

Removing the West of Stevenage Development from the North Herts. Local plan

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SUMMARY

I have been asked to provide a briefing about the technical aspects of including - or not - the West of Stevenage Development in the North Hertfordshire Local Plan.

So far the emphasis has focussed on the green belt issue. Legal advice given to the planning authority indicates that it would not be possible for the councillors to refuse to roll back the green belt. *I concur with this view.* In fact, any discussion in relation to the green belt is wrong legally and technically. ***There has been too much emphasis on green belt and not the issue that is the source of the problem - Hertfordshire County Council's housing projections and their proposals for implementing development.***

My analysis of the situation regarding the councillor's discretion in relation to West of Stevenage is as follows:

- 1. It is not technically or legally correct to refuse to 'roll-back' the green belt in order to restrict development west of Stevenage.** This is because through the structure plan the redrafting of green belt policies is a secondary issue.
- 2. Housing need in the structure plan is disaggregated between the commitment for each local authority - Policy 9 - and the 'strategic allocations at Stevenage and Hemel Hempstead - Policy 8.** This means that if the councillors refuse to implement Policy 8, this does not affect the general policies on housing in the rest of the district.
- 3. If the councillors refuse to implement Policy 8 for sound planning reasons, the County Council can only issue a notice of non-conformity for Policy 8, and those parts of Policy 9 relating to strategic allocations, not housing in general.** This is important because it has the effect on enabling challenges to North

Herts.' housing policies only in respect of West of Stevenage.

- 4. A legal challenge against the decision of the councillors would be unlikely to succeed prior to adoption because it is the planning authority's discretion.**
- 5. There are no costs/damages that can be levied by developers against the planning authority as part of the local plan procedure** (all objectors pay their own costs). If the decision is taken sincerely, in full possession of the facts, then **councillors are not liable for surcharge.**
- 6. A challenge from developers at adoption cannot be ruled out.** The main issue will be the reasonableness of the decision not to implement Policy 8 in order to avoid a charge on 'unreasonableness'.
- 7. The councillors must base their decision not to implement Policy 8 of the structure plan on planning grounds. In my view there is a reasonable defence:**
 - In relation to the recent statements by DETR that housing projection methodologies have significantly over-estimated housing needs;
 - In relation to the quality of the site itself, particularly in terms of landscape value, nature conservation, and hydrology/hydrogeology.
 - In relation to the uncertain nature of housing policy in general, in particular the debate over housing commitments in the South East after 2011 which this site is intended to contribute towards;
 - The clear and unequivocal public concern about the allocation of this site and the effect this would have on the countryside and settlements in the area.

In my view there is sufficient doubt about the reasonableness and effects of Policy 8 for councillors to refuse to implement it.

A DETAILED EXAMINATION OF THE NEED TO IMPLEMENT STRUCTURE PLAN POLICY 8

To date much of the concern relating to the West of Stevenage development has been in relation to green belt. In my view although relevant, it is not of prime concern. The green belt designation is a spatial issue - it does not reflect the quality of the land. The strength of the ecological and landscape value of the area West of Stevenage stands on it's own irrespective of it's definition as green belt.

The question has been posed as to whether or not we should accept 'some' development of housing to the West of Stevenage. This in my view actually phrases the question in the wrong way. Logically, if you are prepared to accept the principle of housing West of Stevenage you must also have an idea as to the limit that you can put on such development. There is then the issue as to how much we would accept, and how much the developers will get in the fullness of time. The question as to whether we accept housing is not therefore a matter of 'how many', but rather 'how many can the development industry justify once the principle of development is established'.

The requirement to implement the structure plan

The local planning authorities have an obligation to implement the terms of the Hertfordshire Structure Plan under Section 36 of the Town and Country Planning Act (TCPA). Paragraph 4 and 9 are directly relevant here:

(4) A local plan shall be in general conformity with the structure plan.

(9) In formulating their detailed policies, the authority shall have regard to -

(a) such information and other considerations as the Secretary of State may prescribe or, in a particular case, direct; and

The term 'prescribe' is defined in section 336 of the Act and means "*prescribed by regulations under this Act*". These regulations are the Town and Country Planning (Development Plan) Regulations (DPR) 1991 (SI. 1991 No. 2794). This section of the TCPA (*which was actually introduced in February 1992 by the amendments to the Act by Schedule 4 of the Planning and Compensation Act 1991*) significantly changed the institutional relationship between two tier planning authorities in non-metropolitan areas.

Under the substituted section, the district are required to give advance notice to the county of at least 28 days (DPR regulation 29) before placing their proposals on deposit for public inspection and objection. But the county no longer have power to block the further progress of the proposals.

Therefore North Hertfordshire are free in principle to depart from the structure plan, but that departure will be weighed in evidence by the Inspector at the local plan inquiry - and commented upon in his report. Following the receipt of the inspectors report the local planning authority would be free to go ahead and adopt the plan, but would certainly face a legal challenge on the grounds of reason (see the 'legal challenge' section below).

