

## **GUILDFORD VISION GROUP**

### **Re: Proposed North Street Design and Development Brief and Guildford Town Centre Interim Framework**

#### **OPINION**

##### **Introduction**

1. I am instructed by Guildford Vision Group ("**GVG**"), the trading name of Vision for Guildford Limited, a private limited company incorporated in England & Wales. The sole directors of GVG are Gerald Bland, a former property partner at Herbert Smith, and John Rigg, a director of Savills Commercial both of whom live in Guildford. GVG has a steering committee of around 12 who meet in Guildford every Friday for two hours, a supporter base of over 300 and a part time administrator<sup>1</sup>.
2. GVG is a single issue pressure group campaigning to persuade Guildford Borough Council ("**GBC**") to engage the best masterplanners and traffic engineers to prepare a long term sustainable Masterplan for the town. GVG's objective is explained on its home page as follows:

"Guildford Vision Group has one objective and our campaign is very simple. We wish to see a new process put in place in which the views and creativity of everyone who lives and works in Guildford can play a part in creating a new Vision that looks out 20

---

<sup>1</sup> See [www.guildfordvisiongroup.com](http://www.guildfordvisiongroup.com)

or more years into future. This would be achieved through a framework of engagement supported, managed and informed by the best external facilitators and expert advisors. Ideally such a process would be led by the Borough Council and we very much hope they will take up this challenge, particularly in the light of changes to their planning responsibilities resulting from the new National Planning Policy Framework and recent Localism legislation.”

3. I have been instructed to consider the proposed adoption by GBC on 6 September 2012 of two planning guidance documents (to put the matter neutrally at this stage) (**“the documents”**):

- (1) The North Street Design and Development Brief (**“NSDDB”**); and
- (2) Guildford Town Centre Interim Framework (**“TCIF”**).

### Summary of advice

4. These documents, and the TCIF in particular, appear to me to be an attempt by GBC to produce a set of non-statutory and untested planning policies, or development management guidance, to counter the absence of an up-to-date local plan (the Guildford Local Plan was adopted in 2003) and the failure to produce a new DPD or even to have assembled at this time (as the TCIF makes clear<sup>2</sup>) the evidence base which would be necessary to support a DPD. The lack of that evidence base and of an up-to-date DPD is of particular concern in this context since, on the basis of purported non-statutory policy, GBC in terms intends to use it
  - (1) As a material consideration in the determination of planning applications<sup>3</sup>; and
  - (2) As the basis for land assembly for schemes in accordance with the TCIF Strategy (Section 6) and if necessary compelled by CPO<sup>4</sup>.
5. Neither document appears to be proposed for adoption through compliance with the statutory planning code, now found in the Planning and Compulsory Purchase Act 2004 (**“PCPA 2004”**), as amended by the Localism Act 2011 and the Town and Country

---

<sup>2</sup> TCIF at pp. 4-5

<sup>3</sup> TCIF at p. 4

<sup>4</sup> TCIF at p. 46

Planning (Local Planning) (England) Regulations 2012 (“**the LPR 2012**”). The LPR 2012 came into force on 6 April 2012. The LPR 2012 replaced the Town and Country Planning (Local Development) (England) Regulations 2004 (“**LDR 2004**”) and substituted local plans for core strategies and area action plans, the DPDs under the LDR 2004.

6. For the reasons I set out in detail below, in my opinion the adoption of those documents would be unlawful as I advised in consultation on 31 August 2012. In my opinion, the two documents have been wrongly characterised by GBC and (properly analysed) fall within the new LPR 2012 - their characterisation is a matter of law and not determined by the intention expressed by GBC. Further, they also appear to me to have been put forward in breach of the requirements of strategic environmental assessment (“**SEA**”) and the Council’s own policies on consultation. The NSDDB relies to some degree at least on matters appearing in the TCIF: see p. 12. It is also referenced under TCIF Site 1, p. 56.
7. Further, if as I consider, the TCIF is properly to be considered a “local plan” within regs. 5 and 6 of the LPR 2012, the Executive does not have power under GBC’s constitution to adopt it even had the TCIF otherwise proceeded lawfully: see Article 4(2) of GBC’s constitution. Even if it were not a local plan, it would fall within the broad definition of “supplementary planning document” (“**SPD**”) in reg. 2(1) of the LPR 2012 and be required to follow the procedures for such a document.
8. It follows that not only would it be unlawful for GBC to adopt the above documents but that if any planning application were determined taking those documents into account, then GBC will be at risk of challenge for taking into account unlawful, and therefore irrelevant, policy guidance.
9. I have been asked to put my views in writing with the intention that this will be disclosed to GBC prior to the meeting of its Executive on 6 September.

## **Relevant legal principles**

### ***(a) Local development documents***

10. As noted above the relevant legislation for local planning policy is provided for in the PCPA 2004 and the LPR 2012. The provisions have been, respectively, extensively revised by, and issued as a result of, the changes made by the Localism Act 2011.

11. S. 17 of the PCPA 2004 (as amended) provides that the local planning authority's local development documents must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area.

**"17 Local development documents**

(3) The local planning authority's local development documents must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area.

(4) Where a county council is required to prepare a minerals and waste development scheme in respect of an area, the council's local development documents must (taken as a whole) set out the council's policies (however expressed) for that area 3 in relation to development which is a county matter within the meaning of paragraph 1 of Schedule 1 to the principal Act (ignoring sub-paragraph (1)(i)).

(5) If to any extent a policy set out in a local development document conflicts with any other statement or information in the document the conflict must be resolved in favour of the policy.

(6) The authority must keep under review their local development documents having regard to the results of any review carried out under section 13 or 14.

(7) Regulations under this section may prescribe—

(za) which descriptions of documents are, or if prepared are, to be prepared as local development documents;

(a) which descriptions of local development documents are development plan documents;

(b) the form and content of the local development documents;

(c) the time at which any step in the preparation of any such document must be taken.

(8) A document is a local development document only in so far as it or any part of it—

(a) is adopted by resolution of the local planning authority as a local development document;

(b) is approved by the Secretary of State under section 21 or 27."

12. Local development documents are subject to independent examination as prescribed by the LPR 2012 (i.e. local plans) before they can be adopted. The Examiner has to determine:

(1) Whether the submitted DPD satisfies the requirements of:

(a) S. 19 of the PCPA 2004, which deals with the preparation of Local Development Documents and stipulates that DPDs must be prepared in accordance with the Local Development Scheme (LDS);

- (b) S. 24(1), which requires that it be in conformity with the regional strategy;
  - (c) The LPR 2012. By reg. 38 of the LPR 2012 everything done under a provision of the LDR 2004 which is revoked and re-enacted is treated as being done under the equivalent provision of the new Regulations. Other than regulation 38 there is no relevant saving or transitional provision.
- (2) Whether the submitted DPD is “sound”. There is no statutory definition of soundness but the National Planning Policy Framework (“**NPPF**”) advises at paragraph 182 what is required to meet that criterion.
  - (3) Whether the authority has complied with the duty to co-operate under section 33A of the PCPA 2004.
13. S. 19 of the PCPA 2004<sup>5</sup> (emphasis added):

**“19 Preparation of local development documents**

- (1) Development plan documents must be prepared in accordance with the local development scheme.
- (1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.
- (2) In preparing a development plan document or any other local development document the local planning authority must have regard to—
  - (a) national policies and advice contained in guidance issued by the Secretary of State;
  - (b) the regional strategy for the region in which the area of the authority is situated, if the area is outside Greater London;
  - (c) the spatial development strategy if the authority are a London borough or if any part of the authority's area adjoins Greater London;
  - (d) the regional strategy for any region which adjoins the area of the authority;
  - (e) the Wales Spatial Plan if any part of the authority's area adjoins Wales;
  - (f) the sustainable community strategy prepared by the authority;
  - (g) the sustainable community strategy for any other authority whose area comprises any part of the area of the local planning authority;

---

<sup>5</sup> S. 19(2)(b) and (d) are to be repealed pursuant to the Localism Act 2011.

