BATH AND NORTH EAST SOMERSET CORE STRATEGY

NOTE ON S110 AND S112 LOCALISM ACT: ROBERT HITCHENS LIMITED

1. This note is supplemental to the written legal submissions furnished to the examination and records the further submissions made at the examination on 17 January 2011.

2. S112 of the Localism Act 2011 is now in force. It affects changes to s20 of the Planning and Compulsory Purchase Act 2004 dealing with the tasks of the independent examiner. By virtue of the new s20(7), a recommendation for adoption is mandatory if the DPD is found to be sound and that the local planning authority have complied with any duty imposed on the authority by s33A in relation to the document's preparation. By virtue of the inserted s20(7A), if the requirements of s20(7) are not satisfied the independent examiner must recommend non-adoption of the document. By virtue of the new s20(7B) and (7C), where the independent examiner does not consider that the document is sound but does consider that the local planning authority has complied with any duty imposed by s33A then, if asked to do so by the local planning authority, the independent examiner can recommend modifications which would enable the document to satisfy the requirements in s20(5)(a) and be sound.

3. By virtue of s112(6), the amendments affected to s20 of the Planning and Compulsory Purchase Act 2004 "apply in relation to all adoptions of development plan documents that take place after the coming into force of those subsections, including an adoption <u>where steps in relation to the</u>

document have taken place before then." The effect, therefore, of s112(6) is to require the independent examiner to apply the tests set out in s20(7)–(7C) to development plan documents even when "steps" have been taken in relation to them prior to the Act coming into force. A number of points arise.

4. Firstly, s112(6) makes no distinction between preparation and submission, and eliminates the argument made on the basis of any distinction made both by the Council's submissions and PINS advice in that regard. The clear intention of Parliament by virtue of s112(6) is that, therefore, the question of whether or not the duty to co-operate has been complied with is, by virtue of the changes to s20(7)-(7C) which are now in force, part and parcel of the examination. It follows that the duty to co-operate is not merely in force (without any limitation placed upon its application in the Act) but also in play at the examination.

5. The Council's suggestion that the phrase "any duty imposed on the authority by s33A" can be read so as to suggest that because there is (in accordance with their distinction between preparation and submission) no duty on them to co-operative is misconceived. It would rob s112(6) of any meaning. The obvious purpose of including s112(6) was to make clear that, as from the coming into force of the changes to s20, it would be the amended s20 against which any DPD would be tested.

6. To suggest that the effect of the extant changes to s20 can be read notwithstanding s112(6) so as to exclude any requirement to examine the duty to co-operate frustrates the purpose of having s112(6) in the first place. Its implication is that there is no need for the independent examiner to consider whether or not the gateway in s20(7B) to the entitlement of the Council to request modifications namely whether or not the duty imposed by

s33A has been passed. Their reading eliminates the clear distinction between s20(7) and s20(7A) on the one hand and s20(7B) and s20(7C) on the other. On their reading all that the independent examiner needs to be satisfied of is that the DPD is unsound and the Council are entitled to request modifications. That is clearly not the intention of s112(2), (3) and (6) read together. Reading the legislation together makes plain that s110(3) (introducing s25(3)) applies to the tasks required by this examination.

7. Furthermore, the phrase "any duty imposed on the authority by Section 33(a)" is to be construed by reference to Section 33A itself. It is clear from Section 33A(1)–(4) that a number of instances of the duty to co-operate may arise between different persons and of differing types during the course of producing the DPD. The use of "any" is therefore to cover the circumstance that there will be a number of them. Further, it also addresses the fact that there may be circumstances where no duty to co-operate arises. I suggested in the course of submissions that an extreme example (in the absence of any relevant prescribed body under s33A(1)(c)) might be the Isle of Wight. Thus, the Council's suggestion does not avoid the obvious impact of s112(6), which makes clear that a material element of the examination is the scrutiny of whether or not the s33A duty has been complied with. It follows from that that the intention of Parliament is that s110 does apply (as does s33A) to the current examination.

8. As explained at the examination, this is consistent with the policy of the legislation which seeks to replace Regional Strategies with the duty to co-operate. It is in no way unfair to the Council, since they have known from the publication of the Localism Bill in late 2010 that the duty to co-operate would be a feature of the new legislative landscape. The risk to the integrity of the process is so serious in this case that to proceed on the basis that the duty does not apply is not sensible.

9. I have been advised that the Inspector would welcome my views on the suggestion from the Council that without prejudice to their views on the duty to co-operate not applying that question should as a matter of fact be examined. It is obviously desirable that the question should be examined rather than not. Logistical issues would, however, equally obviously arise in order to permit the question to be examined fairly. Firstly, it will be necessary to make submissions about the content of the duty as a matter of law. Secondly, evidence will need to be prepared to deal with the issue (and given the late stage at which this course is being taken it will be necessary to cross-reference evidence which may have already been examined). Thirdly, it will be necessary for this material to be the subject of hearing at the examination. Fourthly, the timetabling of this will need to be the subject of discussion and, hopefully, agreement. Adequate time must be allowed to enable proper participation in the process, which was why the original submissions called for an adjournment to allow that to happen.

IAN DOVE QC