The effect of non-conformity

The 'development plan' is intended to form the basis of planning decisions by local authorities. The 'development plan' is defined in section 54 of the TCPA.

The shift under the Town and Country Planning Act 1968 to a two-tier system of planning, the 'development plan' for any given area is always a composite of at least two documents. Not only will there be two or more plans as such, but also their notices of approval or resolutions of adoption are taken to form part of the development plan. However, the explanatory memorandum of the structure plan is not relevant since this was discounted by the case *Holden v. Secretary of State for the Environment* [1994].

Through this complex interaction of documents the *development plan* can be summarised as:

1. The structure plan, together with the Secretary of State's notice of approval, plus any approved alterations, form part of the development plan.
2. Where a local plan is in force for the area, that plan, together with the authority's resolution of adoption (or, if called-in, the Secretary of State's notice of approval) and any adopted or approved alterations, also form part of the plan.
3. In the event of conflict between the local plan and the structure plan, the local plan prevails for all purposes unless it was stated by the county planning authority as not being in general conformity with the structure plan following the adoption of an alteration or replacement plan, and has neither been altered nor replaced since.

Therefore, where the local plan is in conformity with the structure plan, it takes precedence. However, only in those parts of the local plan which are not in conformity (and only those parts defined in the notice of non-conformity) with the structure plan does the structure plan take precedence. However, the 'precedence' of the plans must always be weighed in the general considerations of section 54A of the TCPA:

Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.

...and of course it will be North Herts. who make such determinations in relation to any housing development

proposals in their area.

The main danger is that by not allocating the structure plan's housing requirement the development industry will seek to implement the structure plan requirement any way they can. The general fear of planners is that not providing the structure plan requirement will lead to a 'free for all' of housing development. In my view I think there is no danger of that in this case because the structure plan has been precisely worded. It dis-aggregates the requirements for West of the A1(M) from the general requirement for the district. By specifically not implementing the strategic allocations policy, but implementing the general allocation less the strategic allocation, the terms of the structure plan are met in general terms. If there were to be a 'free for all' it could only happen to the West of the A1(M) within the limits originally defined by the structure plan.

The important issue is therefore how the non-conformity between the local plans and the structure plan would affect the West of Stevenage development. This can be simply summarised as follows:

- Policy 8 of the structure plan creates 'strategic allocations' West of the A1(M) and at Hemel Hempstead. West of the A1(M) the policy requires 5,000 dwellings up to and after 2011, and a 'longer term' phase of 5,000. **Specifically not implementing this policy would result in non-conformity because of failure to implement the strategic allocations.**
- Policy 9 of the structure plan allocates dwellings for each district. **If North Herts. were to make allocations that did not include the specific 'strategic allocations' in Policy 9, the only area of non-conformity would be those specific allocations West of A1(M).**
- By taking care to dis-aggregate the West of the A1(M) development from the other allocated development under Policy 9, the County Council can only proceed with non-conformity on Policy 8, and those parts of Policy 9 that relate to the strategic allocations in Policy 8. **Assuming conformity is granted for the rest of the local plan, developers will not be able to dump development anywhere in the districts using the structure plan as a justification - only in the area identified in the structure plan West of the A1(M). However in deciding these planning application a much wider set of issues would come into play. Section 54A of the TCPA makes it possible to question the basis of the allocation of the site in the structure plan in more detail.**

Ultimately then we can ring-fence the West of Stevenage development within the non-conformity issue to prevent developers trying to implement more development generally. Then, using additional information not available to the structure plan EiP - such as new housing projections, and information about the value of the site - we can defend/defeat the specific West of Stevenage allocation. Both through the local plan inquiry and subsequent planning

applications/inquiries.

Legal challenge

The development industry are not going to sit by and let us effectively remove their cash-cow from the plan. They are likely to take judicial review action - either over the adoption of the local plans, or after the refusal or limiting of any planning permissions, or both. We have to have this in mind when preparing our strategy.

If we accept any development West of the A1(M) we accept, by inference, Policy 8 of the structure plan. By accepting Policy 8 of the structure plan we do not only accept 3,600 dwellings we accept the whole 10,000. Conversely, if we do not accept the 10,000 we are as non-conformant with the structure plan as if we had accepted the 3,600.

By conceding 1 dwelling West of the A1(M) we accept the legal weight of the structure plan. This is because in law the developers only have two grounds on which to judicially review the decision of the planning authorities in not implementing the strategic allocation:

- An error in law by the planning authorities - which as outlined earlier is not strictly possible because planning authorities are totally free to adopt local plans which are not in conformity with the structure plan.
- An error of reason, by which the developers would have to prove that the actions of the local authorities are '*Wednesday perverse*'. That is, the planning authorities have taken a decision that no other reasonable planning authority could have taken in the circumstances.

