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## **JOINT OPINION**

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### **IN THE MATTER OF THE PROPOSED ADOPTION OF CERTAIN DOCUMENTS BY GUILDFORD BOROUGH COUNCIL**

#### **Introduction**

1. We are instructed by Forsters LLP on behalf of the Guildford Vision Group (“GVG”) in connection with the proposal by Guildford Borough Council (“GBC”) to adopt the North Street Design and Development Brief (“the NSB”) and the Guildford Interim Town Centre Framework (“the TCF”) on 6 September 2012.
2. We are asked in particular to advise on whether there are any possible legal impediments to GBC adopting the NSB and/or the TCF, as to which, it seems to us that the following issues arise for consideration:
  - a. whether the NSB is properly characterised as a supplementary planning document (“SPD”) or whether it is properly characterised as a development plan document (“DPD”);
  - b. whether the NSB has been prepared in accordance with the requirements that flow from its characterisation as an SPD or a DPD;
  - c. whether GBC are able to adopt the TCF without according it any particular status as an SPD or as a DPD. In other words, whether GBC are able, on a non-statutory basis, to adopt a document that is of a description that amounts to a local development document (“LDD”) without having complied with the appropriate procedural requirements;

- d. whether the TCF is properly characterised as an SPD or whether it is properly characterised as a DPD;
- e. Whether the TCF has been prepared in accordance with the requirements that flow from its characterisation as an SPD or a DPD; and
- f. Whether GBC's Executive has the power under GBC's Constitution to adopt the NSB and the TCF.

### Summary

#### 3. In summary our view is as follows:

- a. **Issues (a) and (b).** The NSB is most properly characterised as a DPD rather than an SPD. This is because it contains statements regarding the development and use of the relevant land which GBC wish to encourage until the NSB comes to be superseded by GBC's new Local Plan. It also contains statements allocating the site for a major mixed use scheme that will be key to meeting the identified retail needs for Guildford. In addition the NSB identifies the area with which it is concerned as an area of significant change and contains GBC's policies in relation to that area. The upshot is that GBC has mischaracterised the NSB as an SPD. It should have been prepared as a DPD. It was not. It follows that it would be *ultra vires* and procedurally improper for GBC to adopt the NSB as matters currently stand.
- b. **Issues (c), (d) and (e).** In our opinion if a document that is being progressed by an LPA is of a description that amounts to an LDD then it would be unlawful to adopt the document without complying with the appropriate procedural requirements. It is manifestly clear to us that the TCF is properly characterised as a DPD. It contains statements regarding the development and use of land in Guildford town centre which GBC wish to encourage between 2012-2030. It also contains statements regarding the allocation of sites for a particular type of development or

use. Further, it identifies the town centre as an area of significant change and contains GBC's policies in relation to that area. The upshot is that the TCF should have been prepared as a DPD. It was not. It follows that it would be *ultra vires* and procedurally improper for GBC to adopt the TCF as matters currently stand.

- c. **Issue (f).** Because they are properly characterised as DPDs - albeit that they are, as matter stand, procedurally defective - GBC's Executive are precluded from adopting the NSP and the TCF by virtue of reg. 4(3)(d) of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000. This position is reflected in articles 4.2(4) and 7.1 of GBC's Constitution which vest the ability to adopt DPDs in the Full Council.

## Statutory Framework

### *LDDs*

4. The relevant statutory framework is contained in the Town and Country Planning (Local Planning) (England) Regulations 2012 ("the 2012 Regulations") and the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). The 2012 Regulations replaced the Town and Country Planning (Local Development) (England) Regulations 2004 ("the 2004 Regulations") with effect from 6 April 2012.
5. The starting point is that under s. 17(3) of the 2004 Act the policies of an LPA relating to the development and use of land in their area must be set out in LDDs.
6. Section 17(7)(za) of the 2004 Act allows the Secretary of State to prescribe which documents are, or if prepared are, LDDs.



