

Appendix 5

Opinion by Hereward Phillpot, QC
July 2017

Eastleigh Local Plan

NOTE ON REPORT TO CABINET FOR 20 JULY 2017

Introduction

1. I have been provided with the Report to the Council's Cabinet for 20 July 2017 entitled "Eastleigh Local Plan Review: Emerging Approach" ("the Report") and a short note from Mr Steven Pickles of West Waddy ADP which reviews the Report and comments upon it.
2. I have been asked by the Action Group Against Destructive Development to add any further comments of my own on the Report.
3. As an initial observation, I consider that the nature and purpose of the decision the Cabinet is being asked to make, as reflected in the recommendations, is somewhat obscure. The Cabinet is invited to recommend that the Council 'note' the emerging approach in the Eastleigh Local Plan ("the Plan") (recommendation (1)), 'note' that important evidence remains outstanding and that more will be needed before "a definitive decision" is made (recommendation (2)), and "*Approve the use of the Eastleigh Local Plan Emerging Approach as set out in recommendation 1*" (recommendation (3)).
4. It is not clear to me what is meant by the 'use' of the emerging approach in the third recommendation, or why it is considered necessary or appropriate to make such a decision at this stage of the plan preparation process. It appears that this decision is intended to be more significant than just noting what progress has been made, and yet there is an important lack of clarity as to precisely what the decision is meant to signify and its intended practical effects.
5. In my view recommendation (3) cannot sensibly be intended to mean that the emerging approach will be 'used' in the determination of individual applications for planning permission. Such an approach would make little sense in the context of the guidance in paragraph 216 of the NPPF, and the number and nature of unresolved

issues and objections that exist at present. It seems unlikely to me that any responsible local planning authority, properly directing itself, would attach any material weight at all to an emerging plan for the purposes of development control decision-making in those circumstances.

6. The closest the Report comes to explaining the purpose and intended consequences of recommendation (3) is in paragraph 7, where it is said that the views expressed in the Report are *“designed to prompt ... further discussion”* of the evidence, *“enabling the emerging approach to be further tested, and refined or changed as needed”*. That needs to be seen in the context of two later paragraphs in the Report:
 - a. paragraph 79, which makes it clear that what is being done is the initial selection of a Strategic Growth Option (“SGO”); and
 - b. paragraph 87, which offers an ‘on balance’ recommendation *“to note that SGO B/C is emerging as the currently preferred option”*.
7. Against that background, I consider the explanation given in the Report for the necessity or desirability of making any ‘initial decision’ at this stage is manifestly inadequate, for two reasons.
 - a. Firstly, the Report does not offer any explanation as to why it is considered to be either necessary or desirable to make a decision as to which SGO should be preferred at this stage in order to facilitate further discussion or consideration. So far as I can tell there is no practical need for any preliminary view to be expressed at this stage, or at least none that is articulated in the Report.
 - b. Secondly, the Report identifies a wide range of critical issues going to the heart of the decision as to which SGO should be preferred where the evidence base is obviously inadequate to enable any informed view to be reached as to their relative merits or deliverability. If there were a need to express an initial preference before embarking on the next stage of plan preparation (which the Report does not claim), there is no explanation for

why it is felt to be appropriate or necessary to do that now, when so much of the critical evidence is not available.

8. The impression that I was left with was that this is an attempt to seek to accelerate the decision-making ahead of the evidence base, with the clear risk that the subsequent gathering of evidence, comparison of options and consultation exercises will be seen as tainted by pre-determination and the legal requirements of soundness and compliance with the requirements of Strategic Environmental Assessment (“SEA”) will not be met.
9. The current critical shortcomings in the evidence base are helpfully summarised in the note prepared by Steven Pickles, and I do not repeat them here. However, there are other substantial evidential gaps I draw attention to below.

Approach

10. The NPPF and NPPG¹ makes clear that in order to satisfy the test of soundness, the Sustainability Appraisal (“SA”) and an adequate evidence base must inform the development of the plan and the consideration of options on a systematic basis *throughout the plan process*. Collecting evidence retrospectively is not consistent with the requirements of soundness.
11. The same approach applies to the related issue of SEA. In ***Seaport (NI) Ltd. v. Department of the Environment for Northern Ireland*** [2008] Env. LR 23, Weatherup J said this:

“The scheme of the Directive and the Regulations clearly envisages the parallel development of the environmental report and the draft plan with the former impacting on the development of the latter throughout the periods before, during and after the public consultation. In the period before public consultation the developing environmental report will influence the developing plan and there will be engagement with the consultation body on the contents of the report. Where the latter becomes largely settled, even though as a draft plan, before the development of the former, then the fulfilment of the scheme of the Directive and the Regulations may be placed in jeopardy. The later public consultation on the environmental report and draft plan may not be capable of exerting the appropriate influence on the contents of the draft plan.” (paragraph 47)

¹ See e.g. paras 014 and 016

12. Furthermore, the availability of adequate environmental information is essential for any consultation on the draft plan to be effective (see paragraph 49 of the Judgment).
13. A SEA must consider the reasonable alternatives to the plan. It must examine the alternatives on an equal basis to the preferred option. An important purpose of the process is to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of what the authority regards as reasonable alternatives (see *Heard v. Broadland* [2012] Env. LR 23, per Ouseley J at paragraph 71).

