

CANNOCK CHASE DISTRICT COUNCIL

ADVICE ON CANNOCK CHASE SAC

Introduction

We are asked to advise Cannock Chase District Council ('the Council') on the prospects of quickly adopting a robust interim planning policy to inform decision-making on all applications for housing development within the zones of influence identified by Footprint Ecology. In particular we understand that this interim planning guidance would need to be implemented as a matter of urgency and there is a concern to minimise the risk of challenge to such a policy by developers.

We have set out below our answers to the questions raised in the 'request for advice' paper that you provided to us.

QUESTION 1

In a situation where there is incomplete up to date Local Plan coverage across the partnership, can the NPPF policy context, whereby the presumption in favour of sustainable development is 'trumped' by the requirements of HRA, be used as a policy hook for a joint interim planning policy to be adopted which requires mitigation as proposed by FE?

In order to understand the issues arising out of the implementation of an interim planning policy of this nature it is necessary to look in some detail at the relevant legal requirements for the production of policy documents in addition to the policy justification for implementing such a policy. This advice relates to the legal and procedural implications of the implementation of such a policy and does not consider whether the mitigation strategy identified is in fact in accordance with existing or emerging local plan documents across the partner authorities mentioned in the request for advice.

We should also mention that we have considered planning policy documents produced in respect of the Thames Basin SPA, although it is important to note that these documents were put in place before the making of the The Town and Country Planning (Local Planning) (England) Regulations 2012 (the "2012 Regulations"), which now apply.

Risks of challenges to an interim policy

Merits

We can see no obvious challenge to the merits of the mitigation strategy ('the proposed mitigation policy') which the Council and its partner authorities ('the LPAs') are seeking to implement. The Footprint Ecology reports extracts we have seen appear to be clear in their recommendations and are further supported by the Halcrow report of 15 January 2013 relating to the Council's Draft Local Plan.

There is ample legal and policy justification for such a policy approach. The LPAs clearly have duties in relation to the SAC as competent authorities under the Conservation of Habitats and Species Regulations 2010. Second, in policy terms, national policy supports (as noted in our instructions) a distinct and precautionary approach where European sites are concerned, so that the presumption in favour of sustainable development is explicitly stated not to apply where development requiring appropriate assessment is being considered, planned or determined (paragraph 119 of the NPPF).

Although the NPPF and the LPA's legal obligations mean each LPA can determine planning applications in such a way as to include conditions or other requirements to protect an SAC, there are strong reasons for introducing a policy to do so, since it would give guidance on the mitigation measures that would be expected of new applications pursuant to a co-ordinated approach.

In addition, local policy appears to be supportive. In Cannock Chase's plan, for example, such a strategy is contemplated explicitly by emerging Core Strategy policy CP13 and is not obviously in conflict with existing local plan policy C9, although the two policies take a different approach to the protection of the SAC. Further, proposals to recover financial contributions are not inconsistent with Policy IMP1. There are therefore a number of policy 'hooks' on which to hang the proposed mitigation policy, although assuming a supplementary planning document (SPD) is envisaged (see below), such hooks are not required as such^(a).

Procedure

The principal risk, in our view, is that a developer could claim that the policy, if implemented as an 'interim' document that has not gone through the statutory adoption procedures applicable to development plan documents or supplementary planning documents, is unlawful.

This opens up the risk of judicial review of the decision to implement the policy on the basis of procedural impropriety, i.e. failure to comply with the prescribed procedures, which would, include for example a lack of consultation. Similarly any decision on a planning application which was taken in reliance on that policy could be challenged on the grounds that a non-material consideration (an invalid planning policy document) had been taken into account in reaching that decision.

An analysis of this risk and the best approach to minimise it turns on the statutory requirements for the adoption of various local development documents, which category of such documents the proposed mitigation strategy is likely to fall into and whether any procedural requirements might be infringed if there were an interim strategy, to be implemented immediately

The legal background

Local development documents

Applications for planning permission must, of course, be determined in accordance with the "development plan" unless material considerations indicate otherwise (section 38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act)).