7. LDDs fall into one of two classes. Firstly, some LDDs are DPDs. Section 17(7)(a) of the 2004 Act allows the Secretary of State to prescribe which LDDs are DPDs.<sup>1</sup> Under reg. 2(1) of the 2012 Regulations:

*“local plan” means **any document** of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the Act these documents are prescribed as development plan documents.”*(emphasis added)

8. Secondly, some LDDs are SPDs. Under reg. 2(1) of the 2012 Regulations:

*“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”*(emphasis added)

9. Regulation 5 of the 2012 Regulations provides as follows:

*“5. - (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.*

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<sup>1</sup> This is echoed by reg. 6 of the 2012 Regulations which provides that “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.” It is clear from this that DPDs are also known as local plans. For the purposes of this Opinion it is convenient to use the terminology of DPDs.

*(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.”*  
(emphasis added)

10. Accordingly, any document that is of a description within reg. 5 must be prepared as an LDD. Whether it must be prepared as a DPD or as an SPD depends on which paragraph within reg. 5 the documents falls. Any document of a description within reg. 5(1)(a)(iii) is an SPD and must be prepared as such by the LPA. Any document that is of a description within any other paragraph in reg. 5 is a DPD and must be prepared as such by the LPA.

#### *Preparation of LDDs*

11. The process for the preparation of SPDs and DPDs is different. The process for the preparation of SPDs is set out in s. 19 of the 2004 Act and Part 5 of the 2012 Regulations. The process for the preparation of DPDs is set out in ss 19 - 20 of the 2004 Act and Part 6 of the 2012 Regulations. In particular, DPDs must be submitted to the Secretary of State for independent examination. Under s. 19(5) of the 2004 Act DPDs must be subject to a sustainably appraisal whether or not they are also subject to a strategic environmental assessment (“SEA”).

12. It is not necessary to set out the statutory provisions that underlie the propositions that we have summarised above. This is because we take it to be common ground between GVG and GBC that neither the NSB nor the TCF have been prepared in accordance with the procedural requirements for DPDs. Neither has been sustainably appraised and neither has been submitted to the Secretary of State for independent examination. We address this point in more detail below.

13. Under s. 23(4) of the 2004 Act an LPA must not adopt a DPD unless the person appointed by the Secretary of State to carry out the independent examination of the DPD recommends that it is adopted.

*Functions of GBC's Executive*

14. Under reg. 4(1)(a) of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 ("the 2000 Regulations"):

*"(1) In connection with the discharge of the function—*

*(a) of formulating or preparing a plan or strategy of a description specified in column (1) of Schedule 3 to these Regulations*

*...*

*the actions designated by paragraph (3) ("the paragraph (3) actions") shall not be the responsibility of an executive of the authority."*

15. So far as is material reg. 4(3) of the 2000 Regulations provides as follows:

*"(3) the actions designated by this paragraph are-*

*...*

*(ca) the approval, for the purpose of its submission to the Secretary of State for independent examination under section 20 (independent examination) of the 2004 Act, of a development plan document; and*

*(d) the adoption (with or without modification) of the plan or strategy."*

16. The fifth line in column 1 of Schedule 3 to the 2000 Regulations is "development plan documents." The upshot is that to the extent that the NSB and/or the TCF is a DPD GBC's Executive are precluded from adopting it. The adoption of DPDs is a matter for GBC's Full Council.

