategic matter" for purposes of section 33A(4)(a) of the 2004 Act. A "strategic matter" must

13.1 Relate to sustainable operational development or the use of land;

13.2 That has or would have "a significant impact on at least two planning areas".

13.3 The extent of the duty identified in section 33A(2) to engage constructively, actively etc relates to the activities identified in section 33A(3), which in turn are limited by the words "so far as relating to a strategic matter". This is very important because this provision limits the extent of the required engagement by the LPAs to issues which relate to the identified strategic matter. Put another way, once a strategic matter is identified, the engagement that then takes place will be limited to dealing with the strategic matter rather than anything unconnected.

13.4 The issue of whether there is or would be a "significant impact" is clearly a matter for the planning judgment of the LPA, in this case SACDC.

14 Although I shall deal with the detail of the evidence provided at the hearing below, it can be seen at once that the necessary intellectual rigour necessary to apply the above provisions was completely lacking at the preliminary hearing. For the hearing to have any utility, it was necessary to identify what the strategic matter(s) was or were. This was all set out in CEG's Joint Opinion, which was ignored. Identifying what the strategic matters were itself involved

(1) identifying the land upon which the operational development would take place;

(2) identifying any significant impact the development would have, and

(3) whether any significant impact would be on at least two planning areas.

15 It is important to note, at this stage, that there is no statutory or policy requirement to identify what the strategic matters are in any development plan document. A "strategic matter", as defined in section 33A of the 2004 Act, is not the same as "strategic priorities for the area" (the phrase used in paragraph 156 of the National Planning Policy Framework in the context of what should be delivered by a local plan). Some time was taken at the hearing considering whether the Local Plan considers strategic priorities. I can only assume that this is because it was wrongly understood that this has a bearing on identifying the strategic matter. It quite clearly doesn't, and this point is a red-herring. There is no requirement either in statute or policy for the development plan to identify any strategic matter. For what it is worth, the strategic priorities (as opposed to strategic matters) for the area are clearly identified in the SLP Chapter 3 (Vision and Objectives) and Chapter 4 (Strategy).

Strategic Matter(s)

16 On the available evidence, and the approach which has informed the SLP, the only identifiable potential "strategic matter" relates to the east-wards expansion of Hemel Hempstead. This is a matter which has been the subject of extensive joint working and co-operation with the relevant neighbouring LPA (Dacorum BC). It can be noted that the issue of "principle" regarding this proposal is specifically agreed by Dacorum BC. While matters of detail, and the specific minutiae of objections to the soundness of the relevant policies will have to be considered in due course, these points do not go to compliance with DtC.

17 However, the issue of what the strategic matter is, will be determined by whether it would have a significant impact on at least two planning areas. And again, I remind you that the issue of whether there has been constructive engagement can only relate to the strategic matter with a significant impact. Thus, to take an example that was trailed by Mrs Whitehead, the fact that the sewerage from Harpenden is dealt with in Central Bedfordshire does not give rise to a strategic matter unless it can be demonstrated that the development proposed in St Albans District would have a significant impact on the sewerage infrastructure of Central Bedfordshire and SACDC.

18 In fact, the issue which is at the heart of the concern identified by the four authorities, as very clearly articulated by Mr Jameson, does not relate to the operational development or use of land at all. Nor does it relate to the housing or the employment to the East of Hemel Hempstead. Indeed, he expressly eschewed reliance on those issues. Mr Jameson clearly stated the issue thus: "Whose needs is this development meeting?". That, in a nutshell, is the very issue which exercises the four LPAs who he

represents. In essence Mr Jameson's clients seek to stake "claim" to a proportion of the housing provided within St. Albans as meeting a need arising from a different (wider) housing market area to that identified by SACDC. They wish to "claim" some of the housing provided in SACDC as contributing to their needs.

