RE SUSTAINABILITY APPRAISAL OF THE

HUNTINGDONSHIRE LOCAL PLAN TO 2036

ADVICE

INTRODUCTION

1. This Advice is provided to Huntingdonshire District Council ("the Council"). It concerns the question of whether the Council complied with sections 19(5)(a) and 39(2) of the Planning & Compulsory Purchase Act 2004 in undertaking a Sustainability Appraisal ("SA") to support the preparation of the Huntingdonshire Local Plan to 2036 ("the HLP") which is currently undergoing independent examination. It also addresses related matters of law. It is not concerned with planning merits.

2. It has been asserted, in an Opinion dated 9 September 2018 by Thea Osmund-Smith, counsel acting for Larkfleet Homes ("Larkfleet"), that the SA fails to comply with s.19(5)(a) and s.39(2) PCPA 2004. The Opinion also contends in para 33 that the SA fails to comply with national planning practice guidance ("PPG") in relation to SA and Strategic Environmental Assessment ("SEA").

3. Although not mentioned in the Opinion, it is apparent that the matters which are said to be of concern in the Opinion would also engage the requirements of Regulations 5 and 12 of the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633), which implement the Strategic Environmental Assessment Directive, Directive 2001/42/EC ("the SEA Directive").

ASSESSMENT

4. The complaint in relation to s.19(5)(a) PCPA 2004 can be dealt with shortly. S.19(5) PCPA 2004 provides that:

"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."

5. S.19 PCPA 2004 does not prescribe the form or content of a SA, save that it should appraise (or assess) the *"sustainability of the proposals in"* the relevant development plan. Nor have any regulations been made under s.19(6) PCPA 2004 to prescribe the form or content of a SA. There can be no sensible disagreement that the Council has carried out a SA of all of the proposals in the HLP. The Final Sustainability Appraisal Report (CORE/07) is undoubtedly a report of the SA of each of the proposals in the HLP and sets out each of its findings ("the SA Report").

6. S.39 PCPA 2004 provides (so far as relevant):

"(1) This section applies to any person who or body which exercises any function–

(b) under Part 2 of this Act in relation to local development documents.

(2) The person or body must exercise the function with the objective of contributing to the achievement of sustainable development.
(2A) …
(3) For the purposes of subsection (2) the person or body must have regard to national policies and advice contained in guidance issued by–

(a) the Secretary of State for the purposes of subsection (1)(b)."

7. S.39 PCPA 2004 does not define sustainable development. Nor is there a formal definition provided by the Secretary of State in the National Planning Policy Framework ("NPPF"), which comprises guidance issued under s.19(2)(a) PCPA 2004 for the purpose (amongst other things) of informing the preparation of local development documents (including the HLP). The relevant version of the NPPF for the purposes of the HLP examination is the March 2012 version. As is well known, the policies paras 18 to 219 of the NPPF taken as a whole *"constitute the Government's view of what sustainable development in England means in practice for the planning system."*

8. Para 150 of the NPPF advises that *"Local Plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities."* Para 154 of the NPPF advises that *"Local Plans should be aspirational but realistic."* Para 182 of the NPPF provides advice on what will constitute a *"sound"* local plan, and this includes that it should be *"the most appropriate strategy, when compared against the reasonable alternatives, based on proportionate evidence"*, that it should be *"deliverable over its*

period", and that it should *"enable the delivery of sustainable development in accordance with the policies in the Framework."*

9. Clearly, what is *"the most appropriate strategy"* and what are *"the reasonable alternatives"* against which a chosen strategy is to be compared are matters of planning judgment and not matters of law. The same is true for the question of whether a plan (or any alternative to the plan) is *"realistic"* or *"deliverable".* Unless a decision maker makes a planning judgment on such matters that no reasonable decision maker could make, the nature of such a judgment is a matter for the decision maker and cannot be said to involve an error of law.

10. If a decision maker includes in a plan proposals which it considers to be *"the most appropriate strategy"*, having compared those proposals against what it considers to be *"the reasonable alternatives"* in terms of *"realistic"* and *"deliverable"* alternative options, it will have had regard to Government guidance in the NPPF on sustainable development and it will have exercised its plan-making function with the objective of contributing to the achievement of sustainable development.

11. It is not therefore tenable to assert that the Council's preparation of the HLP or of the SA involves any failure to comply with either s.19(5)(a) PCPA 2004 or s.39(2) PCPA 2004. Larkfleet may disagree with the planning judgments made by the Council when preparing the HLP or in compiling the SA but that does not mean those judgments are legally flawed.