Shortcomings in the evidence base

14. In addition to what I regard as the critical shortcomings that Mr Pickles has identified in his note, I would draw attention to the approach that has been taken to the related issues of deliverability and viability.
15. The NPPF requires Local Plans to be deliverable, viable and realistic².
16. More detailed guidance is to be found in paragraph 018 of the NPPG on Local Plans which requires local planning authorities to pay careful attention to identifying what infrastructure is required and how it can be funded and brought on stream at the appropriate time. The Local Plan should make clear, at least for the first 5 years, what infrastructure is required, who is going to fund and provide it, and how it relates to the anticipated rate and phasing of development. Where the deliverability of crucial infrastructure is uncertain then the plan should address the consequences of this, including possible contingency arrangements and alternative strategies. The local planning authority's evidence base must show how the policies have been tested for their impact on the viability of development.
17. In this case the Report makes its recommendation as to which SGO to prefer³, together with an associated link road⁴, before it considers whether this option is deliverable⁵.

² See e.g. paragraphs 154 and 173.

³ Paragraph 87

⁴ Paragraph 88

⁵ Paragraph 90

18. The order in which these issues are addressed might matter less if there were no significant doubts remaining as to deliverability of the preferred option, but that does not appear to be the case.
19. What is said in paragraph 90 about trajectory is based on what are described as ‘assumptions’ which have yet to be tested or discussed with the development industry’. It is not clear from the Report the extent to which these assumptions depend on the delivery of the associated infrastructure considered later in the Report, and the timing of that delivery.
20. Paragraph 95 identifies an estimated cost of the link road at £40 million, and the scope for that to increase. Paragraph 96 makes clear that as yet the costs of school provision are not known. Importantly, paragraph 97 states:
- “The Council has commissioned a high level viability study to provide further understanding of whether or not the development is likely to be able to fund all the infrastructure. ... It is considered this could include part funding from public bodies if necessary. There are a range of potential funding sources from Government and other public agencies which may assist if needed”.*
21. It appears that this “*high level viability study*” has not yet been carried out (or if it is the outcome is not set out in the Report), and so it would seem the Council is being asked to make an initial decision on preference without even that high level understanding of whether the preferred SGO can deliver the link road that is treated as very important to the ‘on balance’ decision to prefer it⁶.
22. No proper consideration is given as to how likely it is that any shortfall in funding will be able to be made up from public funds, or the likely timescale for any such funds being made available and how that impacts on the timetable for delivery of the SGO.
23. It is also apparent that there are other potentially significant obstacles to the delivery of the link road, including land ownership⁷, the need for cross-boundary working with other authorities⁸, impacts on the southern damselfly⁹, and the need to finance and deliver additional measures to overcome constraints at the Allbrook rail bridge¹⁰.

6 See paragraphs 44, 55 and 80 of the Report

7 Paragraph 99

8 Paragraph 99

9 Paragraph 100

10 Paragraph 101

There is no consideration of the likely timing of the delivery of the link road, or reference to analysis of this issue that has been undertaken.

24. The Report acknowledges that when a final recommendation is made *“there needs to be a reasonable prospect that it can be delivered in the timescales envisaged”*¹¹. However, it is not said why it is considered necessary or appropriate to identify a preferred option at this stage when there is insufficient evidence to reach any informed judgment on that issue (even on an initial basis).
25. Finally, I note that paragraph 102 of the Report states that *“Developers are not actively promoting option D”*. It is curious that the Report does not go on to identify who controls the land comprising Option D, and consider why they are not actively promoting it.

Conclusions

26. For the reasons I have summarised above, I consider that the nature and purpose of the decision which the Cabinet is being asked to make is obscure.
27. There is not a clear or adequate explanation as to why it is felt necessary or appropriate to select an initial preferred SGO at this stage, particularly in circumstances where insufficient evidence is available for any such selection to be properly informed.
28. The approach being taken to the relationship between evidence, assessment and decision-making at this stage does not seem to me to be consistent with what is needed to demonstrate that the Local Plan is sound, or the requirements of SEA.

**Francis Taylor Building
Inner Temple
London EC4Y 7BY**

**HEREWARD PHILLPOT QC
19 July 2017**

11 Paragraph 103