19 But this demonstrates a profound lack of intellectual rigour and absence of reasonableness with which Mr Jameson's clients have approached their submissions. The reality is that a disagreement relating to the proper identification of the relevant housing market area has been dressed up as a lack of co-operation on SACDC's part. But even if (contrary to the evidence) there was a failure by SACDC to discuss the issue of the relevant housing market area, this is legally irrelevant as this is not (and not capable of being) a strategic matter, being an issue relating to the development and use of land which will have a significant impact in at least two planning areas. I return to this matter below.

The policy framework

20 Paragraphs 178 and 179 of the National Planning Policy Framework provide:

> "Public bodies have a duty to cooperate on planning issues that cross administrative boundaries, particularly those which relate to the **strategic priorities** set out in paragraph 156. The Government expects joint working on areas of common interest to be diligently undertaken for the mutual benefit of neighbouring authorities.
>
> Local planning authorities should work collaboratively with other bodies to ensure that strategic priorities across local boundaries are properly co-ordinated and clearly reflected in individual Local Plans. Joint working should

enable local planning authorities to work together to meet development requirements which cannot wholly be met within their own areas – for instance, because of a lack of physical capacity or because to do so would cause significant harm to the principles and policies of this Framework. As part of this process, they should consider producing joint planning policies on strategic matters and informal strategies such as joint infrastructure and investment plans."

21 Further, paragraph 181 of the Framework stipulates:

> "Local planning authorities will be expected to demonstrate evidence of having effectively cooperated to plan for issues with cross-boundary impacts when their Local Plans are submitted for examination. This could be by way of plans or policies prepared as part of a joint committee, a memorandum of understanding or a jointly prepared strategy which is presented as evidence of an agreed position. Cooperation should be a continuous process of engagement from initial thinking through to implementation, resulting in a final position where plans are in place to provide the land and infrastructure necessary to support current and projected future levels of development."

22 I again stress that the advice in those paragraphs cannot impose a greater statutory duty in relation to the legal requirement of DtC than exists in the provisions of the 2004 Act.

23 Of most relevance for present purposes, it should be noted that:

23.1 On SACDC's case (the soundness of which will need to be examined in due course), this is not a case where SACDC is unable to meet relevant identified needs within its own boundaries. While SACDC has substantial Green Belt,

the proposed allocations in the SLP would address the level of need as assessed by SACDC.

23.2 There is broad agreement with Dacorum BC that joint working will continue to be required in relation to the proposed eastwards expansion of Hemel Hempstead, whether this is by way of Area Action Plan or joint master plan. The Crown Estate (Mr Sellwood) has confirmed that there has been substantial engagement by both SACDC and Dacorum DC on an on-going basis. Mr Jameson effectively confirmed as much by admitting that this was not about the minutiae of where the housing goes, or where the employment land is located ("all of which is known and accepted" he said).

24 Chapter 9 of the Planning Practice Guidance ("PPG") offers further guidance on the duty to co-operate. The point is repeatedly made that "the duty to cooperate is not a duty to agree". Paragraph 9-001 advises that LPAs must "bear in mind that the cooperation should produce effective and deliverable policies on strategic cross boundary matters". Again, I emphasise that this advice is only applicable in relation to a "strategic matter" and does not extend further. Pertinent here also, paragraph 9-021 states:

> "… the duty to cooperate is not a duty to agree and local planning authorities are not obliged to accept the unmet needs of other planning authorities if they have robust evidence that this would be inconsistent with the policies set out in the National Planning Policy Framework, for example policies on Green Belt".

Submissions

25 The only such issue where there is a potential "strategic matter" is the east-wards expansion of Hemel Hempstead. In so far as the objectors understood the very constrained legal statutory duty, no one identified any different "strategic matter".

26 This is a fundamental point. The extent to which any "duty to co-operate" arises is a direct product of whether any "strategic matter" is proposed to be addressed by the SLP. Where, however, a topic is addressed by the SLP in a manner which is plainly "not strategic", as it engages SACDC's area only, the issue is not one of "duty to co-operate" compliance, but requires assessment as to whether the SLP's approach is "sound" or has been unjustifiably circumscribed.

