LOCAL PLANS

THE DO'S AND DON'TS

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Background

1. Back in the time before lockdown, the Government published to no little fanfare the Planning for the Future document[1]. In there it said the Government would be setting a deadline for all Councils to have an up to date plan by December 2023. Alongside that is the requirement for all LPAs to review their plan every five years – NPPF§33. Needless to say, therefore, there are lots of local planning authorities that ought to be doing lots of local planning.

2. Then came Covid 19. This doesn't change the requirements for up to date plans. But it will affect how we look at policies. There is likely to be a need for more flexibility

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872091/Planning_for_the_Future.pdf

in plans so that they can respond to changing social, economic and environmental needs and requirements.

3. In that context, recent news has seen a number of prominent failures of local plans:

   3.1. Tandridge – 4,000 unit garden village questioned after failure in bid for funding for essential junction upgrade.

   3.2. North Essex Plan – two of three garden villages found unsound.

   3.3. Uttlesford – inspector concerns about fundamental aspects of Garden Community evidence too vague.

   3.4. Sevenoaks – Failure to comply with duty to cooperate.

   3.5. Chiltern and South Bucks – Concerns on duty to cooperate. Insufficient ongoing engagement with Slough's unmet need.

   3.6. Wealdon – Failure to comply with the Duty to Cooperate.

   3.7. St Albans – another victim of failing to meet the Duty to Cooperate.

4. This paper, accompanying the recent podcast[2], examines some of the do's and don'ts of local planning, focussing on the issues that have beset some of those recent plans.

The urban extension

5. We know that all plans must meet the identified need for housing – NPPF §60.

6. Also, that the NPPF supports the use of urban extensions or garden communities – NPPF §72

[2] https://www.kingschambers.com/latest-news/kings-chambers-podcast/

7. However, it is significantly more complex than just identifying a large parcel of land and including it in the plan. In order to satisfy the Inspector that the SUE/GC is a sound plan for meeting the identified housing need, the LPA, and the development sector need to work together to produce the necessary evidence:

7.1. Land agreements need to be progressed to show that the whole scheme is ready to come forward during the plan. This includes the need for CPOs.

7.2. Design and funding of supporting infrastructure needs to be considered and ideally secured and in place. If there is doubt about the delivery of supporting infrastructure, then there is a doubt that any such large allocation is sustainable.

7.3. Details of the plans for supporting facilities to be agreed with service providers and other public bodies.

7.4. Proper consideration of the environmental impact of the scheme. This includes, of course, the flooding, heritage, biodiversity assessment. It is not a full assessment, but it needs to have been considered and evidenced.

7.5. Support from housebuilders as to deliverability.

7.6. Realistic build out rates in the trajectory. Many adopted plans flounder post adoption and LPAs end up back at planning by appeal because the trajectory for the delivery of large schemes is unrealistic. This means the LPA loses its 5YS and is back within the 'titled balance'.

7.7. Viability needs to have been considered and evidenced.

8. It may sound trite, but some authorities have failed on this, but this detail must be evidenced and properly considered.

9. As we set out below, it is essential that work on larger allocations commences as soon as possible in the plan. It is not a robust approach to leave this work to late in the process.

10. When work on such large schemes is commenced, it needs to be examined, checked and tested along the way so that when it is submitted it is in a strong position for adoption.

11. Finally, plans must be flexible to respond to changing circumstances. We advise that building in a 'plan B' for if the large allocation takes longer than expected to come forward or that doesn't yield homes at the expected rate, the plan makes provision for alternative sites.

12. Flexibility in plans is a strength and to be encouraged.

Duty to Cooperate

13. Inserted into s.33A PCPA by the Localism Act. This applies to all local planning authorities, national park authorities and county councils in England - and to a number of other public bodies[3]. The duty:

    13.1. relates to sustainable development or use of land that would have a significant impact on at least two local planning areas or on a planning matter that falls within the remit of a county council

    13.2. requires that councils set out planning policies to address such issues

    13.3. requires that councils and public bodies 'engage constructively, actively and on an ongoing basis' to develop strategic policies

    13.4. requires councils to consider joint approaches to plan making.

14. The Duty to Cooperate has been well litigated, but continues to cause issues. Some key points from the cases:

[3] See Part 2 Town and Country Planning (Local Planning) (England) Regulations 2012.

14.1. The duty ceases once the plan examination has begun (*Samuel Smith* [2015] EWCA Civ 1107) and is tested at the point of submission.

14.2. The duty continues even where it seems they have come to an impasse. Failure to agree does not mean failure to cooperate – *St Albans v SOSCLG* [2017] EWHC 1751 (Admin)

14.3. Assessment is a matter of planning judgment – *St Albans*.

14.4. And that judgment will not be impugned unless it is irrational or unlawful *Barker Mills v Test Valley BC* [2016] EWHC 3028 (Admin)

14.5. In making that assessment, it is "*not a mechanistic acceptance of all documents submitted by the plan-making authority but a rigorous examination of those documents and the evidence received so as to enable an Inspector to reach a planning judgment on whether there has been an active and ongoing process of co-operation. The key phrase in my judgment is "active and ongoing". By reason of finding there were gaps as the Inspector has set out, he was not satisfied that the process had been either active or ongoing. It follows that ground 1 is unarguable*", per Paterson J in *Central Beds v SoSCLG* [2015] EWHC 2167.

