SHOCK

(Stop Housing Obliterating the Character of Keinton)

LEGAL SUBMISSION

INTRODUCTION

1. This is a legal submission prepared on behalf of SHOCK (Stop Housing Obliterating the Character of Keinton) to be read in support of, and in conjunction with the Cook Submission already adopted by SHOCK in its Response Statement. The Legal Submission refers SSDC, and its advisers, to the most relevant judicial authorities governing the exercise of decision-making powers by a planning authority.

COMMON LAW

2. In making a planning decision, SSDC, as a public authority, is subject to a hierarchy of laws. First, it has an overriding obligation to comply with English common law principles relating to the conduct of such bodies (enforced by the remedy of judicial review). It must therefore adopt fair procedures, ensure natural justice, apply relevant considerations and ignore the irrelevant, and, above all, make decisions which meet the rationality test in *Wednesbury*.

3. The common law principles may supplement the statutory duties of a planning authority. For example, depending on the circumstances, adherence to the statutory minimum notice periods set by the Town and Country Planning (Development Management Procedure) Order 2015 may not be adequate to comply with the rules of natural justice.

STATUTE

4. The second tier in the legal hierarchy is statute law governing the planning process. In *Suffolk Coastal PC* v *Hopkins Homes (and others)* [2017] UKSC [37] (hereafter *'Hopkins Homes'*) Lord Carnwath (delivering the judgment of the Supreme Court) said "*The modern system of town and country planning is the creature of statute"* (at 20). In the context of decision-making by a planning authority the key statutory provisions are section 70(2) of the Town and County Planning Act 1990 ('the 1990 Act') and section 38(6) of the Planning and Compulsory Purchase Act 2004 ('the 2004 Act'). But the principle that the decision-maker should have regard to the development plan, so far as material and "any other material considerations", has been at the core of planning since the system was first introduced in 1947. Section 38(6) increased the importance to be attached to the development plan by requiring determinations to be "*made in accordance with the plan unless material considerations indicate otherwise"*.

POLICIES

5. SSDC must also take into account the NPPF. But this is not law. It is policy guidance. It is not binding on SSDC. SSDC has a discretion as to how it applies that guidance and what weight to give to its different elements within the decision process. The Applicants approach the NPPF as if it were a legal instrument governing planning authorities. It is not. Nor could it be, because the 'sustainability' principle, for example, requires value judgments and the balancing of different elements within the 'sustainability' concept itself. Moreover, a concept such as 'sustainability' has to evolve and respond to circumstances prevailing at the time, such as climate change and the carbon footprint of the development. Just because the Applicants ignore those issues does not mean SSDC can do so. As Lord Carnwath emphasised in *Hopkins*

Homes an important distinction must be drawn between development plans and the NPPF, on the one hand, and statute, on the other, because the former are statements only of policy, where it is for the decision-maker to determine the weight to be given to different policies, and how to balance their sometimes-conflicting objectives. But they are bound by statute.

MATERIAL CONSIDERATIONS

6. There is another important area of planning law considered recently by the Supreme Court in *R* v *Resilient Energy Severndale Ltd ('Resilient Energy') and Forest of Dean DC* [2019] UKSC 53. The Court affirmed the settled law established by the House of Lords in *Newbury DC* v *SoS (Environment)* [1981] A.C. 578. A material consideration is one which is directed to a planning purpose (and not some other ulterior motive) and fairly and reasonably relates to the development permitted. So, in *Resilient Energy*, the establishing of a community fund out of the profits of Resilient Energy's windfarm was held not to be a material planning consideration whereas the proximity of a school to a proposed fast-food outlet was held to be a material planning consideration in *R (Copeland)* v *LB of Tower Hamlets* [2010] EWHC 1845.

7. In the case of LVA's Application there is no doubt that the objections raised to the proposal by or on behalf of SHOCK (and other objectors) are all material planning considerations.