27 There is no evidence before the examination that there will be a likely significant cross boundary impact of the development at East of Hemel Hempstead. Numerous issues are raised in the representations of the LPAs expressing concerns as to compliance with the "duty to co-operate" which, on analysis, are matters which go to plan preparation "soundness" alone. While there can be a cross-over with a matter implicating both the "duty to co-operate" and "soundness" considerations (ie, where because a "strategic matter" has not been the subject of co-operation with neighbouring LPAs, the end product is defective and thus unsound), that is not the position here.

28 Examples of representations which fall into this category include:

28.1 The issues of housing market area and consequential assessment of housing need, as directly applicable to SACDC. It is plain that there is a debate to be had as to whether SACDC is correct to treat its area as a single self-contained housing market area, and thus whether the SLP is "sound". If, however, SACDC is correct, and noting that it is proposed to accommodate all identified need within SACDC's area, this by definition does not give rise to any "strategic matter". DtC is not intended as a device by which LPAs are somehow required to pursue discussions with neighbours on purely internal questions. Put another way, SACDC is entitled to its view as to the relevant HMA, unless and until that view is found to be "unsound" in the course of the examination. There would be no purpose or statutory basis for compelling SACDC to "co-operate" on such internal matters with neighbours that disagree, and this is not what can be required of SACDC.

28.2 The issue of whether SACDC was in a position to accommodate any "unmet need" from any neighbouring or nearby LPA. Again, in my submission, this is if anything, a "soundness" issue. Specifically:

a. There is no proper evidence of any other LPA's "unmet need" being realistically likely to have a "significant impact" on SACDC and some other planning area.

b. Notably, Luton (which has a substantial "unmet need") has not suggested that a "strategic matter" arises, no doubt because Luton is in a different

HMA on any view, and it is looking elsewhere to accommodate its "unmet need".

c. Dacorum has put forward no specific or evidence-based case as regards its own needs (or, more particularly, any alleged inability to meet them within its own boundaries), and in consequence it is not credible that a "strategic matter" arises in that regard.

d. In addition, and fundamentally, given the fact that over 81% of SACDC's area is Green Belt, and that (PPG, paragraph 9-021) "the duty to cooperate is not a duty to agree and local planning authorities are not obliged to accept the unmet needs of other planning authorities if they have robust evidence that this would be inconsistent with the policies set out in the National Planning Policy Framework, for example policies on Green Belt", it is unrealistic to expect any change of stance by SACDC unless its approach is assessed during this examination as "unsound". Moreover, the Joint Green Belt Review conducted in 2013/14 with a number of neighbouring authorities should be noted in this regard.

28.3 On economic development, comparable points apply. But, it should be noted that the proposed allocation at East Hemel Hempstead (SLP, policies 13(a) and 13(b)) – which I consider next - allocates land which is "theoretically sufficient to meet the assessed B Use Class land and premises needs of the whole of the SEP M1 / M25 Growth Area": see p18 of the August 2016

Statement of Compliance. In so far as the East Hemel Hempstead allocation considers economic issues, it is embraced in the analysis which follows.

29 As for the east-wards expansion of Hemel Hempstead, paragraph 4.19 of the SLP references various joint working with Dacorum. Further details are provided in SACDC's August 2016 Statement of Compliance (CD015, p14-15), which records (inter alia):

> "The East Hemel Hempstead (EHH) Broad Location has required and will continue to require substantial joint working with DBC, HCC and HLEP. This is a major urban extension of Hemel Hempstead that will contribute to the needs of the St Albans housing market area as defined in earlier joint work.
>
> "The site will provide up to 2,500 dwellings within the Plan period. Inclusion of this strategic growth location in the SLP follows joint work on the Hertfordshire LEP SEP and a joint Green Belt review. This SLP proposal is a direct response to the LEP SEP and DBC's regeneration priority for Hemel Hempstead, including the need to make best use of its New Town origin services and facilities. This is a very significant DtC outcome.
>
> "A period of prolonged co-operation has resulted in various actions to manage this issue and prepare for effective implementation (if the SLP is adopted). It is important to note that this outcome reflects earlier positive DtC work between DBC and the Council on the Dacorum Core Strategy (CS). Despite the history of the idea of east of Hemel Hempstead expansion and uncertainties about implications for sub-regional planning, Green Belt and infrastructure issues, the Council supported Dacorum's CS approach. This offered Dacorum significant assistance in achieving an adopted CS on the basis of early review, including consideration of opportunities for expansion of Hemel Hempstead eastwards into the District.