The latter of these two points will be the basis of any judicial review by the developers. The defence against this is for the planning authority to prove - that given the weight of evidence on the ecological value, landscape value, problems with water supply or drainage, etc. - that it was incorrect to allocate these sites in the structure plan, and hence not allocate them in the local plan.

There is also an interesting wider political perspective to this process. At any point the Secretary of State can intervene and direct the local authorities to implement Policy 8 of the structure plan. However, to do so would be to say that once a site is included in the structure plan it must be developed. Such an argument cannot be legally sustained within planning law, conservation law, or environmental assessment law. It also is contrary to the Government's adopted viewpoint on sustainable development.

If there is legal action by the developers then it will be in the High Court between the local planning authority and the developers concerned. However, this is not problematic, and actually helps those campaigning against West of Stevenage. Local campaign groups can, by 'joining' such an action, fight the developers case

through the courts in a cheaper manner than if they brought a legal action alone. There is a general issue about the 'public interest' in this case that needs to be clarified. Therefore, it is possible that we could get a judgement early in the case that the *public interest principle* (as established by Greenpeace in 1994) exempts local campaign groups from an award of costs if the developers win.

Any attempt to limit the West of Stevenage development through the local plans, or by through limiting/refusing subsequent planning permissions, is likely to end in legal action. We must accept this as an inevitability and plan for it, but we must not be afraid of it. In practice the developers have cause to be more afraid of legal action because if they lose, the precedent would affect housing development in the whole of England. Losing a legal action on West of Stevenage would be a bigger loss for the development industry than for conservationists.

The changes in national housing policy

The 'need' for housing cannot be planned purely on the basis of the figure handed down from the structure plan. Housing policy has changed significantly since the EiP considered the need for housing in early 1997. There are five significant changes to planning guidance on housing that should be considered:

- There has been a marked change in Government policy away from the '*predict and provide*' approach¹. In particular, through the new UK Sustainable Development Strategy, the emphasis has shifted from mere provision towards the planned regeneration of urban areas.
- Recent guidance has shifted towards developing sustainability-led policies on housing. The main report to take note of on this issue is '*Planning for Sustainable Development: Towards Better Practice*'². However the UK Roundtable on Sustainable Development's Report on *Housing*³ also provides valuable guidance on developing sustainable strategies for providing societies housing needs. This guidance moves significantly beyond the position of the structure plan.
- The assessment of housing needs that formed the basis of the structure plan EiP were clearly incorrect. This has been admitted by DETR in their press release no.297/99. This stated that the housing requirement in

England has been significantly over-estimated⁴ - perhaps by 15 to 28%

- The generality of public objections is not only a factor that councillors should weigh⁵, they must take specific note of it. Recent legal judgements⁶ mean that councillors should give specific consideration to expressions of fear or concern where there is a demonstrable case to be made.
- Finally, housing policy is more uncertain than in 1997. For example, we now have a draft of a revised PPG3.

The councillors are free to consider all this information in determining their position on development west of the A1(M).

In conclusion

If we accept any development West of Stevenage we accept, by inference, Policy 8 of the structure plan - which demands a longer term objective of 10,000.

In my view the issue of the green belt, for the purposes of the argument over West of Stevenage, is irrelevant. This is because the county council have already accepted the principle of rolling back the green belt conditionally on the allocation of the strategic housing sites. Any argument that seeks to protect the green belt is therefore mistaken since this is not the most important concern in terms of the development of the strategic allocations.

In my view no evidence exists to argue that the site is capable of accepting X number of dwellings. Any move to do so is therefore baseless, and risks compromising the position on Policy 8 of the structure plan. Also, for the purposes of the law, not accepting 10,000 dwellings has the same effect as accepting 3,600. For the purposes of the TCPA they both merit the same legal sanction, and this sanction does not differentiate between the 'level' of non-conformity.

In my view there is a defensible way to refuse to implement Policy 8 of the Hertfordshire Structure Plan, and those parts of Policy 9, relating to strategic allocations, based upon sound legal/planning grounds. This is the process through which North Hertfordshire's councillors should remove the West of Stevenage development from the local plan. They should not rely on arguments in relation to green belt.

¹ '*Planning for Communities of the Future*', Cm3885, February 1998.

² '*Planning for Sustainable development: Towards Better Practice*', DETR October 1998

³ '*Housing and Urban Capacity*', UK Roundtable on Sustainable Development, February 1997.

⁴ DETR Press Release 297, 29th March 1999 - '*Household Growth Down*'

⁵ *Stringer v. Minister for Housing and Local Government* [1971] JPL. 114

⁶ See *West Midlands Probation Committee v. Secretary of State for the Environment and Walsall Metropolitan Borough Council* [1998] JPL. 388, and *Newport Borough Council v SoS Wales and Browning Ferris Environmental Services Ltd* [1998] JPL 377