EARLIER PRECEDENTS- INSPECTORS' APPEAL DECISIONS

8. It is also clear that previous appeal decisions such as those above referred to in the Cook Submission are capable of being important material considerations even if they do not relate to the development site itself. Again, this issue has recently been considered by the Court of Appeal in *DLA Delivery* v *Baroness Cumberledge of Newick* [2018] EWCA Civ. 1305. Lindblom L.J. emphasised that this was essential to maintaining consistency in planning decisions, and that the court should not limit the circumstances in which a previous decision could be a material consideration. The classic statement of principle is that of Mann L.J. in *North Wilts DC* v *SoS (Environment).*

PRECEDENT- the IMPACT of GRANTING PERMISSION

9. The Courts have also accepted the principle that a planning authority may refuse planning permission if it would be likely to lead to a proliferation of applications for similar developments, see Lord Widgery C.J. in *Collins Radio* v *SoS (Environment)* [1975] JPL 221 and *Poundstretcher* v *SoS (Environment)* [1988] 3 PLR 69 citing *"sporadic development in the countryside"* as an example where this might occur. This is particularly the case where the result would be permissions in cases in breach of a policy without any good reason (e.g. where reliance is placed on a temporary inability to demonstrate a 5-year supply of housing land) but where the harmful consequences of permission would be permanent. Obviously, if permission were given for the LVA estate beyond the built-edge of the village it would inevitably result in development of the green space between the site and the true western edge of the built settlement (i.e. the line of houses in Row Lane and Irving Road).

THE 'TILTED BALANCE'- NPPF Paras 14 and 49

10. The judicial authorities of most significance for LVA's application are those recent judgments analysing the effect on the decision-making process of a planning authority of the lack of a 5-year supply of housing land: *Hopkins Homes, Hallam Land Management* v *SoS (Communities and Local Government)* [2018] EWCA Civ. 1898 (*'Hallam'*) and *Crane* v *SoS (Communities and Local Government) and Harborough DC* [2015] EWHC 425 (*'Crane'*).

11. The Applicants' Planning Statement as to the effect of the 'tilted balance' is wrong in law. First, as Lord Carnwath emphasises in *Hopkins Homes*, the lack of a 5-year land supply only affects the ability of a planning authority to rely on *"policies for the supply of housing in the ordinary sense of that expression"* (para. 57). A shortfall in housing land does not render out-of-date other parts of a development plan which serves different purposes, such as, taking Lord Carnwath's example, policies for the protection of the countryside.

12. Secondly, the 'tilted balance' does not preclude in law reliance on policies in the development plan. This is a matter of discretion for the local planning authority. It is for the planning authority to consider, in the exercise of its decision-making power, how to weigh up different policies even when the 'tilted balance' applies, including policies for the provision of housing. This is emphasised by Lindblom L J in *Hallam* (para 51) when he said:

    "Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment, and the Court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, ***how long it is likely to persist****,* (emphasis added) *what the local planning authority is doing to reduce it, and how much of it the development will meet."*

13. Finally, *Crane* shows that the nature, magnitude, and cause of a housing land shortfall has to be taken into account in assessing what weight can still be given to housing policies. Lindblom J (as he then was) said, at paras 71 to 74:

    "However, the weight to be given to such policies" (i.e. policies for housing development) *"is not dictated by government policy in the NPPF. It will vary according to the circumstances, including, for example, the extent to which the policies actually fall short of providing for the required five-year supply,* ***and the prospect of development soon coming forward to make up the shortfall****."* (emphasis added)

    "The presumption in favour of the grant of planning permission in paragraph 14 is not irrebuttable. And the absence of a five-year supply of housing land will

not necessarily be conclusive in favour of the grant of planning permission. In this case it was not."

"Paragraph 14 of the NPPF does not say that where "relevant policies" in the development plan are out of date, the plan must therefore be ignored. It does not prevent a decision-maker from giving as much weight as he judges to be right to a proposal's conflict with the strategy in the plan, or, in the case of a neighbourhood plan, the "vision."

14. These judicial pronouncements on how the 'tilted balance' works are important in this case because it is Natural England's embargo on developments which are not phosphate neutral that is the primary cause of the shortfall and that is about to be resolved. The case-law supports the Cook submission as to how SSDC should approach determining LVA's application. In SHOCK's submission, SSDC is entitled, and indeed obliged by statute, to continue to have regard to its plan policies, and in particular those such as SS2, which the Applicant concedes it breaches, because these are not policies for housing development, but policies directed at other purposes (i.e. the protection of the countryside and rural environment), within the analysis of Lord Carnwath in *Hopkins Homes*.