- (h) any other local development document which has been adopted by the authority;
  - (i) the resources likely to be available for implementing the proposals in the document;
  - (j) such other matters as the Secretary of State prescribes.
- (3) In preparing the local development documents (other than their statement of community involvement) the authority must also comply with their statement of community involvement.
- (4) But subsection (3) does not apply at any time before the authority have adopted their statement of community involvement.
- (5) The local planning authority must also–
- (a) carry out an appraisal of the sustainability of the proposals in each development plan document;
  - (b) prepare a report of the findings of the appraisal.
- (6) The Secretary of State may by regulations make provision–
- (a) as to any further documents which must be prepared by the authority in connection with the preparation of a local development document;
  - (b) as to the form and content of such documents.
- (7) The sustainable community strategy is the strategy prepared by an authority under section 4 of the Local Government Act 2000 (c. 22).”
14. In preparing a draft DPD therefore a planning authority is required to conduct a sustainability appraisal (“SA”) under s. 19(5) and by s. 19(2) to have regard to *inter alia*:
- (1) The NPPF, which was published on 27 March 2012;
  - (2) Other Local Development Documents (“LDDs”) which here include the saved policies of the Guildford Local Plan 2003;
  - (3) An adopted Statement of Community Involvement (“SCI”).
15. The regulations which now prescribe the contents and procedure for adoption of LDDs are the LPR 2012. It is important to note the importance of applying the LPR 2012 notwithstanding the fact that any draft document originated when the predecessor LDR 2004 was in force. The LPR 2012 came into effect from 6 April 2012 and apply to LDD procedures which are already under way subject to the transitional provisions of reg. 38 (see below).
16. As the Supreme Court made clear earlier this year the proper interpretation of planning policy is for the Courts and is not subject to discretion on the part of the planning

authority – though it has discretion in the application of that policy, provided it is properly interpreted. See **Tesco Stores v. Dundee City Council** [2012] P.T.S.R. 983 *per* Lord Reed at [18]-[23]. Although Lord Reed was there dealing with the construction of the development plan, the principle is plainly of much wider application and lays to rest the notion that planning policy is open to planning decision makers to interpret with some degree of discretion - as might have appeared from cases such as **Northavon DC v. Secretary of State for the Environment** [1993] JPL 761 and **R v. Derbyshire CC, Ex p Woods** [1997] J.P.L. 958.

17. Where, as in the LPR 2012, the statutory code lays down the meaning of “local plan” and “SPD” it must be a matter of law whether a guidance document produced by a planning authority falls within the statutory definitions of those types of document. Indeed, the High Court applied this approach in **R. (Wakil) v. Hammersmith and Fulham LBC** [2012] EWHC 1411 (QB) to the predecessor provisions of the LPR 2012 in the LDR 2004 by holding that guidance produced by the local authority there was in substance an AAP.
18. Wilkie J. considered the judgment in **Tesco v. Dundee** and continued:

“80. Their Lordships concluded that policy statements should not be construed as if they were statutory or contractual provisions. Many of the provisions of development plans are framed in language whose application, given a set of facts, requires the exercise of judgment which falls within the jurisdiction of planning authorities and whose exercise of judgment could only be challenged on the grounds of irrationality or perversity. Nonetheless, they concluded, planning authorities “do not live in the world of Humpty Dumpty. They cannot make the development plan mean whatever they would like it to mean” (para 19). In paragraph 21 of Lord Reed’s speech, he said:

“21. A provision in the development plan which requires an assessment of whether a site is “suitable” for a particular purpose calls for judgment in its application, but the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment, it is a question of textual interpretation which can only be answered by construing the language used in its context ..... [The question in the case] . . . . . is not a question which can be answered by the exercise of planning judgment. It is a logically prior question as to the issue to which planning judgment requires to be directed.”

The question in the present case is whether the 27th October document:

1. Relates to part of the area of the local planning authority
2. Identifies that area as an area of significant change or special conservation
3. Contains the authority’s policies relevant to areas of significant change or special conservation.

If it does, then it is an Area Action Plan and, as such, has to be a DPD, if it does not, then it is an SPD.

81. In my judgment, and by way of analogy with the *Tesco* case where, as here, the question is whether a document satisfies or does not satisfy all of the conditions identified in a statutory document, that is an application of fact to legal requirements and, as such, is a matter where the Court has to make the judgment. It is not limited to reviewing a decision made by the local planning authority, subject only to intervention only on Wednesbury grounds.

82. I accept that in making that judgment, the Court must bear in mind that a local planning authority has, as I find, in good faith, characterised the document as not satisfying those three conditions. I have, therefore, to be cautious in concluding that the local planning authority has got that judgment wrong. That, however, is not the same as saying that I can only come to a different view only if I think that it was perverse for the Defendant to have come to a different view. What I have to do is to consider the document as a whole and then conclude whether, in my judgment, it satisfies each of the three conditions.”

19. Applying that approach, Willkie J. held that the purported SPD was, in law, an AAP and therefore had been incorrectly characterised by the planning authority:

“90. Accordingly, and conscious of the fact that in making this judgment I am disagreeing with the view taken by the local planning authority, in my judgment they have, erroneously, failed to characterise this document as an area action plan. That being so the statutory scheme requires that it should have been subject to the procedure required for a DPD. It is not in dispute that it was not subject to that procedure. It follows that, for that reason, the adoption of the document by the Council on the 27th October was procedurally flawed and, on that ground, the decision was unlawful.”

20. It is therefore necessary to apply the provisions of the LPR 2012 to determine the true nature of a policy or guidance document produced by a planning authority. As *Wakil* demonstrates, the fact that the authority may have acted in good faith and not acted unreasonably is no answer to a challenge if the document has been mischaracterised in law (although there could in theory be additional grounds of challenge besides mischaracterisation).
21. Regulations 5 and 6 of the LPR 2012 set out the terms of what now constitutes a “local plan” and thus DPD. See also the definition in reg. 2(1) which is in the same terms. Regulation 5 provides as follows:

**“5. Local development documents**

(1) For the purposes of section 17(7)(za) of the Act the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

- (i) the development and use of land which the local planning authority wish to encourage during any specified period;
- (ii) the allocation of sites for a particular type of development or use;
- (iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
- (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b) where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted.

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

- (i) relates only to part of the area of the local planning authority;
- (ii) identifies that area as an area of significant change or special conservation; and
- (iii) contains the local planning authority's policies in relation to the area; and

(b) any other document which includes a site allocation policy.”

22. Reg. 6 states:

**“6. Local plans**

Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan.”

23. “SPD” is defined by reg. 2(1) as follows:

“...“supplementary planning document” means any document of a description referred to in regulation 5 (except an adopted policies map or a statement of community involvement) which is not a local plan...”

24. Essentially, this means that (other than the excluded categories of document) SPD is a document falling within reg. 5(1)(a)(iii) which does not otherwise fall within the other parts of reg. 5 (which would make it a local plan). In other words it is “any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities” which “contains statements regarding” –

“any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i).”

25. There is no longer any reference to core strategies in the legislation nor is there in terms any requirement that DPDs conform to each other, as there was under the 2004 Regulations, though this is replaced by similar provisions in reg. 8 (below). As noted, the terminology of DPDs, core strategies and AAPs has been replaced with that of “local plan”. As advised in paragraph 152 of the NPPF, the objective is now that each local planning authority should produce a Local Plan for its area (i.e. a single plan) and that any additional development plan documents should only be used where clearly justified.
26. Development plans which were adopted prior to the PCPA 2004 procedure do not attract the 12 month “period of grace” allowed by NPPF para. 214 but otherwise, as in the case of the current local plan adopted in 2003, are given weight according to their degree of consistency with the NPPF (para. 215). It is 9 years since the saved policies of the Guildford Local Plan were adopted and doubtless their evidence base is significantly older than that. It is easy to understand why GBC recognises the need to advance new and up-to-date policies consistent with the NPPF. However, as the NPPF makes clear at paras. 150-155, the mechanism for this is the local plan and not the provision of non-statutory policy which lies outside the framework of the LPR 2012:

“150. Local Plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities. Planning decisions must be taken in accordance with the development plan unless material considerations indicate otherwise.

...

153. Each local planning authority should produce a Local Plan for its area. This can be reviewed in whole or in part to respond flexibly to changing circumstances. Any additional development plan documents should only be used where clearly justified. Supplementary planning documents should be used where they can help applicants make successful applications or aid infrastructure delivery, and should not be used to add unnecessarily to the financial burdens on development.”

27. However, doubtless to accommodate the case where there may be the possibility of

more than one element of the statutory development<sup>6</sup>, there is now a requirement under reg. 8(4) of the LPR 2012 that:

“(4) .....the policies contained in a local plan must be consistent with the adopted development plan.”