## Discussion

### *Issue (a): Is the NSB a DPD or an SPD?*

17. If the NSB is a document of a description within reg. 5(1)(a) or reg. 5(2)(a) of the 2012 Regulations then by virtue of s. 17(7)(za) of the 2004 Act it must have been prepared as a DPD. Whether the NSB is a document of a description within any of those paragraphs is a question of objective fact. It is not a matter that is left to the discretion of GBC: *R (Wakil) v Hammersmith and Fulham LBC* [2012] EWHC 1411 (QB) *per* Wilkie J at [81] - [82].
18. *Wakil* concerned an application for judicial review brought by a consortium of traders whose premises were situated adjacent to Shepherd's Bush Market. The defendant LPA adopted an SPD which purported to provide guidance on how the market area and adjacent areas should be regenerated. In particular, the SPD envisaged the delivery of "*a vibrant mixed use destination providing a new focus in the Western Part of the town centre*" in that area. Paras 19 - 20 of Wilkie J's judgment sets out the relevant extracts from the impugned SPD.
19. One of the grounds on which the LPA's adoption of the SPD was quashed was that the LPA had mischaracterised the document as an SPD when in fact it was a DPD by virtue of being an AAP under reg. 6(2)(a) of the 2004 Regulations. It is material that reg. 6(2)(a) of the 2004 Regulations is now contained in reg. 5(2)(a) of the 2012 Regulations. Documents of a description within reg. 5(2)(a) are no longer known as AAPs but the three characteristics of such documents remain materially similar. The reasoning in *Wakil* applies to the question of whether a document is of a description within any of the paragraphs in reg. 5 of the 2012 Regulations.
20. It is our opinion that as a matter of fact the NSB is a DPD within the meaning of reg. 5(1)(a) and/or reg. 5(2)(a) of the 2012 Regulations. We consider both possibilities in turn.

*Regulation 5(1)(a) DPD*

21. Any document falls within reg. 5(1)(a) of the 2012 Regulations provided that it contains any of the following statements, whether or not it also contains statements regarding any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land: (a) statements regarding the development and use of land which GBC wish to encourage during any specified period; (b) statements regarding the allocation of sites for a particular type of development or use, and (c) statements regarding development management and site allocation policies which are intended to guide the determination of applications for planning permission. In our opinion the NSB does contain such statements. Section 1.1 of the NSB provides that:

*“The principal purpose of this brief is to provide a **clear steer to prospective developers on the form of development** considered most appropriate for the site. The brief...lays down principles for [the site’s] redevelopment that seek to serve the interest of the wider town. The brief will become a material consideration when determining planning applications.”* (emphasis added)

22. It is material that the NSB seeks to provide a clear steer in relation to the form of development that GBC considers most appropriate. There is a difference between (i) a document that articulates environmental, social, design and economic principles that should inform the design and delivery of a form of development that has a pre-existing policy basis and (ii) a document that seeks to put in place that policy basis. Only type (i) documents may legitimately be promoted as SPDs.
23. Section 4.4 of the NSB contains the principal statements regarding the form of development and use of the NSB land that GBC wish to encourage. There it is said that:

*“The North Street site is key in meeting the identified retail needs for the town. The future redevelopment should provide for this need as part of a mixed use scheme that will form a vital and lively extension to the town centre during the day and into the evening. Other uses that could be accommodated include:*

- *New homes (a sustainable location and a priority for the Council)*
- *A3 uses (cafes and restaurants)*
- *Leisure uses such as a gym*

*The size of the development should be subject to detailed capacity and feasibility studies but it is expected that it will be in the order of 50 to 60,000 sq m (gross)..."*

24. In our opinion it is difficult to see this text as amounting to anything other than a statement regarding the development and use of the NSB land which GBC wish to encourage in advance of the adoption of their Local Plan. Indeed, para. 2.1 of the Report of Head of Planning Services to the GBC Executive (prospectively dated 6 September 2012) states that:

*"The redevelopment of this centrally-located site **for the uses set out within the brief** will contribute to the strategic priorities of a dynamic economy..."* (emphasis added)

25. This supports our view that the statements in the NSB are, in practice, an allocation of the site for a major mixed-use scheme based around a retail facility which is sufficiently large to "meet the identified retail needs of the town" as well as residential, A3, leisure and commercial uses.<sup>2</sup> This aspiration is confirmed by the NSB's Introduction which states that:

*"The site is the only land within the retail core area capable of accommodating the required amount of retail floor space for which demand has been identified. Furthermore, redevelopment offers great potential to enhance Guildford's townscape, stimulate the regeneration of neighbouring streets and safeguard and improve Guildford's position as a popular shopping and visitor destination."*

26. Indeed, para. 3.2 of the Report of Head of Planning Services to the GBC Executive (prospectively dated 6 September 2012) states that the background to the NSB is the requirement in the NPPF to:

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<sup>2</sup> The references to identified retail demand is a reference to the quantitative recommendations set out in GBC's Retail Leisure Study (May 2011) and North Street site development commercial advice (2012).