12. The complaint that the SA fails to comply with the PPG wrongly treats the PPG as a regulatory requirement. It is not. It is guidance. Even if there was a departure from the guidance in the PPG, this would not be an error of law.

13. The relevant part of the PPG gives guidance in relation to the carrying out of SA and SEA. As noted above, the regulatory requirements in relation to SA are limited (and clearly not transgressed in this case). The regulatory requirements in relation to SEA are a little more detailed in terms of the matters to be addressed and the process to be followed.

14. Regulation 5 of the EAPPR 2004 provides (so far as relevant):

"(1) … where–
(a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and
(b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3),
the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations,

during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which–

(a) is prepared for … town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC."

15. Since the EAPPR 2004 are not made under the PCPA 2004, it should be noted that the terms it uses do not necessarily have the same meanings as those terms would under the PCPA 2004 (or its subordinate regulations). When Regulation 5(1) EAPPR 2004 refers to SEA being carried out *"during the preparation of [the] plan… and before adoption…"*, this does not mean that all elements of the SEA must necessarily be completed prior to the submission of a plan for independent examination (which is when *"preparation"* ends under the PCPA 2004). SEA can continue after a plan has been submitted, provided that all required steps are carried out before formal adoption of the plan. This is clear from the decision of Singh J in Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin), where the Judge said (at para 113):

"Furthermore, although arts 4 and 8 of the [SEA] Directive require an 'environmental assessment' to be carried out and taken into account 'during the preparation of the plan', neither article stipulates when in the process this must occur other than to say that it must be 'before [the plan's] adoption'. Similarly, while art 6(2) requires the public to be given an 'early and effective opportunity … to express their opinion on the draft plan or programme and the accompanying environmental report', art 6(2) does not prescribe what is meant by 'early', other than to stipulate that it must be before adoption of the plan. The [EAPP] Regulations are to similar effect: reg 8 provides that a plan shall not be adopted before account has been taken of the environmental report for the plan and the consultation responses."

16. This passage was endorsed by the Court of Appeal in No Adastral New Town v Suffolk Coastal District Council [2015] EWCA Civ 88 (at para 53).

17. Part 3 of the EAPPR 2004 includes Regulation 12, and this provides (so far as relevant):

"(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

(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."

18. Whilst Regulation 12(2)(b) EAPPR 2004 requires an environmental report for SEA purposes to identify, describe, and evaluate *"reasonable alternatives"* to the plan or programme in question, it does not define what will constitute a *"reasonable"* alternative, save that it should be something which takes account of the objectives and scope of the plan or programme.

19. In R (RLT Built Environment Ltd) v Cornwall Council [2016] EWHC 2817 (Admin) Hickinbottom J reviewed the relevant authorities (and guidance issued by the European Commission and the former ODPM) and set out key principles as to what was required for something to be a *"reasonable alternative"* for SEA purposes, including (at para 40):

"(iii) In addition to the preferred plan, "reasonable alternatives" have to be identified, described and evaluated in the SEA Report; because, without this, there cannot be a proper environmental evaluation of the preferred plan.

(iv) "Reasonable alternatives" does not include all possible alternatives: the use of the word "reasonable" clearly and necessarily imports an evaluative judgment as to which alternatives should be included. That evaluation is a matter primarily for the decision-making authority, subject to challenge only on conventional public law grounds.

(v) Article 5(1) refers to "reasonable alternatives taking into account the objectives… of the plan or programme …" (emphasis added). "Reasonableness" in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an "alternative" to the preferred plan, is not a "reasonable alternative". An option which will, or sensibly may, achieve the objectives is a "reasonable alternative". The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no "reasonable alternatives" to it.

(vi) The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process."

20. Having regard to paras 154 and 182 of the NPPF (which is guidance a plan-maker must take into account in accordance with s.19(2)(a) PCPA 2004), one of the *"objectives"* of the HLP (as with any other local plan) is that its proposals are *"realistic"* and *"deliverable".* An alternative proposal which is not realistic or deliverable, or where there is uncertainty as to whether it is realistic or deliverable, is an alternative that the decision maker could properly and rationally conclude, as a matter of planning judgment, is not a *"reasonable alternative"* because of doubts as to whether it could achieve the objectives of the plan. This is an *"evaluative judgment"* for the decision maker. In such a case, the decision maker would be under no obligation to subject that alternative to comparative assessment in a SEA environmental report. The decision maker would be entitled to treat that alternative as not being a *'reasonable alternative'* and it would not need to feature in the SEA process or in the resulting environmental report.