The development plan, of course, includes the current Guildford Local Plan adopted in 2003 part of which was saved under the provisions of the PCPA 2004. The TCIF does not purport to replace existing policies since it does not purport to be a local plan and so reg. 8(5) (which deals with replacement policies) does not appear to apply. However, given that the TCIF purports to define a new town centre boundary and primary shopping area<sup>7</sup> (“PSA”) this raises issues of consistency.

28. The meaning of “be consistent with” appears to be similar to the displaced concept of “conformity”. With regard to the requirement of “conformity” which was the previous concept utilized for multi-part development plans, this was considered by the Court of Appeal in *Persimmon Homes (Thames Valley) Ltd v. Stevenage BC* [2006] 1 W.L.R. 334. There, Laws L.J. explained the meaning of “conformity” in terms which not only refer to “consistent” but also appear to be applicable to the reg. 8 duty and the current circumstances<sup>8</sup> (emphases added):

“28. ... that because structure and local plans together form the development plan under the 1990 Act ... they must, broadly at least, be consistent; otherwise section 54A of the 1990 Act, which I have set out, would not be workable. I agree with the judge ... that to read “general conformity” as simply meaning that the proposals of the local plan should be “in character” with the structure plan would be to accept too broad a construction. On the other hand, there are the features to which I have earlier referred- the long lead-times involved, the fact that the exigencies of planning policy may present a changing picture, and the statutory words themselves. In construing the general conformity requirement the court should, in my judgment, favour a balanced approach by which these different factors may be accommodated. I consider that on its true construction the requirement may allow considerable room for manoeuvre within the local plan in the measures taken to reflect structure plan policy, so as to meet the various and changing contingencies that can arise. In particular (for it is relevant here) measures may properly be introduced into a local plan

---

<sup>6</sup> E.g. where an authority might be in the course of adopting what started life as a draft AAP when it has an existing core strategy.

<sup>7</sup> See the structure described at p. 5, the town centre boundary at p. 9 and Fig. 1, and PSA at pp. 11, 38-39 and fig. 6.

<sup>8</sup> Substituting the adopted elements of the development plan for the reference to the Structure Plan, and s. 38(6) PCPA 2004 for s. 54A TCPA 1990.

to reflect the fact, where it arises, that some aspect of the structure plan is itself to be subject to review. This flexibility is not unlimited. Thus measures of this kind may not pre-judge the outcome of such a review. They must respect the structure plan policies as they are, while allowing for the possibility that they may be changed.... I agree with these observations made by the judge below (paragraph 53):

"While the requirement that the Local Plan should be in general conformity with the Structure Plan is an important legislative purpose, there are other purposes. The local plan is there to inform and guide local planning decisions. The guidance of the Local Plan is likely to be of considerable significance to local investment and to choices made about the pattern of local development and the environment. It is desirable in the public interest that the Local Plan should address relevant issues and do so as accurately and fully as it reasonably can...."

29. The principal differences which need to be accommodated within the concept of "consistency" under reg. 8(4) of the LPR 2012 are:

- (1) The term is now "consistency" rather than the older term "general conformity" considered by the Court of Appeal above. Whilst the significance in the change of language may not be very great, it does suggest that there is less flexibility in the current requirement as compared to "general" conformity;
- (2) The relationship between a new local plan and the existing Core Strategy differs from that between old style structure and local plans since the old division between a hierarchy of strategic policies and detailed local policies is no longer relevant;
- (3) The possibility that there may be more than one local plan (at least until the new system becomes well-established) means that the issue of consistency is even more important than between the old types of plan in the *Persimmon* case since both are providing policies in the local context and in circumstances where the NPPF will expect them to be delivered in a single local plan in future<sup>9</sup>;
- (4) Accordingly, there is less scope for flexibility in interpreting "consistent with" than was the case between old structure and local plans.

30. SPD is also subject to a similar, possibly stricter, requirement in reg. 8(3):

---

<sup>9</sup> This would not be true of the relationship of a new local plan with existing Regional Strategy, at least until the RS is revoked, but that issue does not arise here.

“(3) Any policies contained in a supplementary planning document must not conflict with the adopted development plan.”

31. There is also a detailed procedural code prescribed, which I will not set out here:

- (1) For SPD, by Part 5 of the LPR 2012; and
- (2) For local plans, by Part 6 of the LPR 2012.

***(b) Strategic environmental assessment (SEA)***

32. In parallel with the requirement to carry out a SA for DPDs, there is also a requirement for the SEA of “plans or programmes” pursuant to Directive 2001/42/EC *on the assessment of the effects of certain plans and programmes on the environment* (“**the SEA Directive**”) and the Environmental Assessment of Plans and Programmes Regulations 2004 (“**the SEA Regulations**”).

33. Article 3(2) of the SEA Directive (transposed by reg. 5(2)-(3) of the SEA Regulations) provides, insofar as is relevant (emphasis added):

“2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.”

34. Directive 85/337/EEC (the old EIA Directive), to which the passage quoted above refers, has now been consolidated into Directive 2011/92/EU (the current EIA Directive). The list of projects in Annex II includes, at para. 10(b), “(b) *Urban development projects, including the construction of shopping centres and car parks*”. Town centre redevelopment and schemes such as aare found in and encouraged<sup>10</sup> by the TCIF are plainly capable of falling within that category of EIA project.

---

<sup>10</sup> See e.g. the list of sites set out in Section 6 of the TCIF.

35. It follows that SEA is required for all “plans and programmes” which are prepared for planning and land use and which set the framework for future development consent for urban development projects. The TCIF is intended to set the framework for town centre planning applications (which are plainly urban development projects<sup>11</sup>) since it is to be a material consideration in their determination.

36. The concept of “plans and programmes” is defined in Article 2(a) of the SEA Directive (transposed by Reg. 2(1) of the SEA Regulations) as follows:

“...“plans and programmes” shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
- which are required by legislative, regulatory or administrative provisions;”

37. Both local plans and SPD are prepared and adopted by planning authorities pursuant to the procedures in the PCPA 2004 and LPR 2012. The stipulation that they be “required” does *not* mean that there must be a duty to prepare and/or adopt but it is sufficient if there is a legislative, regulatory or administrative *power* to do so: Case C-567/10 **Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale** [2012] Env. LR. 601.

38. In that recent judgment (22 March 2012), the CJEU considered the meaning of the provision in Art. 2(a) of the SEA Directive that, in order for the Directive to be engaged, the plan or programme in question must be “*required by legislative, regulatory or administrative provisions*”. One of the questions referred in the case was:

“Must the word ‘required’ in Article 2(a) of that directive be understood as excluding from the definition of ‘plans and programmes’ plans which are provided for by legislative provisions but the adoption of which is not compulsory...?”

39. In answering this question in the negative (and thus rejecting the submissions of the UK government), the CJEU held (emphases added):

“25. According to the applicants in the main proceedings, a mere literal interpretation of [Article 2(a)], which would exclude from the scope of Directive 2001/42 plans and

---

<sup>11</sup> This does not mean that all projects need be EIA projects.

programmes that are only provided for by legislative, regulatory or administrative provisions, would entail the dual risk of not requiring the assessment procedure for land development plans which normally have major effects on the territory concerned and of not ensuring uniform application of the directive in the Member States' various legal orders, given the differences existing in the formulation of the relevant national rules.

26. The Belgian, Czech and United Kingdom Governments submit, on the other hand, that it is apparent not only from the wording of Article 2(a) of Directive 2001/42 but also from the directive's *travaux préparatoires* that the European Union legislature did not intend to make administrative and legislative measures that are not required by rules of law subject to the environmental impact assessment procedure established by the directive.

27. The European Commission considers that, where an authority is subject to a legal obligation to prepare or adopt a plan or programme, the test of being 'required' within the meaning of Article 2(a) of Directive 2001/42 is met. That is *prima facie* so, in its view, in the case of the plans that must be adopted by the Brussels-Capital Region.

28 It must be stated that an interpretation which would result in excluding from the scope of Directive 2001/42 all plans and programmes, inter alia those concerning the development of land, whose adoption is, in the various national legal systems, regulated by rules of law, solely because their adoption is not compulsory in all circumstances, cannot be upheld.

29 The interpretation of Article 2(a) of Directive 2001/42 that is relied upon by the abovementioned governments would have the consequence of restricting considerably the scope of the scrutiny, established by the directive, of the environmental effects of plans and programmes concerning town and country planning of the Member States.