*“allocate a range of suitable sites to meet the scale and type of retail, leisure, commercial, office, tourism, cultural community and residential development needed in town centres...” (emphasis added)*

27. We are reinforced in our view by para. 3.3 of this Report and section 4.1 of the NSB which confirms that:

*“Redevelopment of the North Street area is intended to make it a fully integrated part of Guildford town centre based on typical town centre uses, especially retail.*

*In its physical layout, it will extend the network of gates and streets that characterise the historic street pattern of Guildford between North Street and High Street and thereby extend the active part of the town centre beyond North Street. The objective for North Street is to make it an attractive and interesting street aligned to the High Street, albeit with a potentially **distinct retail character**...” (emphasis added)*

28. In our judgment it is significant that the GBC Local Plan (2003) does not allocate the site for any particular form of development. The NSB correctly states at p. 11 that para. 9.62 of GBC’s Local Plan (2003) identifies the site as a major approved development site. However no specific policy implications appear to follow from this. The statement in the Local Plan (2003) is a statement of fact that reflects the grant of planning permission in 1997 in respect of the site. The Local Plan (2003) of itself does not provide any policy support for the form of development that the NSB envisages for the site. Indeed, para. 9.62 of the Local Plan (2003) records that a planning application for a 25,000 sq m retail scheme was refused permission in 2001.<sup>3</sup>

29. In the context of the policy silence of the Local Plan as to the form of development that GBC wishes to encourage on the site the NSB seems to us to seek to put in place, rather than supplement in design-policy terms, a site-specific allocation for a retail-led mixed-use scheme along the lines which are further developed in the TCF.

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<sup>3</sup>These inconsistencies raise the likelihood that the NSB conflicts with the development plan. Such a conflict amounts to a breach of reg. 8(3) of the 2012 Regulations. As presently instructed we have been unable to consider the global extent of the incompatibility between the NSB and the 2003 Local Plan but Those Instructing us will no doubt wish to consider this issue in more detail.

30. Some of the text in in sections 3 and 4 of the NSB consists of statements of development management policy which are intended to guide the determination of applications for planning permission both in respect of the site and, consequently, in respect of other retail schemes that may be brought forward on other sites. In particular:

- a. **Marker buildings.** Page 19 envisages the location of a key attractor(s) on North Street at the eastern side of the development site while the first figure 3.10 on p. 27 states GBC's desire to secure the delivery of a landmark building at Dominion House.
- b. **Car parking.** The NSB envisages a "comprehensive redevelopment" of the site involving the removal of all existing on-site car parking and its replacement elsewhere on the site. Page 21 of the NSB requires the submission of a transport statement and travel plan with any planning application. Curiously, it also requires any scheme to have full regard to the TCF, which GBC has not promoted as an SPD or DPD.
- c. **Retention and removal of existing buildings.** The second figure 3.10 on p. 28 and the accompanying text indicates which components of the existing built form in and adjacent to the site should be retained and which should be replaced.
- d. **Creation of new street.** Section 4.5 and envisages the creation of a new east-west main street across the centre of the site which will serve as the "spine of the redevelopment". Figure 4.3 on p. 37 illustrates the location of the proposed new main street.
- e. **Spatial policies relating to streets.** Figure 4.2 and the text on page 38 proscribes a minimum street width of 12 - 15m for the proposed new main street and a maximum width of 8m for any linking lanes.

- f. **Pedestrian priority.** Page 38 states that development proposals must show very clearly (a) how any vehicular movements are constrained to create a pedestrian priority environment and reserve areas for cafes and shops and extend areas for cafes and shops, (b) how the alignment of building frontages creates areas for outdoor space.

