BANES CORE STRATEGY

COUNCIL RESPONSE TO SUBMISSION ON BEHALF OF RHL PREPARED BY ANTHONY CREAN Q.C.

1. This Note has been prepared in a short time frame to respond to the very late submission of RHL's document of 9th January 2012. BANES will further consider its stance before next week but thought it appropriate to set out as quickly as possible its initial response.

S.110

2. For the avoidance of doubt, BANES considers that it has engaged constructively, actively and on an ongoing basis and has co-operated with, in particular, Bristol, in the preparation of the Core Strategy: see BNES4. It is not therefore accepted that there is any breach of s.110 in what has happened to date. However, the Inspector has asked for comments to be limited to the legal point about whether s.110 applies.

The Statutory Scheme

3. S.110 (which is in force) inserts a new s.33A into the 2004 Act (the duty to co-operate) and a new purpose of the independent examination into s.20(5) (to ensure that the local authority complied with the s.33A duty in preparation of the LDD).

4. The duty to co-operate, in particular with other local authorities (s.110(1)(a)) on strategic matters (s.110(4)), is a duty to co-operate to maximise the effectiveness with which s.33A(3) activities are undertaken. The relevant s.33A(3) activity is "the preparation of development plan documents". The local authority is therefore required to engage constructively, actively and on an ongoing basis in any process by which development plan documents are prepared (s.110(2)(a)) and any activities which can reasonably be considered to prepare the way for preparation of the LDD (s.110(3)(d).

5. Thus it can be seen that the various duties in s.110 all focus on plan preparation. As shown below, the plan preparation stage finished with submission of the LDD for independent examination and s.110(3) is only consistent with that plan preparation having concluded at the point of submission of the LDD.

6. There are effectively three stages leading to adoption of an LDD: (1) plan preparation; (2) independent examination (with possible binding recommendations[1]); and (3) adoption.

Plan Preparation

7. The plan preparation stage is addressed in s.19 of the 2004 Act and the Town and Country Planning (Local Development)(England) Regulations 2004 ("the 2004 Regulations").

8. S.19 is headed "Preparation of local development documents". LDDs are to be "prepared" in accordance with the LDS (s.19(1)). S.19(2) tells the LPA what it must have regard to "in

[1] s.113 is not yet in force and therefore s.20(7) and (8) and s.23(3).

preparing" the LDD. S.19(3) requires the LPA to comply with its SCI in "preparing" its LDDs. All of that s.19 process of preparation is carried out before the document is submitted for independent examination.

9. The 2004 Regulations confirm that basic position – reg 25 public participation in preparation; reg 27 - publication of proposed submission documents; reg 28 - representations on the proposed submission documents; reg 30(1)(d)(iv) – preparation of a statement as to how representations have been taken into account.

10. Once the s.19 (and reg 25 – 30) process is complete, the local authority will "think the document is ready for independent examination" (s.20(2)(b)) and can submit it. The preparation stage is at an end and the document is now ready for the second stage – independent examination.

Independent Examination

11. Once a LDD has been "prepared" in accordance with s.19, it is submitted for independent examination under s.20. An LDD cannot be submitted unless and until all the requirements of s.19, s.24 – conformity - and the 2004 regulations have been complied with (s.20(2)(a)). An LDD is only submitted when the LDD is considered "ready for independent examination" – in other words once the LPA is satisfied that the document as prepared is ready to be tested and then adopted.

12. The local authority has no continuing power to amend but can only make suggested modifications in the light of any further representations received or any comments made by the Inspector which it is then for the Inspector to recommend or otherwise. The Inspector may of course make his own recommendations which will then be (to all intents and purposes) binding. Another way of looking at this is that, post-submission, it is not the local authority but the independent examiner (inspector) who is modifying, or deciding how to progress with the LDD.

13. The s.20 stage of the process is not a "preparation" stage (and it is interesting to note that the word preparation nowhere appears in the legislation in respect of this stage) but a testing and challenging (and potentially modifying) stage.

14. S.110(3) confirms this approach. The relevant purpose of the Independent Examination is to determine "whether the local planning authority complied with any duty imposed on the authority by s.33A in relation to its preparation". This wording is only consistent with the preparation having been concluded prior to the submission of the LDD for independent examination because:

a. the wording looks at the past compliance of the local authority with the s.110 duty – that is inconsistent with the duty continuing post – submission[2];
b. the focus is on the local authority's preparation – not the independent examiner's examination/recommendations; and
c. after submission the local authority's role is very substantially constrained - see paragraph 12 above.

15. The PINs Advice is therefore correct.

Response to RHL's Submission

16. There is no false dichotomy (para 8) between preparation and submission. The distinction between the stages is entirely clear from the legislation (s.19 preparation; s.20 submission and examination).