30 Consequently, such an interpretation of Article 2(a) of Directive 2001/42, by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to this effect, Case C-295/10 *Valčiukienė and Others* [2011] ECR I-0000, paragraph 42). That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures.

31 It follows that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down.

32 It follows from the foregoing that the answer to the second question is that the concept of plans and programmes 'which are required by legislative, regulatory or administrative provisions', appearing in Article 2(a) of Directive 2001/42, must be

interpreted as also concerning specific land development plans, such as the one covered by the national legislation at issue in the main proceedings.”

40. Accordingly, in construing and applying the SEA Directive and Regulations a broad purposive approach should be taken especially with regard to securing practically the purpose of the Directive in the establishing a procedure for scrutinising measures likely to have significant effects on the environment.
41. In the case of both local plans and SPD there is at least a regulatory “requirement” in these terms since both the PCPA 2004 and LPR 2012 comprise regulation by law of the procedure for the production and adoption of those document.
42. To the extent that both the TCIF and NSDDB “screened out” the need for SEA, and it is not clear how it could do so (or whether it was done prior to the *Inter-Environnement Bruxelles* judgment), and SEA was required it would not be lawful for GBC to adopt them without taking into account the SEA environmental report and consultation upon it: see reg. 8(2)(b) of the SEA Regulations and art. 4(1) of the SEA Directive.
43. Art. 4(1) provides:

“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.”
44. As reg. 8 provides (emphasis added):

**“Restriction on adoption or submission of plans, programmes and modifications**

8. - (1) A plan, programme or modification in respect of which a determination under regulation 9(1) is required shall not be adopted or submitted to the legislative procedure for the purpose of its adoption -

(a) where an environmental assessment is required in consequence of the determination or of a direction under regulation 10(3), before the requirements of paragraph (3) below have been met;

(b) in any other case, before the determination has been made under regulation 9(1).

(2) A plan or programme for which an environmental assessment is required by any provision of this Part shall not be adopted or submitted to the legislative procedure for the purpose of its adoption before -

(a) if it is a plan or programme co-financed by the European Community, the environmental assessment has been carried out as mentioned in regulation 7;

(b) in any other case, the requirements of paragraph (3) below, and such requirements of Part 3 as apply in relation to the plan or programme, have been

met.

(3) The requirements of this paragraph are that account shall be taken of -

- (a) the environmental report for the plan or programme;
- (b) opinions expressed in response to the invitation referred to in regulation 13(2)(d);
- (c) opinions expressed in response to action taken by the responsible authority in accordance with regulation 13(4); and
- (d) the outcome of any consultations under regulation 14(4)."

## **Analysis**

45. I begin by noting that I have not had the time available since instruction to analyse all of the elements of the TCIF of the NSDDB or their various procedural stages though I have looked in some detail at the draft masterplan which preceded the TCIF. What follows are conclusions based on what I have seen and it may be that other issues arise on a more detailed consideration of the documentation.
46. It is nonetheless possible to reach the conclusions that the TCIF and NSDDB cannot lawfully be adopted by GBC on 6 September.

### **(1) TCIF**

47. For reasons I will explain below, in my opinion the TCIF is in law a local plan applying the provisions of regs. 5 and 6 of the LPR 2012. In the event that this were incorrect, then it is at least SPD falling within reg. 2(1) and reg. 5(1)(a)(iii) of the LPR 2012.
48. I also wish to make it clear that none of my analysis is directed to the specific content of the document and its objectives, as opposed to their nature and implications. Whilst I know that GVG has strong views about the proper masterplanning of the town centre, I have not engaged in a discussion of the GBC's approach to this issue in this opinion.
49. It is plain that the production of the TCIF has not followed the procedure for local plans in Part 6 of the LPR 2012 nor its predecessor provisions for DPDs in the LDR 2004 (e.g. had it been an AAP). It has also not been subject to SEA which it is said was "screened out": see TCIF at p. 3 and OR at para. 5.2. The OR at section 5 under "legal implications" does not even mention the LPR 2012 or **Wakil** and simply states "there are no legal implications" arising from the adoption of the TCIF.
50. The TCIF announces itself as a strategy necessary to address issues facing Guildford

town centre (emphases added):

**“Why is a town centre town centre framework needed?**

Guildford town centre is a great place to live, work, shop, visit, and to run a business. It is the largest shopping and service centre in Surrey and the heart of Guildford borough’s community. It is not however currently achieving its full potential. Key issues such as traffic congestion, public transport facilities, and the incoherent and poor pedestrian environment in some places require resolution.

Redevelopment of key sites alongside infrastructure and environmental enhancement projects requires co-ordination to achieve maximum effect. This will ensure that the town centre becomes a more lively, attractive, economically robust and environmentally sustainable place.

The interim town centre framework will help to shape how our town centre will look, function, perform and prosper over the next 18 years, to 2030. This timeframe links with the Council’s adopted Economic Strategy 2011 and with the forthcoming Local Plan strategy document.

....

**What effect will it have?**

On adoption by the Council, the final town centre framework will be a material consideration in determining planning applications. The suggested uses for sites, environmental enhancements and other interventions will be given appropriate weight in pre-application advice and in determining planning applications.

This interim town centre framework will be a formally adopted Council strategy, having similar status to the Council’s Economic Strategy and Conservation Area Character Appraisals. However, it will not have statutory status, as the Local Plan and Supplementary Planning Document (SPDs) do. Once the new Local Plan strategy document is in place, anticipated to be in 2014, the final town centre framework is likely to be upgraded to a SPD. The Local Plan (consisting of Strategy and Delivery Plans) will be the land use strategy for the whole borough, and will have the highest level (development plan) status in determining planning applications.

Sites allocated for development by the 2003 Local Plan will remain until superseded by the new Local Plan Strategy and Delivery documents. Where a site is allocated by the current Local Plan and the town centre framework suggests different uses, it will be for either the Council, or in the event of an appeal, the Planning Inspectorate, to determine the relative weight to give to each document. The development plan status of the allocations will be weighed against the town centre framework as an adopted Council strategy based on more up-to-date government policy and evidence studies.

Existing design and development guidance or planning briefs for town centre sites are not superseded by the town centre framework. The document makes suggestions for new designations where the latest evidence suggests these would be suitable. These signal future direction and would need to be brought into full statutory effect through the Local Plan.”

51. Although it is not explicit, the clear implication is that the policies of the current local

plan are out of date and are no longer fulfilling the function required by GBC of enabling the town to achieve “its full potential” in today’s circumstances and to -

“help to shape how our town centre will look, function, perform and prosper over the next 18 years, to 2030.”

52. The TCIF adds at p. 24:

“... the town centre is currently not meeting its considerable potential, and needs attention and direction to ensure its successful future. Although the town centre has considerable strengths to build upon and therefore great potential, it also currently suffers from many weaknesses, some of which are interrelated.”

53. Indeed, the Officer Report for 6 September (“**OR**”) states (Agenda Item 4):

“3.1 The town centre is not standing still; companies continue to make investment decisions and we need to ensure that we are an attractive investment location. If we do nothing we will be disadvantaged relative to our competitors, many of whom already have area actions plans in place to manage the future of their town centres.

3.2 It is therefore important to produce a framework for the town centre, drawing on available evidence and the views of interested organisations and individuals.”

54. It is stated in terms in the TCIF that it is to be adopted for development management purposes and is intended to be a material consideration in determining planning applications. Whilst the question of weight is addressed (above) it seems a reasonable inference that GBC intends it to guide their decision-making until the new local plan is in place (or the TCIF updated). Indeed, the quoted passage above makes it clear that in considering weight, the TCIF is –

“based on more up-to-date government policy and evidence studies ...”

55. I note that the TCIF purports to be a later version of the Guildford Town Centre Masterplan (Consultation Draft December 2011) (“**TCM**”) and relies on the consultations carried out in this respect. See TCIF p. 3:

“The interim town centre framework is based upon the draft Guildford Town Centre Area Action Plan, the responses to the consultation on that plan, updated evidence, and the views of interested organisations and individuals at two subsequent engagement opportunities on a draft masterplan. This interim framework was written by Guildford Borough Council in consultation with Surrey County Council as highways authority for the area, and other interested parties.