*Regulation 5(2)(a) DPD*

31. Provided that it meets the following three criteria the NSB will be a DPD within the meaning of reg. 5(2)(a) of the 2012 Regulations: *Wakil (supra)* First, the document must relate only to part of the area of GBC. Secondly, the document must identify that area as an area of significant change or special conservation. Thirdly, the document must contain GBC's policies in relation to that area. For the following reasons we consider that the NSB meets these criteria.
32. First, the NSB clearly relates only to a part of GBC's administrative area, namely the land enclosed by and adjacent to the red line shown in Table 1.2 of the NSB.
33. Secondly, we consider that the NSB identifies the area as an area of significant change. In *Wakil* Wilkie J considered the meaning of the phrase "identifies that area as an area of significant change or special conservation." In that case the LPA submitted that in order for this requirement to be met the impugned SPD had to say in express terms that the area to which it related was either an area of significant change or special conservation. This submission was rejected. Wilkie J held at [85] and [89] that the requirement was satisfied because the "whole point" of the document was to identify the Shepherd's Bush Market area as an area of significant change. In other words, the judge held that "the whole thrust, tenor and organisation of the document is about the fact that the area is to be transformed and identifies it as an area of significant change." The "SPD" in that case was found in fact to provide guidance on how the area should be regenerated and envisaged a level of regeneration that amounted to an identification of the area as an area of significant change.

34. For the reasons that we have set out above, we are of the view that the same analysis can be applied to the NSB. The NSB envisages the comprehensive redevelopment of the site in the form of the delivery of a retail-led mixed-use scheme which is heavily pedestrianised and has at its spine a new main street. This is a materially different form of development and use to that which is currently in place on the site.
35. Thirdly, the NSB contains GBC's policies in relation to the area. We have already pointed out above that the extant development plan is silent on the form and development which GBC wish to see delivered on the site. Section 1.1 of the NSB remedies that. It says that it provides a "clear steer" to developers. In fact, it provides the only site-specific steer.

*Issue (b): Preparation of the NSB*

36. If, as we have stated, the NSB is in essence a DPD it should have been prepared in accordance with ss 19-20 of the 2004 Act and Parts 4 and 6 of the 2012 Regulations. In particular, it should have been submitted to the Secretary of State for independent examination and must have been subject to sustainability appraisal, whether or not it was also required to have been subject to SEA.
37. The NSB has not been submitted to the Secretary of State for independent examination. Neither has it been subject to sustainability appraisal. It follows in our view that it would be *ultra vires* (as a breach of s. 23(4) of the 2004 Act) and procedurally improper for GBC to adopt the NSB as matters currently stand. In *Wakil* the impugned SPD was quashed on this basis.
38. In view of these defects which we have identified it is unnecessary at this stage to consider whether the NSB suffers from any other defects which may arise under the 2004 Act, the 2012 Regulations or any other statutory provision. In particular we note that GBC takes the view that neither appropriate assessment under the Conservation of Habitats and Species Regulations 2010 nor SEA were required in respect of the NSB. As presently instructed we have not been able to consider the satisfactoriness of these screening decisions.

*Issue (c): Legal basis for adoption of documents other than LDDs*

39. Lord Scarman's leading speech in *Pioneer Aggregates. (U.K.) Ltd v Secretary of State for the Environment* [1985] AC 132 stressed that planning control is a creature of statute, a comprehensive code imposed in the public interest. We doubt whether there is a non-statutory basis for the adoption of documents which are of a description within reg. 5 of the 2012 Regulations other than as DPDs or SPDs as appropriate.
40. The starting point is that under s. 17(3) of the 2004 Act the policies of an LPA relating to the development and use of land in their area must be set out in LDDs. The basis for non-statutory planning documents has never been clear. In our view since s. 180(3)(b) of the Planning Act 2008 amended s. 17(3) of the 2004 Act so as to place SPDs on a statutory footing it is questionable whether a power exists for LPAs to adopt documents for the same planning purpose which purport to be material to the discharge of their planning functions outside of the framework for the preparation and adoption of LDDs.
41. Regulation 5 of the 2012 Regulations prescribes documents for the purposes of s. 17(7)(za) of the 2004 Act. That section allows the Secretary of State to prescribe documents which, if prepared, are to be prepared as LDDs. In our opinion therefore the effect of reg. 5(1) of the 2012 Regulations is that "any document" which contains statements regarding any of the matters in reg. 5(1)(a)(i), (ii) and/or (iv) is to be prepared as an LDD. Similarly, reg. 5(2) makes it clear that "...if prepared...any document..." which meets the requirements set out in reg. 5(2)(a) or (b) must be prepared as an LDD. *Wakil* is authority for the proposition that this is a matter of objective fact.