21. In the present case, Larkfleet seeks to promote the allocation of land at Sibson Aerodrome for large-scale residential development as a new settlement in the HLP. This Advice is not concerned with the planning merits of that proposal.

22. It is not contended in the Opinion that the Sibson proposal was a *"reasonable alternative"* at the outset of the preparation of the HLP. Rather, it is contended (in para 15 of the Opinion) that when it became apparent to the Council in 2017 that its distribution strategy would need to be revised, due to it becoming apparent that a Strategic Expansion Location ("SEL") at Wyton Airfield would not be deliverable, this fact *"should have prompted the Council to consider whether [their] original preferred strategy – growth in larger settlements including three SELs – should be retained by the identification of a further SEL to replace Wyton"* and that *"given that the proposed strategy including Wyton was no longer deliverable, it was absolutely incumbent on the Council to properly revisit the issue of distribution of growth and consider reasonable alternatives for delivering the growth required as against the proposed approach. There is no evidence that the Council at that stage or at any stage thereafter considered any reasonable alternatives before settling on the final distribution of growth that is now set out in the Plan."*

23. It is also contended (at para 25 of the Opinion) that *"It is therefore wrong to consider that Sibson did not provide a reasonable alternative to the final distribution strategy."*

24. Thus, putting these points together, the contention is that when it became apparent to the Council that Wyton was not a deliverable part of its distribution strategy, it was (i) obliged to reconsider that strategy, (ii) obliged to consider whether a replacement SEL should be identified, and (iii) obliged in so doing

to regard the Sibson proposal as a reasonable alternative and to assess it as such.

25. This Advice considers whether any parts of that contention are sound as a matter of law.

26. The first element of the contention is not in dispute. When it became clear to the Council that the strategy could not realistically include a SEL at Wyton, due to the inability of that site to provide the required transport mitigation (as found by the Strategic Transport Study), the strategy needed to be reconsidered. However, the evidence is that this was done. The evidence of reconsideration is provided in the SA Report itself.

27. Chapter 7 of the SA Report sets out *"details of the tasks that have been completed in order to progress the Draft Final Sustainability Appraisal Report to the Final Sustainability Appraisal Report"* (para 7.1, p.758). Those tasks included responding to issues raised during public consultation in summer 2017. One of those issues was *"that an iterative process had not been taken, that all reasonable options had not been appraised and that the selection of Strategic Expansion Locations (SELs) did not look at reasonable alternatives"* (box on p.759). The SA Report response was *"An iterative approach has been taken…This was returned to in Stage D, task D2, in the Draft Final SA which looked at what had changed and as such concentrated on the amount of growth as that was where the change was considered to have been, rather than in distribution, which was considered consistent with the preferred option from Stage B. The D2 content also looked at the Strategic Transport Study that considered 5 options in terms of their transport infrastructure impacts and the relationship with sustainability appraisal. The selection and appraisal of options for the SELs looked at all the reasonably available options that the Council was aware of at the time. Further changes will be incorporated into this Final SA to [address] changes made, including changes to the distribution of growth and potential new SELs"* (box on p.759).

28. Chapter 7 of the SA Report also drew attention to the assessment undertaken in the Housing & Economic Land Availability Assessment *"to assess a total of 129 sites to determine whether they were suitable, available and achievable, and if so whether they should be added to the local plan as allocations for development. These sites can be categorised as: Potential new settlement proposals – being broadly freestanding sites away from existing towns and villages, potentially capable of accommodating over 1,000 homes…"* (para 7.39, p.770). Para 7.44 of the SA Report summarised the *"current approach"* and stated that *"The approach has been refined through development of the local plan, most recently and significantly with the removal of Wyton Airfield as a Strategic Expansion Location. This came about due to the Strategic*

Transport Study which demonstrated that the road infrastructure requirements to serve redevelopment of Wyton Airfield, and the current funding requirements for these in particular, are not deliverable at this time…" (box on p.771).

29. There can, therefore, be no doubt that there was a reconsideration of the strategy (described as a *"refinement"* of the approach) in the wake of the non-deliverability of the Wyton Airfield site.

30. The contention that the Council was obliged to consider a replacement SEL is not sound as a proposition of law. It was a matter of planning judgment for the Council as to how to respond to the loss of the Wyton Airfield site. However, in the event, the Council did consider potential SELs as part of the assessment set out in the HELAA. This is clearly recorded in the SA Report (as indicated above). The Council did not select any of those potential SELs as sites to take forward as allocations in the HLP. That was a matter for the Council's planning judgment.