We have prepared this interim town centre framework following a similar process to that of a supplementary planning document, including input from the public and other interested parties. Involving the community and other interested organisations and

people has been undertaken in accordance with the Council's strategy for public involvement in planning, Community Involvement in Planning, 2011. It has also been subject to Habitats Regulation Assessment, Strategic Environmental Assessment, and Equalities Impact Assessment screening, which all conclude that full assessments would not be required."

56. See also the OR paras. 3.3-3.10 which also explains why the TCM was not pursued as such:

"3.8 The number and content of responses required considerable thought to be given to how we would proceed. We decided to focus the document as a framework rather than a masterplan. Some of the key evidence studies have yet to commence or to conclude. These will inform preparation of the final town centre framework. The main outstanding evidence is transport modelling, parking strategy review, vehicle movement/gyratory study, and bus facility study. This evidence is required for a movement strategy to be formulated in a final framework.

3.9 We recognise that transport infrastructure, in particular peak hour traffic congestion and the condition of the existing bus station and the future location of bus facilities, are some of the most important issues currently facing the town centre. Transport and parking studies, transport modelling and other evidence studies are being or will be prepared. The framework presented at Appendix 1 is therefore an interim framework.

3.10 Following the completion of these studies, the interim framework will be reviewed and updated in response to their findings. There will be further public engagement on the updating of the framework to include a movement strategy once the remaining evidence studies have been completed. The final town centre framework will be completed towards the end of 2013 (refer table 4, appendix 4 of the interim town centre framework document)."

57. I have been copied an email sent to members on 3 April 2012 which also seeks to explain the changes:

"Dear Councillors

Due to the level of interest and depth and content of many of the responses generated by the last consultation, we have decided to appoint urban designer consultants to work with us to finalise the above document, in particular, to work on its presentation including its maps and new diagrams.

We will also be asking them to provide comments on the updated Vision, as the draft Vision evoked much debate.

I write to tell you that the process of putting the document forward to Executive for adoption will therefore necessarily need to be extended by two months to allow us to undertake further work with consultants. It will therefore be considered by the Executive on 19 July 2012.

I'm sure you will appreciate that this will help us to produce a quality plan for the future.

On the matter of its name -

- As several of the important evidence studies are still underway, we have decided that we will review it next year in light of the new evidence, and update it where necessary to produce the final plan. This version will therefore be termed “interim”.
- A few respondents have said that it is not really a masterplan in terms of the level of detailed design proposals, etc, and we agree that in its narrowest interpretation, it will not be a masterplan. The version for adoption will therefore be called the “town centre framework”.

Please contact me if you have any questions about this.

Regards

Tanya Mankoo-Flatt

Principal Policy Planner

Planning Services”

58. This makes it clear that substantial additional work was commissioned from consultants *after* the consultation had closed.
59. It is plain that GBC does not advance the TCIF as a local plan or as an early draft of the local plan, which is due for initial consultation later in the year. I assume that the reason for it not being even a preliminary draft of the local plan is that both the OR and TCIF make it clear that the evidence base is not yet complete. See the passage from the OR above and TCIF pp. 4-5 which states:

“This interim town centre framework is based on evidence that was available at the time of writing. This necessarily represents a snapshot in time. There are some important evidence studies still in progress, and some that are yet to commence. Most of these relate to traffic, highways and parking issues and/or to future uses of sites. Most of these evidence studies are expected to be completed in 2013.

Rather than wait until we have all the evidence available to develop a final strategy, we consider it to be valuable to develop an interim framework for the town centre to help in guiding planning and investment decisions based on the evidence currently available. This framework will therefore have interim status, and will be reviewed and updated following completion of these studies to reflect all available evidence. The framework will replace this interim framework. A list of these studies, their anticipated completion dates, and date for adoption of the final framework are set out in Appendix 4.”

60. In other words, the Council promotes the TCIF for development management purposes in a context where existing policy is considered to be outdated and not to meet the current and urgent needs of Guildford but also where the evidence base:

- (1) Is incomplete and expected to be incomplete until 2013; and
  - (2) Has not been tested by public examination and has been changed from the TCM draft consulted upon to that now set out in the TCIF Appendix 1.
61. In my opinion, what GBC seeks to do is not consistent with the principles set out in paras. 150 et seq. of the NPPF which requires the issues in the TCIF to be addressed through a local plan in a way which allows full engagement and collaboration, and using a proportionate evidence base, which can be examined for soundness.
62. However, compliance with the NPPF is only a secondary issue since, as I have indicated already, in my opinion the proposed adoption of the TCIF as it stands on 6 September will be unlawful since:
- (1) It is a local plan within regs. 5 and 6 of the LPR 2012 and has not been through the process required by law for a local plan under Part 6 of the LPR 2012;
  - (2) It has not been subject to SEA as required by the SEA Regulations and SEA Directive;
  - (3) It has not been subject to SA as required by s. 19(5) PCPA 2004
  - (4) The failure to meet (1) and (2) means that consultation has not been appropriate, has not been based on the evidence base required by the NPPF and has not been submitted to the Secretary of State and examined for soundness by an independent inspector.
63. I reach this conclusion since it seems to me that the TCIF clearly falls within the definition of reg. 6 of the LPR 2012 since it is a document prepared by GBC which “contains statements” regarding “the development and use of land which the local planning authority wish to encourage during any specified period” and thus falls within reg. 5(1)(a)(i).
- (1) The TCIF is clearly for a “specified period”. See the passage on p. 3 quoted above, to the effect that the plan “*will help shape*” the centre over “*the next 18 years, to 2030*” and will be adopted to become a material consideration for determining applications in that context; and
  - (2) The TCIF is comprised of many statements regarding the development and use of land which GBC wishes to encourage during that period of 18 years. Indeed, the

passages from pp. 3 and 4 of the TCIF and from the OR I have already quoted make it very clear that the purposes of the TCIF is *precisely* to encourage development in ways which are then detailed later in the document, to “help shape” the centre, to guide planning applications and to meet the need to provide investor confidence and to avoid being disadvantaged relative to the town centre’s competitors.

64. If further demonstration of this were necessary, I highlight the following aspects of the TCIF (though this is not intended to be a comprehensive analysis) which are functions which would be expected of a local plan:

(1) The town centre boundary shown on the 2003 Proposals Map is redefined by the TCIF. The reasons for this are described at pp. 10-11 and include taking that step which is required to be taken in a local plan -

“National planning policy in the NPPF1 requires a town centre boundary to be defined as part of Local Plans in which certain national town centre planning policies will apply. Specific local policies may also apply to this area if required for determining planning applications. The town centre boundary, the primary shopping area and shopping frontages of this town centre framework will be included in the future Local Plan. There is a requirement to show the town centre boundary on the new proposal map as part of the statutory Local Plan. Accordingly, this town centre area will be defined on the amended proposals map accompanying the Local Plan Strategy 2014.”

(2) The PSA which is the key to the application of town centre policies, particularly retail, is defined - and defined in a manner which does not correspond with the designation of primary, secondary etc. frontages in the 2003 local plan (said to be “revised”). At p. 37 it is clear that the PSA has been produced to meet NPPF expectations not met by the 2003 plan –

“National planning policy requires the primary shopping area (PSA) to be defined, with reference to primary and secondary shopping frontages. The PSA consists of the primary shopping frontage and those secondary shopping frontages which are adjoining and closely related. Whilst the Local Plan 2003 designates primary and secondary shopping frontages (as well as tertiary and specialist frontages), it does not specifically delineate a PSA. Guildford’s 2006 Retail Study recognised the need to review the town centre’s shopping frontages.”

TCIF p. 37 makes it clear that the definition of the PSA is to make up for an absence of such in the 2003 plan with the significance set out in detail on p. 38 –

“Planning policies need to ensure that the retail heart of the town centre, the

PSA, is protected from too many non-retail uses at ground floor level. New retail development will be required to be located here unless there are reasons to deviate from this retail core (the sequential “town centre first” approach). Although this policy results in a quiet central area (in the primary frontage area) in the night-time, this can be beneficial for people living above shops.

Later opening of shops could enliven this area in the early evening. Outside of this retail core, other areas of the town centre can provide for other town centre functions, including the night-time economy.

The last review of shopping frontages in Guildford was over a decade ago. We are now proposing to simplify the shopping frontages by deleting the tertiary and specialist frontages.