15. Research by planning consultancy Lichfields showed that some 13 local plans have been withdrawn from examination or recommended for non-adoption since 2012 because of a failure to meet the duty to cooperate4. Almost two-thirds of the total 13 were withdrawn of recommended for non-adoption in the first four years after the duty came into force with no plans failing in 2018 and 2019 before the three failures this year (St Albans, Sevenoaks DC and Wealden DC).

[4] 'Why some Councils are still struggling to meet the Duty to Cooperate' Ben Kochan, 30 April 2020, *Planning Resource*

URL: https://www.planningresource.co.uk/article/1681910/why-councils-struggling-meet-duty-cooperate

16. Disappointingly, LPAs failure the DtC for similar reasons. Failure to engage adequately on addressing their unmet housing needs in neighbouring LPAs, or on meeting the housing needs of their neighbours is a recurring theme. Engagement may come far too late in the process, only after the strategy has been fixed or the plan has been published for consultation.

17. Wealden DC, Sevenoaks and St Albans are all in high-growth areas of the wider South East and all have high amounts of GB or other protected land. The lack of engagement with neighbours on accommodating unmet housing need was a key issue mentioned by inspectors in all three cases.

18. Another common problem is no or no effective SOCG at the right time (e.g.- St Albans). To meet the DTC in a way which is truly valuable (i.e. provides genuine cross-border engagement on key issues) requires lots of time, resources and mutual political will. It requires early engagement and for the LPA to take a critical view of its own work. Key actions to meet the DtC:

    18.1. Engage early on the main issues: often unmet housing need.

    18.2. Discuss challenges in meeting housing target at an early stage.

    18.3. Do not leave it too late, an SOCG should be ready pre-submission.

    18.4. Do not produce a statement of common ground which neglects the main issues on which there ought to have been engagement: housing.

    18.5. Take a comprehensive view of the strategic issues in their borough which can then be discussed with neighbouring authorities.

    18.6. Have a structure/ agenda/ purpose to the meetings. A mere ‘list of meetings’ will not suffice.

    18.7. A question of substance and not form: is there an audit trail showing attempts to engage.

18.8. Effective engagement with public agencies, as well as neighbouring councils, throughout the plan preparation process.

Strategic Environmental Assessment

19. EU Directive 2001/42/EC ('The SEA Directive ") is concerned with assessment of the effects of certain plans and programmes on the environment. Such plans include local plans. The objective is to ensure that such effects are taken into account "during their preparation and before their adoption"[5]. The Directive is "of a procedural nature"[6] and applies to "plans and programmes ..which set a framework for future development consents" of projects listed in Annexes 1 and II of Directive 85/337/EEC[7]. Article 5 to this Directive contains the source of the key provisions.

20. In England and Wales the Directive is given effect to by the Environment Assessment of Plans and Programmes Regulations 2004 ('The SEA Regs').

21. As with the Duty to Cooperate, the SEAs is another area that is fertile for litigation and from those judgments plan making authorities can take a lot of guidance:

21.1. The SEA regs apply to a plan or programme which is the framework for consent to be given, and not to projects – see *Walton v Scottish Ministers* [2012] UKSC 44

21.2. They were found not to apply to the NPPF - *R (on the application of Friends of the Earth Ltd) v SoSCLG* [2019] EWHC 518 (Admin)

21.3. The Regs only apply from the point when a plan or programme can be properly regarded as such. See *R (on the application of Berks, Bucks and Oxon Wildlife Trust v SST & Highways England* [2019] EWHC 1786

[5] Text (4)

[6] Text (9)

[7] Text (10).

(Admin) a case concerned with the route of the proposed Oxford to Cambridge Expressway road scheme. However, the decision challenged merely took forward to the next stage of development two mutually exclusive preferred corridors, but did not prevent consideration of routes outside the preferred corridors at a later stage. Lang J held that the decision was "*a step taken in the course of the preparation of a project, and not a plan*" and did not set the framework for the future development consent of a project.

21.4. Get your consultation right on the SEA. Legal errors do arise as they did in the case of *Kendall v Rochford DC, SoSCLG* [2014] EWHC 3866 (Admin) in which Lindblom J held that consultation on the SEA with the public which only made use of the website of the authority complied neither with Article 6 of the SEA Directive nor regulation 13 of the SEA Regs. In the circumstances of the case in order to inform public consultees of the assessment of alternative allocations in the SA report – consultation had to be both early and effective. As Lindblom J put it:-

> *An individual member of the public would only have been aware of the council's consultation on the draft plan together with the sustainability appraisal, and able to act on it, if he had discovered it for himself on the website or found out about it in some other way, and there was still time for him to submit his comments before the deadline*
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> *94. I cannot accept that the council could properly consult the general public under the SEA regulations in that way. Its failure effectively to notify the public that it was using its website to consult them on the draft allocations plan and the sustainability appraisal and its failure to use an extra means of consultation, which would have extended the consultation to people who, for whatever reason, were unable to use the internet, amounted, in this case, to a breach of article 6 and regulation 13.*