The 2004 Act introduced a new regime for the adoption of development plans and also provided a new framework for the adoption of other local planning documents, collectively referred to as "local development documents" (LDDs).

Under section 17(3) of the 2004 Act a local planning authority's LDDs must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area. Beyond that LDDs are not defined.

(a) See the former PPS12 at paragraph 6.1 which states "supplementary planning documents are not required to have a specific link or to "hang off" a development plan document policy, but they must be consistent with national planning policy and the relevant regional plan".

LDDs fall into two categories; (i) those which form part of the development plan (“development plan documents” or DPDs, in accordance with which planning applications must be determined unless material considerations indicate otherwise) and (ii) other LDDs (which do not form part of the development plan and are therefore only constitute material considerations in determining any planning application). LDDs include what were previously planning guidance and other non-statutory documents and also include SPDs.

The 2012 Regulations specify which categories of document identified in the 2004 Act must constitute DPDs and which must constitute SPDs. By virtue of regulation 2, documents referred to in paragraphs (1)(a)(i), (ii), (iv) and (b) of regulation 5 (set out below) must be prepared as DPDs, and documents within paragraph (iii) must be prepared as SPDs:

“(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.”

Other documents that do not fall within the above categories may nonetheless be LDDs.

Procedural Implications

The procedures for the adoption of DPDs are considerably more onerous than for other LDDs. SPDs are a form of LDD which have their own specific procedure for adoption.

DPDs

Every DPD must be submitted by the LPA to the Secretary of State for examination by an independent inspector. Opportunities must be given for those interested to appear before, and to be heard at, the examination. The inspector is required to determine whether the DPDs comply with certain legal requirements and are “sound”. The LPA may only adopt a DPD following that examination and, broadly speaking, in accordance with the recommendations of inspector. We do not think that the proposed mitigation strategy would constitute a DPD.

Other LDDs

An LPA has much greater flexibility with respect to the adoption of other LDDs. Under section 23 of the 2004 Act it may adopt a LDD (other than a DPD or SPD) either as originally prepared or as modified so as to take account of any representations made in relation to the document or any other matter which it thinks relevant. Under section 17(8) of the 2004 Act an LPA can adopt a document as an LDD simply by resolution.

The 2012 Regulations contain additional procedures required in respect of SPDs. Before adopting an SPD an LPA must prepare a statement setting out the persons whom it consulted when preparing that document and how the main issues which those persons raised have been addressed in it. The LPA must then give the public an opportunity for at least four weeks to make representations.

The Proposed Interim Policy

The distinctions between different types of policy documents under the 2004 Act and the 2012 Regulations are often fine ones. The regulations are still relatively new and case law on the how they are to be interpreted is still developing. However, we think that the proposed mitigation policy contain statements that amount to an environmental objective relevant to the attainment of the development and use of land which the local planning authority wish to encourage. Therefore, in short, the mitigation strategy probably falls within regulation 5(1)(a)(iii) as set out above, which is why we have put it in bold text. It follows from this that it must be prepared as a SPD.

The Milton Keynes decision

The interpretation of regulation 5 was considered at some length in the case of *RWE v Milton Keynes Borough Council* [2013] EWHC 751. The case concerned an emerging policy on wind power, adopted as a SPD by Milton Keynes Borough Council. It provided that planning permission would be granted if certain conditions relating to minimum distance between turbines and residential premises were met. However, it did not state that permission would be refused if such conditions were not met. The adopted local plan policies stated that planning permission would be granted for wind turbine development unless there would be significant harm to the amenity of environment, or unacceptable visual impact.