Government planning policy suggests that the only designated shopping frontages are primary and secondary. This would be a simpler approach than the four designated shopping frontages of Guildford Local Plan 2003. The Guildford Retail Study 2006 also recommended that Guildford town centre’s shopping frontages be simplified into primary and secondary, and that a PSA be defined. The PSA will be defined on the Proposals Map as part of the new Local Plan Strategy.

The proposed PSA has been based on a review of revised shopping frontages, and is shown at in Figure 6, and summarised at Appendix 2.”

Its role is also made clear on p. 11 -

“The primary shopping area, described below, is where retail development will be focused and reinforced. All other town centre uses (outlined above) will be directed to the wider town centre in accordance with the sequential approach of the national town centre first approach.”

- (3) Section 4 at p. 19 sets out the TCIF “Objectives” which appear to be strategic policies for the centre and which reinforce the application of reg. 5(1)(A)(i) –

#### **“4 Objectives**

The objectives set out below will help the Council, its partners, landowners and businesses to achieve the vision for the town centre in 2030.

Objectives TC6, TC8 and TC9 are based on the 2011 Economic Strategy’s objectives for the town centre. Guildford Economic Strategy was prepared by Guildford Borough Council and Guildford Local Strategic Partnership, working with Guildford Business Forum

**TC 1** Retain and enhance the town centre’s distinctive character

**TC 2** Improve the quality of the environment with well-designed buildings and spaces that compliment [sic.] and enhance the character of the area

**TC 3** Create an environment with lively streets and spaces to accommodate a wide range of activities and events

**TC 4** Enhance the appearance and use of the River Wey and its riverside

**TC 5** Increase the number of homes, including affordable homes in this

sustainable location

**TC 6** Support and strengthen the diversity of the town centre economy and its contribution to the wider area, broadening the range of jobs

**TC 7** Promote a diverse evening and night time economy, including later shopping hours

**TC 8** Provide opportunities for a wide range of retail businesses including markets to trade to retain the town centre's competitiveness

**TC 9** Improve infrastructure serving the town centre, addressing traffic issues, improving access by sustainable travel modes, minimising flood risk, and ensuring adequate community infrastructure

**TC 10** Improve the environment for pedestrians and cyclists to find their way around and to move around

**TC 11** Improve the cohesion between the town centre's key attractions and promote its potential as a diverse visitor destination."

- (4) The strategy, which is at the heart of the TCIF, is set out in considerable detail in Section 6 which has 4 main strands which are then developed in detail at pp. 43-115 by reference to areas of the town centre, 18 detailed sites (see further below) and principles and objectives to be applied both generally and specifically. The individual character areas each have their own "strategy" section set out in coloured boxes which look remarkably similar to some land use policies which might be found in a local plan. See TCIF pp. 49, 59, 73, 83, 91 and 97.
- (5) Section 7 sets out steps to be taken in order to secure delivery of the objectives and strategy of the TCIF. P. 119 makes clear how this role relates to GBC's development management functions and indicates that CPO powers may be utilised –

"The Council and its partners will use planning obligations funding from major developments, the Community Infrastructure Levy (CIL), the Council's and Surrey County Council's capital programmes, and the Local Authority Business Growth Incentive (LABGI) to develop its town centre sites, to unlock other key development sites, and to implement environmental improvements. Public sector money may also be available from bidding, including the Surrey TravelSMART bid. This may also bring in further funding from private sector sources.

...

The Council will use, where necessary, Compulsory Purchase Orders (CPOs) for land assembly to facilitate redevelopment of key sites. Where suitable, it will

form development partnerships with the private sector to deliver key sites.”<sup>12</sup>

65. These provisions together assume in many places the role of the local plan in defining boundaries which are relevant to the application of policy and setting the policy objectives for the town centre both in general and in detail, and how those objectives are to be achieved. It appears clear therefore that the TCIF contains many statements, both in strategic and detailed terms, which relate to *“the development and use of land which the local planning authority wishes to encourage during any specified period”*. The statements that the document will be used for development management purposes, that CPO may form part of the means of delivery of the strategy, and that the document will be kept under review all support the analysis that the TCIF as a whole falls within reg. 5(1)(a)(i).

***Additional reasons for my conclusion under reg. 6***

66. As reg. 6 makes clear, only one of the list of the sub-paragraphs of reg. 5 needs to be satisfied<sup>13</sup> for the document to be a local plan as a matter of law. What I have already set out, in my opinion, is more than sufficient to show that the TCIF falls within the reg. 6 definition. However, the TCIF also appears to fall within reg. 5(1)(a)(ii) and (iv) as well though it is not necessary to demonstrate that in addition to (1)(a)(i).
67. In terms of reg. 5(1)(a)(ii) and (iv) I consider that the details of Section 6 (“Strategy”) and the 18 Sites dealt with in some detail (some of which are also current local plan allocations<sup>14</sup>) are in substance *“allocations of sites for a particular type of development or use”*. Each of the Sites is analysed in terms of its physical and legal status, its current uses and then both “location and development considerations” and “opportunities and suggested uses” – plainly intended to set out what constraints apply and what development “opportunity” GBC considers appropriate for that site.
68. Indeed, the various sites are introduced on pp. 44-45 in terms which relate them clearly to reg. 5(1)(a)(ii) and (iv) (as well as reinforcing the application of (a)(i))

---

<sup>12</sup> This possible use of CPO powers is repeated on p. 46.

<sup>13</sup> Note the use of the disjunctive “or” twice in reg. 6 and the introductory words of reg. 5(1)(a) “regarding one or more of the following....”

<sup>14</sup> E.g. Sites 3, 4, 8 and 18.

(emphases added):

“The sites shown on each of the townscape strategy diagrams that follow are those sites whose redevelopment would benefit the wider town centre, as well as the immediate area.

Redevelopment sites include land that has potential to:

- reinforce the townscape area’s character
- contribute to the local economy and competitiveness of the town centre
- strengthen the community with new homes
- enhance the appearance of the surrounding area, and
- deliver infrastructure and wider regeneration benefits.

These sites have been selected for their potential, either individually or in combination, to have a significant positive impact on the town centre through their redevelopment. Redevelopment of these sites would help to deliver objectives TC1 to TC10.

Sites are categorised as follows:

**Key opportunity sites** - large sites with potential to accommodate a significant amount of town centre use floorspace. This will contribute to meeting identified needs, and will have a significant impact on a wider area.

**Opportunity sites** - sites in prominent locations including those on pedestrian desire lines, whose redevelopment will have potential to have a major impact on the appearance and function of the town centre.

**Other sites** - other less prominent town centre redevelopment sites. These offer opportunities to improve the streetscape, river setting, urban grain, and/or contribute to the local economy or housing stock.

A few **Potential sites** have also been identified. These identify land where a redevelopment opportunity may not be realised within the period of the town centre framework, or where it is unclear whether the site would be redeveloped or refurbished.

Two of the identified sites, the North Street site and Guildford Railway station site are of key importance to the whole town centre due to their size, location, and potential to improve the town centre. Both of these are in private ownership.

Nine of the 18 redevelopment sites identified are owned by Guildford Borough Council. Several of these have been used as temporary surface car parks for some years, for example Portsmouth Road and Bright Hill. The redevelopment of each of these sites must enhance the distinctive character of each townscape area in terms of its scale, massing, and design, to reinforce the townscape character of that part of the town centre and improve the local environment.

Their redevelopment will bring about improvement to the appearance and functioning of the public realm. For example new pedestrian routes to and through the site can improve permeability and legibility, as well as enhance the wider street scene.

Mixed-use developments contribute to the vitality of the town centre often at different times of the day, and reduce the need to travel by encouraging linked trips. A mix of uses will be encouraged as most suitable for town centre sites with potential to accommodate significant developments. This approach will be carried through from the borough of Guildford's Local Plan Policy G1 (13), and will be included in the Local Plan delivery document."

69. The strategy is also set out in a series of figures setting out in diagrammatic form various aspects/areas of the proposals: see fig. 7 (summary) and (individual areas) figs. 8 to 15.
70. The totality of Section 6 appears to me to give rise to the view that the sites are identified/allocated and that development management policies are provided to guide their development, both with regard to constraints, opportunities and preferred uses.