> "As Dacorum noted in their 2012 DtC Statement, the District co-operated on "joint evidence work and consultation for Growth at Hemel Hempstead, 2006 and East Hemel Hempstead Area Action Plan Issues and Options, 2009". Formal liaison with the HIPP and HPG has also ensured follow up co-operation with other DtC parties directly involved. The development at East Hemel Hempstead has also been considered directly with all neighbouring and nearby authorities throughout the Plan process. DtC liaison and decision making with HLEP has ensured that the East Hemel Hempstead site will benefit from any significant public funding available for infrastructure (particularly transport improvements in the SEP M1 / M25 Growth Area). The work which has currently been undertaken with regards to East Hemel Hempstead represents a significant DtC outcome."

30 It can be noted that Dacorum BC's 19 February 2016 consultation response (at p10) supports the "principle" of the relevant SLP policies on East Hemel Hempstead, before going on to raise a number of detailed objections on the soundness of the specifics.

31 Taking these matters in the round, it is clear that there is robust and credible evidence that SACDC has discharged its "duty to co-operate" with Dacorum BC in relation to matters arising from the eastwards expansion of Hemel Hempstead. Any lingering criticisms of Dacorum BC or others resonate as issues of "soundness", and should be assessed in due course.

32 At all events, I return to the fundamental issue identified by Mr Jameson, and really encapsulates all the complaints of the LPAs for whom he appears – they are frustrated by the refusal of SACDC to agree that a proportion of the housing provided within SACDC should "count" towards meeting the needs of neighbouring authorities. But

on any basis that does not amount to a "strategic matter". It cannot, as SACDC's position reflects its assessment of its own needs, and its intention to accommodate all such identified needs within its own borders.

Mrs Whitehead's submissions

33 Similar points apply to Mrs Whitehead's submissions, which equally fail to engage rigorously with whether a "strategic matter" arises. Her points on sewerage have been addressed above. As to her other points:

33.1 Highways. It is inevitably the case that there are road links between neighbouring Districts. That does not per se establish a "strategic matter". Nor does the fact that the development proposed in the SACDC will require consideration of highways mitigation schemes at some junctions, an entirely normal state of affairs. What is required is that there "would" be a "significant impact on at least two planning areas" in highways terms. Where is the evidence of that here? It is non-existent.

33.2 Schooling. Again, no "strategic issue" arises. Questions as to the location of the schools to which Mrs Whitehead's representations were addressed are purely internal to SACDC. The schools are to meet local (ie, SACDC) needs, and there is no credible evidence that sites cannot be located within SACDC's area, per the draft Plan.

33.3 Green Belt/landscape implications. The suggestion that there will be a "significant" cross-boundary impact in these terms is exaggerated and unjustified. It is pure assertion, and not supported by any evidence at all. There is no particular reason why, with appropriate conditions and design treatment, the relevant development at Harpenden supported by the draft Plan

should have any meaningful, let alone "significant", cross-boundary impacts in the terms suggested. It is certainly no part of Dacorum BC's case that there would be such impacts and Central Bedfordshire Council is not asserting any significant cross boundary impact will arise.

Conclusion

34 For the reasons I have set out above, there is no lawful basis for concluding that the DtC has not been fulfilled pursuant to section 33A of the 2004 Act.

PETER VILLAGE QC

39 ESSEX CHAMBERS

LONDON

31 October 2016