*Issue (d): Is the TCF a DPD?*

42. The legal propositions which we have set out under issue (a) above are applicable here. It is unnecessary to set out them out again. Once again, the issue is whether the TCF is a document of a description within reg. 5(1) or reg. 5(2) of the 2012 Regulations. In our view it is. We reach this conclusion for the following reasons.

*Regulation 5(1)(a) DPD*

43. In our opinion the TCF contains (a) statements regarding the development and use of land which GBC wish to encourage during any specified period; (b) statements regarding the allocation of sites for a particular type of development or use, and (c) statements regarding development management and site allocation policies which are intended to guide the determination of applications for planning permission.
44. It is unnecessary to set out all of the statements contained within the TCF which fall into the above categories. GVG will be familiar with the substantive content of the TCF. For present purposes in order to make good this point it is sufficient simply to outline the way in which the TCF operates and to set out its key passages. A useful starting point is contained at p. 12 of the NSB where it is said that the TCF:

*“...sets out a strategy that will help to shape the town centre over the next 18 years, till 2030... The Interim Framework will now serve as a tool to deal with the most immediate planning and investment decisions...*

*A key strategic strand of the [TCF] is the redevelopment of sites to enhance the built environment and to provide additional floor space within the town centre.”*

45. This is echoed at p. 4 of the TCF where it is stated that:

*“...the final [TCF] 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...determining planning applications.”* (emphasis added)

46. The text on the same page goes on to say that in some cases the TCF “suggests different uses” for sites which are allocated for other use or development in the Local Plan (2003) and that “The [TCF] makes suggestions for new designations where the latest evidence suggests these would be suitable.” We note also the assertions that the TCF does not supersede any extant allocations as a matter of

law. This may be correct but the relevant point for these purposes is that the TCF contains statements of a description within reg. 5(1)(a) of the 2012 Regulations. As a result, the TCF must have been prepared as a DPD. The statements in the TCF that pay lip service to the primacy of the extant development plan illustrate that GBC has failed to follow the correct procedure in preparing the TCF. The only reason that any strategic inconsistency arises and requires explanation is because the TCF was not prepared in accordance with the statutory framework.

47. Section 3 of the TCF sets out an overarching vision for the spatial development of the town centre: p. 15. Section 4 sets out 11 key strategic objectives which seek to give effect to this overarching vision: p. 19. Each objective is individually numbered and labelled in the form TC*n*. Presumably TC stands for town centre. Throughout the rest of the TCF policies, site allocations and statements regarding the development and use of the town centre that GBC wish to encourage, are cross-referenced to these objectives. Section 5 provides an analysis of the current planning state of play in Guildford town centre.
48. In the course of its discussion of the primary shopping area in the town centre section 5.5 of the TCF makes a number of revisions to the matrix of primary and secondary shopping frontages that are contained within the extant Local Plan (2003). In particular Appendix 2 of the TCF (p. 140-141) sets out a list of thirteen shopping frontages whose designation under the TCF is different to that under the Local Plan (2003). The TCF removes tertiary and specialist shopping designations contained in the extant Local Plan: see p 38. The TCF designates a new primary shopping area where none is contained in the Local Plan (2003): see p. 39.
49. Section 5.4 identifies six 'townscape areas' which essentially function as the TCF's spatial axis. Section 6 of the TCF articulates development control policies, site-allocations and statements regarding the development and use of land by reference to each of these six townscape areas as well as by reference to a seventh 'cross-cutting' spatial tier. These policies, allocations and statements seek to give effect to the vision and objectives articulated in section 3 -4 of the TCF.