### ***Conformity with the Local Plan 2003***

71. If the TCIF is properly considered a local plan then it is required to be in conformity with the other aspects of the development plan (see above) – here, significantly, the 2003 local plan which remains in force as saved.
72. It is clear from the TCIF itself that it does not regard itself as being in conformity with the local plan since it states:

"Sites allocated for development by the 2003 Local Plan will remain until superseded by the new Local Plan Strategy and Delivery documents. Where a site is allocated by the current Local Plan and the town centre framework suggests different uses, it will be for either the Council, or in the event of an appeal, the Planning Inspectorate, to determine the relative weight to give to each document. The development plan status of the allocations will be weighed against the town centre framework as an adopted Council strategy based on more up-to-date government policy and evidence studies."

73. Whilst it might be possible to have conflicting policy documents in some circumstances (though increasingly less under the new regime) this is not lawful with local plans or SPD. So long as a local plan does not seek to supersede earlier policy (see reg.8(5)) then it must be in conformity and the TCIF (apart from purporting to be non-statutory) does not claim to supersede and replace earlier policy except in the sense quoted above i.e. by contending that the TCIF may be weightier given its more recent origin.
74. Further, as noted above, the PSA and fig 6 do not conform with the Proposals Map and the town centre shopping frontage designations in the 2003 plan:

- (1) The PSA extends beyond the primary and second shopping areas in 2003 and

encompasses what were then described not as primary shopping but as secondary and tertiary;

- (2) It is not clear how the definition of primary shopping area sits consistently with the designations of primary frontage and service/leisure areas (though there may be a typo<sup>15</sup>, but even so, secondary frontages) on fig. 6;
  - (3) The tertiary shopping area in the 2003 plan has been removed despite policy S6 of the 2003 plan which applies to it;
  - (4) The primary shopping frontage now shown on fig. 6 includes large areas of shops shown as secondary and tertiary in 2003 despite the fact that policies S5 and S6 of the 2003 plan apply to such areas.
75. The town centre boundary is also different since that in the TCIF is put forward as the focus for town centre policies whereas in 2003 it has a specific role in car parking (see policy M1) and the proposals map shows the town centre parking boundary. The boundary in 2003 includes significant areas to the west of the railway line, and an area to the east of the TCIF boundary (adjacent to Epsom/London Road), compared to that in the TCIF.
76. No doubt this has come about as a result of changes which have occurred since 2003 (or its earlier evidence base) and the recognition at p. 37 that “Guildford’s 2006 Retail Study recognised the need to review the town centre’s shopping frontages.” However, absent revocation or replacement of the 2003 plan the TCIF must be consistent with it, which it is not. These changes underline the fundamental difficulty created by seeking to “revise” development plan policy (by setting up a more up-to-date counterweight to it) where this brings it outside the terms of the LPR 2012.
77. Whilst I have not at this stage identified all inconsistencies (and this should be done if the Plan is to be challenged), I note the following points in addition to those mentioned above:

---

<sup>15</sup> Service and leisure areas appears twice on fig 6 and I suspect, from the earlier version in the TCM that the orange line which is not the primary frontages is meant to be secondary frontages. Even so, most of what is now shown as primary was secondary in 2003 and the PSA function is now much wider which has significant implications for town centre policy and the sequential approach in NNPF paras. 23-25.

- (1) Section 6, p. 56, Site 1 (North Street) for the reasons set out below, in respect of the NSDDB, which is said to be “a key site in defining the town centre’s future”;
- (2) Site 6, Debenhams (p.70). The site is allocated as a secondary shopping area on the 2003 Proposals Map where policy S5 in the Local Plan applies. The proposed redevelopment of the site for housing or offices above ground floor level is inconsistent with that designation as is the inclusion of Site 6 in the PSA.
- (3) Site 8 Guildford Railway Station (p.77). The area included has changed from that shown in the 2003 Proposals Map. The development considerations, including the reference to the site being on the edge of the PSA and proposed removal of safeguarding, are in conflict with paragraphs 9.55 and 9.61 of the Local Plan.
- (4) Site 16 Land at Bellerby Theatre (p.89). Here again the boundaries differ from those shown on the Proposals Map. The proposed Waitrose supermarket appears contrary to GT3 in the Local Plan. In light of reg. 8(3) of LPR 2012 little weight can now be afforded to the January 2011 adopted Planning Brief which seeks to facilitate this proposed retail use.

78. I have also been referred to conflicts between the policies in the 2003 Local Plan including its Proposals Map and the boundaries and/or descriptions of Sites 3, 4, 10, 11, 12, 13, 14, 17 and 18 in the TCIF. I have not considered these additional sites in the time available to me nor any other site not specifically referred to above.

### **SPD**

79. The matters under this heading only arise if I am incorrect with regard to the characterisation of the TCIF as a local plan. However, even if I were incorrect that the TCIF were not a local plan as a matter of law, it appears that it would fall within the reg. 2(1) definition of SPD given the terms of reg. 5(1)(a)(iii) and the analysis of the TCIF. I note the reference in the TCIF eventually for it to be adopted as SPD once the new local plan has been adopted.
80. It is claimed in the OR at para. 5.2 (above) that SPD process has been followed by GBC in bringing forward the TCIF and, presumably, reg. 38 of the LPR 2012 would then apply. However, it is very doubtful whether the consultation on the TCM, which is relied upon by GBC, can properly be relied upon to show compliance even if all the formal requirements of SPD were otherwise met in Part 5 LPR 2012 (and its predecessor) since:

- (1) There has been no SEA;
- (2) The document put forward for adoption as the TCIF is a substantially different document from the TCM consulted upon in December 2011. The reasons for the change have been set out above. No doubt it will be said that the TCIF incorporates the results of consultation but in my opinion the point goes much further than this since the TCIF substantially rewrites the document so that it changes in format from what purports to be a development brief/masterplan to a much more detailed development management guide for the town centre. I have not had time to carry out a complete comparison (which should be done) but note that there is significant evidence that there have been major changes –
  - (a) Although appearances should not be regarded as decisive, it is noticeable that the final TCIF is a substantial document<sup>16</sup>, far more substantial than the TCM and in appearance presented much more like a local plan than a masterplan. See also the officer's email of 3 April, quoted above;
  - (b) The town centre boundary has been changed and enlarged;
  - (c) There are now 11 rather than 7 objectives (TCM p. 4);
  - (d) The analysis section (TCM pp. 5-6) has been expanded considerably from 2 to circa 16 pages<sup>17</sup> (TCIF pp. 23-39);
  - (e) The NPPF has been issued in final form;
  - (f) The strategy has been expanded from 39 pages (TCM pp. 19-58) to 72 (TCIF pp. 43-115) and, moreover –
    - (i) The guidance for each of the sub-divisions of the town centre has been significantly increased and put into more detail. Moreover, as noted above, each area now has a coloured box setting out the specific strategy for each of the sub-areas;

---

<sup>16</sup> As the OR itself notes at 1.3 when explaining why individual copies have not been provided to all members.

<sup>17</sup> This is approximate since items such as the PSA appear elsewhere in the TCM.

- (ii) The detailed guidance now takes account of the NPPF which was only in draft at the time of the TCM;
  - (iii) The number of specific sites has been reduced.
  - (g) The evidence base for the document appears to have expanded if a comparison is made between TCM Appendix 2 and TCIF Appendix 1;
  - (h) The vision for the Town Centre is now intended to be fixed and included in the new local plan.
81. While some of the above changes taken in isolation might simply have been considered a response to the consultation process, in my view this response is inadequate when the change from the TCM to the TCIF is considered as a whole.
82. Given the above changes, it is questionable whether GBC has complied with its own Community Involvement in Planning (July 2011) (see s. 19(3) PCPA 2004) and Community Engagement Strategy 2001 since:
- (1) Both underline the need for effective and wide (albeit proportionate) engagement with the public, local businesses and those concerned with planning in the area;
  - (2) There cannot be effective engagement if the document being consulted upon has changed significantly so what is produced deprives those affected from the opportunity to consider and respond on important aspects of the documents e.g. the specifics of the strategy which is intended to underpin town centre planning in Guildford for some time and possibly to support the making of CPOs. See **R v. Brent London Borough Council, Ex p Gunning** (1985) 84 LGR 168 applied by the Court of Appeal in **R v. North and East Devon HA ex parte Coughlan** [2001] Q.B. 213 at [108]. The need for “*sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response*” is undermined if the document is substantially rewritten without an opportunity for consultation on the new document. This problem is underlined by the lack of SEA which would have required an amended or supplementary environmental report and further consultation on the version as modified.
  - (3) I am instructed that a workshop was held on 23 June 2011 followed by two weeks of early consultation. This resulted in the publication of the draft Masterplan which was released for consultation on 7 December 2011. Consultation closed on

23 January 2012 but it was not until 3 April 2012 that GBC announced the draft Masterplan had been abandoned as such and that it was intended to rebrand and redraft it with the help of external consultants culminating in the publication of the TCIF on 28 August 2012. No public consultation has taken place on the TCIF since its publication.