17. It is not understood how the SEA Regulations can assist in construing domestic legislation (para 9). The SEA Regulations are setting out circumstances in which SEA is required. They have nothing to do with the meaning and structure of the 2004 Act as amended by s.110. The duty to co-operate is a domestic law provision inserted into domestic legislation and not required by, or an adjunct to, any EU law requirement. The context is in any event wholly different and no assistance can be gleaned from the use of words in the SEA regulations.

18. The "on-going basis" requirement (para 13) should not be taken out of context. It is entirely plain that the s.33A(2)(a) requirements are an exposition of what the local authority must do to satisfy the duty to co-operate during the plan preparation stage. It does not serve to and cannot be read as extending the plan preparation stage obligations into the examination stage. It is impossible to sustain the contention (para 13) that Parliament intended an ongoing duty to co-operate in preparation when it clearly and carefully draws a line between the stage when the local authority is preparing and the stage when the DPP is being tested by the independent examiner. This is not a one off duty to co-operate or static, but an ongoing duty to co-operate *up to* the point of submission.

19. Given this conclusion, it is not necessary to address "what process should be adopted if s.110 applies". It is accepted that if the inspector concludes (para 18) that an urban extension is required, the SEA will have to be revisited. There is no prospect of a common platform of law and policy being agreed (para 20) along the lines envisaged by RHL. It is not understood what paras 21 – 23 add to the discussion because they proceed on the basis that somehow co-operation with Bristol would mean an urban extension was needed when Bristol has made clear that if there was an urban extension it would object.

[2] given that the duty was not in place in at the time of submission, no duty was imposed by virtue of s.33A on the local authority in this regard - cp s.110(3)

Strategic Environmental Assessment

20. It is fundamental to understand the basic facts before opining on compliance with well-established legal principles. The factual position is as follows.

21. The final version of the SEA of the submission Core Strategy (incorporating appraisal of implications of Proposed Changes and Bath Compensatory Storage Study) is as follows:
    - Non-Technical Summary – dated September 2011
    - Appraisal Report – dated November 2011
    - Annex A: Policy Plan and Programme Review – dated April 2011
    - Annex B: Baseline Data – dated April 2011
    - Annex C: Core Strategy Spatial Options Consultation Document (2009), Summary of SA Findings – dated April 2011
    - Annex D: Submission Core Strategy Policy Appraisal Matrices – dated November 2011
    - Annex E: Urban Extension Commentary – dated April 2011
    - Annex F: Mitigation and Residual Effects of the Submission Core Strategy Policies – dated April 2011
    - Annex G: Recommendations and Residual Performance of the Submission Core Strategy Policies – dated April 2011
    - Annex H: Potential Cumulative Effects – dated April 2011
    - Annex I: Contextual Indicators Monitoring Programme – dated April 2011
    - Annex J: Schedule of Significant Changes, Screening Assessment – dated September 2011
    - Annex K: Assessment of Housing Contingency Sites – dated September 2011

22. In summary most elements of the final SEA are those dated April 2011 (i.e. submission version). The non-technical summary was updated to reflect further proposed changes to be put forward to the Inspector considered and agreed by Council in September 2011 and the main appraisal report and Annex D were updated to incorporate appraisal of further proposed changes (September 2011) and implications of Bath Compensatory Storage Study (November 2011). The latest version of each element of the SEA includes and indicates each round of changes from the submission version.

23. There is no paper chase. On the facts there is a consolidated up to date set of documents which assess that which the Inspector is being asked to endorse (and alternatives).

24. Given that SEA is by definition an iterative process running alongside iterations to the LDD, it is inevitable (and common place) that various parts of the SEA will change over time. The documents are entirely clear as to what has been done and why and the Council is left wondering on what possible factual basis it is so robustly contended that the SEA is "a complete mess" (para 24) or "confused and confusing" (para 29). Even at this very late stage, no details are provided as to where the documents are said to fall foul of the Directive or how the documents fail the *Newmarket* test.

25. Annex E compares the sustainability effects of the submission Core Strategy with the alternative spatial options strategy incorporating urban extensions. That is ample compliance with *Newmarket* in respect of alternatives. Para 31 is wrong.

26. There is no need for an adjournment. The late submissions are clearly and manifestly wrong on all points made, fail to address the basic statutory scheme and fail to provide any detail of the claimed flaws in the SEA. The process does not envisage detailed oral representations being made at the sessions which are not set out in advance. The Council will object to any new points being raised by RHL orally in respect of legal compliance which have not been raised (with the factual details) in writing in accordance with well established practice.

David Forsdick

Landmark Chambers

12th January 2012