50. Section 6, in turn, is based on a “spatial strategy comprised of four key strands.”

The second of these strategic strands consists of the identification of eighteen redevelopment sites (“RSs”). Page 45 of the TCF formulates the following general development management policy which applies to the RSs:

*“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.”*

51. The primary function of section 6, however, is to set out policies, allocations and statements regarding each of the seven spatial tiers. A set of strategic objectives is articulated for each spatial tier. The TCF then explains how those each strategic objective will be delivered. In most instances this is envisaged to take place by way of development of the RSs and/or the provision of new facilities on unallocated sites. RSs which are ‘key opportunity sites’ and ‘opportunity sites’ are effectively allocated for the purpose set out in the section labelled ‘suggested uses’ - of which there may be more than one. Some of the RSs are already allocated for development in the Local Plan (2003). Others are, in effect, freshly allocated by the TCF. In some cases the TCF envisages intervention by way of the delivery of new infrastructure or the amelioration of existing infrastructure: see e.g. pp. 108 - 110.

52. Section 7 of the TCF summarises 38 separate schemes - which fall into 13 different classes - that are either envisaged by the TCF as a whole or are in the process of being brought forward by GBC or third parties. To the extent that the schemes are envisaged by the TCF we consider that they amount to statements of the development and use of land which GBC wish to encourage.

53. It is apparent from the TCF, the NSB and the Report of Head of Planning Services to the GBC Executive (prospectively dated 6 September 2012) that there is an intention to “upgrade” the TCF to an SPD and to merge its contents into the emerging Local Plan. This supports our conclusion that the TCF is as matters currently stand a DPD. This is because it seems to be envisaged that the strategic allocations, development management policies and statements concerning the

development and use of land that are currently contained in the TCF will come to be contained in the Local Plan: see pp. 9, 15, 140 of the TCF. Apart from the fact that what comes to be placed in the new Local Plan will be based on an updated transport assessment it is unclear whether the strategic vision contained in the TCF will change when it is merged with the Local Plan. This is an indication that GBC consider that it would be desirable, in due course, for the material within the TCF to have DPD status.

54. We consider that, at the very least, the fact that GBC intend to convert the TCF into an SPD in due course is an indication that even as matters stand GBC considers the TCF to be, in effect, an SPD. Although GBC claims to have followed substantially the same process in preparing it it is clear that the statutory process, which involves, for example, the preparation of a consultation statement and the avoidance of inconsistency with the Local Plan (2003), has not been followed. On that basis alone - which would be difficult for GBC to contest - the TCF's preparation has been procedurally defective and it would be unlawful for GBC to adopt it.

55. It would be helpful if it could be clarified by reference to any documentary evidence as to why GBC chose to prepare the TCF on a non-statutory basis rather than as an LDD. If it could be shown that it did so in order to side-step the procedural requirements for the preparation of LDDs then that would itself be unlawful: *Laker Airways Limited v Department for Trade* (CA) [1977] QB 643 per Lord Denning MR at p. 706-7. From what is said at p. 4 of the TCF we suspect that the decision was made in response to the Guildford Society's objections to the TCF's predecessor and, in particular, the argument that the evidence base was not sufficiently mature or robust to support the adoption of an AAP. It is difficult to understand why GBC chose to advance down a non-statutory path rather than simply waiting and diverting resources towards completing the evidence base.