83. Moreover, the TCIF is in conflict with the 2003 local plan and thus contravenes reg. 8(3), for the reasons set out above. To the extent that the TCIF is not consistent with the 2003 local plan, as I have explained above, then it seems to me that if the TCIF is SPD then it is in conflict with the 2003 plan to the same extent.

### ***GBC Constitution***

84. This is a secondary point given the other issues set out in this Opinion, but it appears that a consequence of the TCIF being a local plan, and thus a DPD, is that the Executive of GBC does not have power to adopt it: see Article 4.2(4) of the Council's Constitution and the definition of "Policy Framework" in Article 4.1(a) which includes "Guildford Borough Development Plan Documents".

85. Article 4.2(4) provides:

#### **"Functions of the Full Council**

The following functions must not be exercised by the Leader/Executive and, where not otherwise delegated, shall be reserved to the full Council:

...

(4) to approve, amend, revoke or replace any plan or strategy falling within the Council's policy framework (including any decision required for submission to the Secretary of State)"

### **(2) The NSDDB**

86. This is acknowledged in terms to be SPD: see NSDDB para. 1.1. p. 5 and the OR (Agenda Item 5) at paras. 1.1 and 4.1. Indeed, the heading to the OR specifically refers to it as -

"North Street Design and Development Brief Supplementary Planning Document (SPD)".

87. To the extent that the NSDDB relies upon the changes made by the TCIF, and the new town centre and PSA boundaries, then it suffers from the same difficulties as the TCIF and is based on a document which is legally flawed. It appears at p. 12 to rely on the re-designation of shopping frontages and the PSA in the TCIF.

88. Moreover, whatever the planning merits, the site now included in the NSDDB the boundary of which is shown on fig. 1.2 is not the same as that allocated as a major site in 9.62 of the 2003 plan<sup>18</sup> which (in contradistinction to the NSDDB) was significantly smaller in that it:
- (1) Excluded most of the buildings fronting North St apart from a small group to the east of the Woodbridge Street junction;
  - (2) Excluded the car park and buildings on the eastern side of Leapale Rd (south of the BT Exchange); and
  - (3) Included part of the Friary Centre.
89. The brief therefore appears to conflict with 9.62 of the 2003 local plan and para 8.15 which provides that there is “no overriding need for further major retail development in the Borough during the Plan period” although the plan was intended to run to 2006 it has not been replaced, as noted.
90. On the basis of the town centre and primary shopping as it stood in the 2003 plan, it does not appear that development of the site in the NSDDB would meet S2 of the local plan. There is no sequential appraisal in the NSDDB to justify the new area proposed in the brief. It appears to proceed on the basis of the TCIF designation as part of the new PSA and not to require sequential testing based on the 2003 plan designations.
91. Further, in the 2003 plan all of the area of the NSDDB was secondary or tertiary shopping frontage (some was not even that) and therefore policies S5 and S6 of the 2003 plan apply. P. 11 of the NSDDB does not note let alone seek to consider those policies.
92. I have not at this stage examined whether GBC can rely upon reg. 38 of the LPR 2012 as having complied with the procedure required of SPD in the LDR 2004. This is something which ought to be checked if the issue is to be raised in any legal challenge.

---

<sup>18</sup> Marked in red cross-hatching on the proposals map.

### **(3) Failure to carry out SEA**

93. If the TCIF is a local plan, as I have advised, then it should have been subjected to SA (s. 19(5) PCPA 2004) and SEA (which might have been included within a SA, had one been produced). More importantly, the failure to carry out SEA means that GBC is not permitted in law to adopt the documents since they can only be adopted if the authority has first taken into account the SEA environmental report and the results of consultation.
94. That environmental report should have assessed the various effects of the proposed policy guidance together with the reasonable alternatives. A failure to do so will open the document to being quashed by the High Court: see e.g. ***Save Historic Newmarket v. Forest Heath DC*** [2011] J.P.L. 1233 and ***Heard v. Broadland DC*** [2012] Env. L.R. 23.
95. For the reasons set out above, I consider that even if the TCIF were SPD then it should have been subject to SEA given the power to adopt SPD under the LPR 2012 and the broad interpretation given in the ***Inter-Environnement Bruxelles*** case. This conclusion also applies to the NSDDB as an acknowledged SPD.

### **Conclusion and consequences**

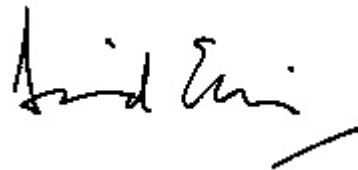
96. As I have advised, the documents proposed to be adopted by GBC on 6 September may not lawfully be adopted by the Executive – or even by full council.
97. In the event that GBC decides to proceed with the formal decision to adopt, then the documents will be open to judicial review under CPR Part 54 for the period of 3 months following the decision to adopt.
98. Although there is a general requirement for “promptness” within the 3 month JR period within Part 54, it is unlikely that it would be applicable here given that the issue involves legal obligations derived from EU law (i.e. the SEA Directive) in which case the Courts generally apply the 3 month period as it stands: see ***Uniplex (UK) Ltd v NHS Business Services Authority*** (C-406/08) [2010] 2 C.M.L.R. 47, ***R. (U & Partners (East Anglia) Ltd) v Broads Authority*** [2011] J.P.L. 1583 at [37]–[47], and ***R. (Berky) v Newport City Council*** [2012] 2 C.M.L.R. 44. In ***Berky*** there was a difference of views in the Court of Appeal, though it did not affect the result, but the majority view was expressed by Moore-Bick L.J. as follows:

“48. CPR 54.5(1)(a) provides that the claim form seeking judicial review must be filed “promptly and in any event not later than 3 months after the grounds to make the claim first arose”...

49. In *Uniplex* [2010] 2 C.M.L.R. 47 the Court of Justice of the European Union held that the requirement in reg.47(7)(b) of the Public Contract Regulations 2006 that proceedings under the Regulations be brought “promptly” was contrary to the Community law principles of certainty and effectiveness. As Carnwath L.J. notes, the decision has since been applied to challenges to planning decisions based on the failure to obtain an EIA. In principle that is in my view correct, because there is no distinction for these purposes between the cases, each of which involves the application in the domestic context of rights deriving from Community legislation. However, that raises the question whether, if there has been undue delay in commencing proceedings, the court can decline to grant relief in the exercise of its power under s.31(6) of the Senior Courts Act 1981. In *U & Partners* [2011] EWHC 1824 (Admin), Collins J. held that it cannot, because there cannot be said to have been undue delay if the claim is brought within three months.

50. On this issue Carnwath L.J. and Sir Richard Buxton (whose judgment I have had the privilege of reading in draft) have expressed differing opinions. It is unnecessary to reach a final conclusion on this question in the present case, but I prefer the view of Sir Richard Buxton. The principle to be derived from *Uniplex* [2010] 2 C.M.L.R. 47 is that rules limiting the period within which proceedings may be brought to vindicate rights deriving from Community law must be certain in order to ensure that the law is capable of effective enforcement. A requirement that proceedings be brought “promptly” is considered by the Court of Justice to render the limitation period discretionary and thus to undermine the effectiveness of the transposition into domestic law of the relevant Community legislation.”

99. Further, if the two documents are adopted unlawfully then any planning decisions taken based on them are also liable to be challenged on the grounds that they have taken into account irrelevant (because unlawful) documents or acted unreasonably in doing so. Any CPO based on those documents would be similarly open to criticism.
100. I have nothing to add as presently instructed but would be pleased to advise further if necessary.



DAVID ELVIN Q.C.

Landmark Chambers  
180 Fleet Street  
London EC4A 2HG  
6 September 2012

**GUILDFORD VISION GROUP**

**Re: Proposed North Street Design & Development  
Brief & Guildford Town Centre Interim Framework**

---

**OPINION**

---

**Forsters LLP,**  
31 Hill Street,  
London W1J 5LS  
Email: [tim.taylor@forsters.co.uk](mailto:tim.taylor@forsters.co.uk)

Your ref: TJJT

Our ref: Case 126209 [DE]