THE NATURE OF SSDC'S PLANNING DECISION

15. The Application poses a number of questions for SSDC, even though, SHOCK submits, the substantive result – a rejection of – cannot be in any doubt. These are:

    - the effect of/response to a misleading/negligent planning application
    - whether the Application gives sufficient information to enable SSDC to make an outline decision in principle or whether it should be rejected for incompleteness
    - whether it is premature for SSDC to make a substantive decision.

FRAUDULENT/NEGLIGENT MISREPRESENTATION

16. The Application is a litany of errors and contradictions, some highly material and clearly deliberate, for example, the misquoting of the relevant site assessments, and the distances quoted to village locations to make the LVA estate appear less remote from the village centre. The Application is, in parts, designed to mislead. There seems to be no statutory protection for a planning authority in such circumstances, as often exists elsewhere in relation to information provided to regulatory bodies, such as the Competition and Markets Authority. The only judicial authority found deals with the reverse case – misrepresentation **by** (not **to**) a planning authority (see *Slough Estates v Welwyn DC*) where substantial damages were awarded to the plaintiff developer.

OUTLINE PLANNING PERMISSION

The nature of outline permission

17. An application for outline planning permission allows a planning authority to give a decision that a particular form of development on a site is in principle acceptable and reserve details for subsequent approval. In this case, SHOCK submits that SSDC should not consider the outline application separately from all or any of the reserved matters. Alternatively, SSDC should reject the Application as incomplete.

Incompleteness

18. The issue of incompleteness has been raised by Natural England, Somerset Highways and SCC Strategic Transport Planning. SHOCK agrees with them. There are obvious omissions in the Application if it is to be decided according to current NPPF criteria, including: the lack of a phosphate mitigation strategy; the omission to provide a carbon neutrality assessment; the absence of sufficient information to enable a Habitats Regulations assessment to be carried out; failure to provide a Full Travel Plan such that the tests in paragraph 110 of the NPPF can be applied; failure to comply with SCC Travel Plan Guidance 2011; the absence of commitments in relation to the provision of woodland and landscaping and open space;and the impact on the Celtic Way, requiring a footpath diversion order.

19. If SSDC were to grant approval on the incomplete material in the Application it would grant a blank cheque to the Applicants. Key aspects of the development which cannot constitute reserve matters are sketched out, only in embryonic form, without the necessary supporting commitments, financing, or methodology to ensure that they can be carried fully into effect.

PREMATURITY

20. The NPPF (which is guidance not binding law) recognises that a planning application can be refused as premature. There are obvious reasons, SHOCK submits, for taking this approach: Keinton Mandeville Parish Council is in the process of completing a Neighbourhood Plan (which will define local need and encapsulate the community's views); there is a new development plan for the SSDC area which will be considered and adopted by the new planning authority, the Somerset Unitary Authority, when it formally takes over from SSDC on 1 April 2023; and the phosphate embargo by NE is about to be resolved with the result that consented dwellings can be built ending the housing shortfall alleged by the Applicant. The judgment on prematurity is within the discretion of SSDC and not dictated by the NPPF.

21. The scale, location and effect of the LVA estate on Keinton Mandeville will be significant and permanent and should not be permitted simply because of a transitory set of circumstances. The development proposed predetermines and pre-empts a decision which ought to be taken within the context of an up-to-date development plan and assessment of local demand by the Unitary

Authority. There is no prejudice to the Applicant in this approach since the land is unavailable to it before September 2023. The application is also one for outline consent only with major reserved matters to be determined. It is also to be noted that the Promotion Agreement between LVA and the +Chinnock landowners, which was signed in November 2020, is effective for 7.5 years i.e. it therefore runs until June 2028.

CONCLUSION

In conclusion, SHOCK submits that the arguments made in the Cook Submission and the SHOCK Response are supported by the case-law referred to above, which, is, of course, binding on SSDC. In particular, in the current context, this balance is not to be tilted in the Applicants' favour to any material degree (following *Hopkins Homes, Hallam,* and *Crane*) and their thoroughly unmeritorious and flawed application should plainly be rejected by SSDC. The options open to SSDC, discussed above, are all within the range of its discretionary powers of decision and do not therefore expose it to any material risk of legal action. Nor is it for a planning authority to make good an application's failings through fashioning complex conditions and commitments to deal with omissions in the applicant's case for approval.

SHOCK

30 August 2022

* * *