*Regulation 5(2)(a) DPD*

56. We are also of the view that the TCF meets the three requirements contained in reg. 5(2)(a) of the 2012 Regulations. In particular, firstly, the TCF clearly relates only to a part of GBC's administrative area, namely the land enclosed by the red line shown in Figure 1 at pp. 8 - 9 of the TCF.
57. Secondly, on the basis of Wilkie J's reasoning in *Wakil* we consider that that the TCF identifies Guildford town centre as an area of significant change. The whole thrust, tenor and organisation of the TCF is about the fact that the town centre is to be transformed. The TCF provides guidance on how the area should be regenerated and envisages a level of regeneration that amounts to the identification of the area as an area of significant change.
58. Our conclusions in this regard are reinforced by the fact that between 2003 - 2006 the document that is now known as the TCF was being progressed as an Area Action Plan ("AAP") that was known as the Town Centre Area Action Plan. Under the 2004 Regulations, which preceded the 2012 Regulations, AAPs were a species of DPD that fell within a description in reg. 6(2).
59. Thirdly, the document contains GBC's policies in relation to the area with which the TCF is concerned, namely Guildford town centre. The GBC Local Plan (2003) also contains policies in relation to this area. However we do not consider that reg. 5(2)(a)(iii) of the 2012 Regulations is to be interpreted as requiring that an LPAs policies for an area are set out exclusively in the AAP. That would mean that the existence of an area-specific policy elsewhere would prevent a document being an AAP. We do not consider that interpretation to be correct.

*Issue (e): Preparation of the TCF*

60. If, as we have advised, the TCF is a DPD it should have been prepared in accordance with ss 19 - 20 of the 2004 Act and Parts 4 and 6 of the 2012 Regulations. In particular, it should have been submitted to the Secretary of State for independent examination and made subject to a sustainability appraisal, whether or not it was also required to have been subject to SEA.

61. The TCF has not been submitted to the Secretary of State for independent examination. Neither has it been subject to sustainability appraisal. It follows that it would be *ultra vires* and procedurally improper for GBC to adopt the TCF as matters currently stand. As we have stated previously, in *Wakil* the impugned SPD was quashed on this basis.

62. Even if the TCF is properly characterised as an SPD it would still not have been prepared in accordance with s. 19 of the 2004 Act and Part 4 - 5 of the 2012 Regulations.

*Issue (f): Can GBC's Executive adopt the NSB and the TCF?*

63. We have set out the relevant statutory framework above. It is clear that if the NSB or the TCF are, as we have advised, DPDs then GBC's Executive lacks the ability to adopt them by virtue of reg. 4(3)(d) of the 2000 Regulations. The position in the 2000 Regulations is reflected in the following provisions of GBC's Constitution:

*"4.2 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);*

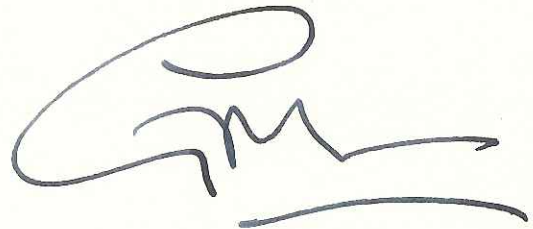
...

*7.1 Role [of the Executive]□. The Executive will carry out all of the Council's functions which are not the responsibility of any other part of the Council, whether by law or under this Constitution, as delegated by the Leader."*

64. It follows that in addition to being a breach of reg. 4(3)(d) of the 2000 Regulations for GBC's Executive to adopt the NSB and the TCF would be unlawful as it would amount to a breach of their constitution.

***Conclusions***

65. For the reasons which we have set out above we consider that it would be unlawful for GBC to adopt the NSB and/or the TCF. We have summarised our reason for this view above and it is not necessary to repeat it here. If GBC was to proceed and adopt these documents in any event, it would face the very real prospect of successful legal challenge.

A handwritten signature in dark ink, appearing to be 'GJ', with a long horizontal flourish extending to the right.

**GREGORY JONES Q.C.**

A handwritten signature in dark ink, appearing to be 'GM', with several horizontal strokes extending to the right.

**GEORGE MACKENZIE**

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**4 September 2012**

**IN THE MATTER OF THE PROPOSED ADOPTION OF CERTAIN  
DOCUMENTS BY GUILDFORD BOROUGH COUNCIL**



**JOINT OPINION**

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