22. The SEA Directive and Regulations present one particular hurdle which Plan Making Authorities have found requires great care and attention in getting right. This is the lawful

consideration of reasonable alternatives to the plan or programme. The key elements of this are to be found in the SEA Regs at paragraphs (2) and (3) of Regulation 12.[8]

23. Key points on the consideration of reasonable alternatives:

23.1. Engage with the consideration of alternatives as early as possible. Ambitious and in many respect laudable joint plan making at a higher or wider strategic level has been seen to flounder where this hasn't happened. For example if the strategic allocations within such a joint plan have not been arrived at in a manner[9] legibly informed by a methodical and reasonable set of criteria and choices made against identified reasonable alternatives such a plan will not pass the first base. Such was the fate of the West of England Joint Spatial Strategy which was withdrawn from Examination last month[10] following the intervention of the examining inspectors.[11]

23.2. When a plan changes direction and may for example increase housing numbers it is important for this to be matched with relevant sustainability appraisal work in order for continued compliance with the SEA Directive and Regulations to be shown – see *Save Historic Newmarket Ltd v Forest Heath District Council, SSCLG* [2011] 606 Admin.

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[8] "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of–

(a) implementing the plan or programme; and

(b) reasonable alternatives taking into account the objectives and the geographical scope

of the plan or programme.

(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–

(a) current knowledge and methods of assessment;

(b) the contents and level of detail in the plan or programme;

(c) the stage of the plan or programme in the decision-making process; and

(d) the extent to which certain matters are more appropriately assessed at different levels

in that process in order to avoid duplication of the assessment."

[9] Which is doubly challenging with cross-boundary issues to be resolved

[10] See letter from the SRO to the JSP to the Examining Inspectors dated 7th April 2020

[11] See letter from Examining Inspectors dated 11th September 2019 at §6-10

23.3. Compliance with the requirements of an SEA to support a plan is a process and an earlier failing in respect of sustainability appraisal need not be fatal to the successful progress of a local plan to adoption. This has been made clear by the case of *Cogent Land LLP v Rochford DC* [2012] EWHC 2542 (Admin). Singh J accepted that a later Addendum was capable in law of remedying earlier defects in the SA process.

24. "Reasonable alternatives" has a broad definition as set out by Hickinbottom J in *R (Friends of the Earth) v The Welsh Ministers* [2015] EWHC 776 (Admin*):*

> *The term "reasonable alternatives" in the 2001 Directive signified options which were considered by the decision-maker to be viable in the sense of being capable of meeting the objectives to which the decision-maker was working to such an extent that that option was viable. Article 5(1) of the 2001 Directive required the relevant environmental report to identify, describe and evaluate all, and not merely a selection, of the alternatives capable of meeting the plan's objectives. An option other than the preferred option that was capable of meeting the objectives of the plan, as determined by the relevant decision-maker, was the truest and most helpful formulation. However, an option which the decision-maker considered "viable", having regard to the full planning context, was also a helpful and appropriate way to characterise "reasonable alternatives". In the current case, it was primarily for WM to identify objectives, give each appropriate weight, and determine whether they were met by a particular option. If a particular plan was incapable of meeting the identified objectives such that in practice it would never be pursued, there was no point in subjecting it to a full environmental impact assessment. On the facts of the case, it was clear from both the plan and the WelTAG appraisals that the options discarded before the SEA assessment had been rejected because they would not significantly improve the position.*

25. This leaves a fair amount of discretion to the Plan Making Authority. However, there are some clear messages from the case law and examples of cases that have run into trouble at examination:-

25.1. It is important to identify the reasonable alternatives and particularly important not to ignore candidates that clearly do arise or are being promoted;

25.2. To be evaluated against reasonable alternatives posits that the evaluation is being conducted on a fair and equal basis. It is particularly important to have a consistent approach to matters such as mitigation of highways or other impact. If mitigation is included for the option supported by the plan it is unacceptable to leave it out of account for other reasonable alternatives. [12]

25.3. For those concerned to object to a Plan based on failure to consider reasonable alternatives there is at least some practical expectation that the objection will be pursued at a sufficiently early stage for the Plan Making Authority to take it into account. Failure to do so will make legal challenge an uphill task as it was in the case of *Holiday Extras Limited v Crawley Borough Council* [2016] EWHC 3247 (Admin). [13]

25.4. Whilst the process is an iterative one changes in the plan need to be matched by supporting SEA work.

25.5. Reasons for the plan and rejecting reasonable alternatives to the plan should be clearly set out in the SA report.

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[12] There have been a number of examples of Plans failing in this way. A recent example can be seen in the interim report of the examining inspector into the Eastleigh Local Plan – see §21 of the correspondence from the Inspector to the PMA dated 1st April 2020.

[13] See Collins J at §21.