31. The contention that the Council was obliged to treat the potential SEL at Sibson as a *"reasonable alternative"* is not sound as a proposition of law. Whilst it was an alternative which had been identified to the Council, and it was considered as such in the HELAA, the Council was perfectly entitled as a matter of planning judgment to conclude that there was insufficient evidence to show that it was deliverable and so that it should not be regarded as a *"reasonable alternative".* The HELAA showed that *"A new junction onto the A1 would be needed"* and that *"A significant negative is transport infrastructure"* (p.12). Whilst the HELAA itself did not reject the site, its conclusions were considered further by the Council in the SA and the SA Report *"set out the sustainability appraisals for the sites that have been assessed as being potentially suitable for development and have been selected to go into the Local Plan as development allocations"* (para 7.65, p.881). The Sibson SEL was not one of the selected sites. Necessarily, therefore, it had been rejected in the assessment process.

32. It is correct that the SA Report does not provide any reasoning to explain that decision. However, once the Council had decided, as a matter of planning judgment, that the Sibson site was not a *"reasonable alternative"* there was no legal obligation for it to say anything about the Sibson site in the SA Report or to set out any reasons why it was not selected. As was clearly stated by Hickinbottom J in RLT Builders (at para 40) *"If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process".*

33. It appears from the Opinion that Larkfleet disputes, as a matter of fact, that the Council did make the planning judgment that the Sibson site was not a *"reasonable alternative".* However, evidence that such a decision was made is set out in the Sustainability Appraisal Explanatory Note (EXAM/03). This sets out (in paras 3.15 to 3.26) the steps undertaken for *"Preparation of the Final Distribution of Growth Option"*, including (at para 3.20) that *"Consideration was given to the five new settlement proposals put forward".* Other passages in the Sustainability Appraisal Explanatory Note similarly record that such a decision was made: *"A revised growth strategy was prepared"* (para 3.19), *"there was insufficient evidence on the viability and achievability of the infrastructure required… so it was not considered to be a reasonable alternative"* (para 3.20). Larkfleet may disagree with the judgments that the Council reached but there is no basis, in fact or in law, for disputing that those judgments were made.

34. The fact that the Sustainability Appraisal Explanatory Note was produced subsequent to the events that it describes does not make it ex post facto reasoning or mean that its explanation of the work that was carried out or the decisions that were made are untrue. There is no basis for treating it as anything other than what it states it is, namely an *"explanatory note to provide clarification on the decision-making processes which informed the selection of the growth target and the distribution of growth within the Proposed Submission Local Plan to2036"* (para 1.1). There is no reason to treat that statement as false representation of the factual position.

35. To be fair, the Opinion does not in fact assert that the Council has produced a false document. Rather, it simply makes the forensic point that *"There are no memos, notes or resolutions by the Council that have been provided to support the process that is alleged to be undertaken"* (para 19). Unless that point is accompanied by an allegation that the Council has deliberately produced a false document to the examination, it is a point that goes nowhere.

36. In any event, even if it were the case that the Council did not apply its mind to whether the Sibson site was a *"reasonable alternative"* prior to finalisation of the SA Report, and had only reached the conclusion that it was not a *"reasonable alternative"* when it produced the Sustainability Appraisal Explanatory Note, that would not lead to any breach of the requirements of the EAPPR 2004 in relation to SEA. As noted above, there is no bar on steps in the SEA process being undertaken at any stage prior to the adoption of the plan or programme in question. SEA is a process and not a document, and can continue to be carried out after a plan has been submitted for examination, provided only that the exercise is completed before adoption of the plan.

37. There is, therefore, no sound basis to regard the preparation of the HLP or the SA/SEA of the HLP as being in breach of the regulatory requirements set out in the PCPA 2004 or in the EAPPR 2004. Any contentions to the contrary in the Opinion dated 9 September 2018 should be rejected.

17 September 2018

MICHAEL BEDFORD QC

Cornerstone Barristers

2-3 Gray's Inn Square

London WC1R 5JH

RE SUSTAINABILITY APPRAISAL OF THE HUNTINGDONSHIRE LOCAL PLAN TO 2036

ADVICE

Andy Moffatt

Head of Development

Huntingdonshire District Council

Pathfinder House

St Mary's Street

Huntingdon

PE29 3TN