In this case it was held that the policy was an SPD and not a DPD. The court held that the policy did not fall within regulation 5(1)(a)(i) because it did not contain any new statements seeking to encourage a particular land use, beyond those already stated in adopted local plan policies. It plainly did not fall within regulation 5(1)(a)(ii). Nor did it fall within regulation 5(1)(a)(iv). The court held that “development management policies’ in the context of regulation 5(1)(a)(iv) referred to policies which were intended to guide the determination of all applications for planning permission, and thus were concerned with regulating land use generally. Documents which related to particular uses of land would fall within paragraphs (i) to (iii). If this were not the case paragraph (iii) would be redundant: there could be no SPDs because all such documents inevitably constitute development management policies intended to guide the determination of applications for planning permission *regarding such development and use of land*, and thus all would fall to be treated as DPDs - this clearly cannot be the intention of the provision.

The facts of this case are largely, though not entirely, analogous to the situation facing the LPAs as regards Cannock Chase. It would appear, applying the arguments rehearsed in the case, that the mitigation strategy would not constitute a ‘development management policy’ since it relates to one

potential use of land and its impact on one specific existing site (as opposed to all development in the LPA area generally). On that basis the proposed mitigation policy would not fall to be treated as a DPD. The court held that the policy under consideration fell within 5(1)(a)(iii). This reinforces our view that the proposed mitigation policy for Cannock Chase would also fall within this paragraph and therefore must be prepared as an SPD.

Possible ways forward and risks involved

The proposed mitigation strategy must be prepared as an SPD, and under the relevant legislation there is no scope for the adoption or implementation of an interim version of such a document. If an interim policy document was implemented it would plainly be vulnerable to challenge, as set out above, as would decisions made in reliance upon it.

There are two possible approaches to implementing some type of interim policy:

(a) There appears to be nothing in the relevant legislation to prevent an SPD being produced in draft form. Indeed the 2012 Regulations contemplate a draft document being produced since the SPD itself must be made available for public inspection prior to its adoption. There is then nothing to stop such a draft being taken into account by the LPAs as a material consideration in determining relevant planning applications.

(b) It would also be open to the LPAs to produce an internal guidance document, explicitly stated to be 'interim' that enshrined the relevant principles. Such a document could, for example acknowledge the findings of the Footprint Ecology reports, the fact that the other partner authorities have also 'signed off' on these, and note that these reports and the recommendations therein would constitute material considerations that will be taken into account in the consideration of relevant planning applications. However, such a document would have no legal status, and it would expose the LPAs to the risk of challenge on the basis that they were implementing a policy (by another name) without complying with the appropriate procedures.

In our view the best course is to commence the preparation of an SPD as soon as possible. This will be required in any event and although it does not eliminate the risk of challenge, any decisions taken pursuant to it would only be open to challenge until the final SPD was adopted and the period for judicial review has expired without challenge. This risk must also be seen in context. Currently any planning permission granted by the LPAs which might affect the SAC is at risk of challenge due to non-compliance with the Habitats Directive.

QUESTION 2

Is this a feasible way forward, what would be the appropriate mechanisms for collecting financial contributions? Not all the partner LPAs are committed to taking forward CIL and those that are have not yet published preliminary draft charging schedules. Charging schedules are unlikely to be in place by April 2014.

Bullet Point 1: Is CIL in principle a possible mechanism for the future of funding mitigation measures, either in general or with specific projects identified in S123 lists accompanying charging schedules?

We think that CIL can be used, but with reservations as described below

Under regulation 59(1) of the Community Infrastructure Levy Regulations 2010 as amended ("CILR 2010") a charging authority must apply CIL to;

"... funding the provision, improvement, replacement, operation or maintenance of infrastructure to support the development of its area".

In addition, under regulation 59(3) CILR 2010 a charging authority may apply CIL for such funding outside its area where so it would support the development of its area. This raises a number of questions, one of which is what is meant by the term "infrastructure", a question answered by Section 216(2) Planning Act 2008 as amended ^(b).

Infrastructure is widely defined by this sub-section to include;

- (a) roads and other transport facilities
- (b) flood defences
- (c) schools and other educational facilities
- (d) medical facilities
- (e) sporting and **recreational facilities**
- (f) **open spaces**

The words above in bold type are clearly the most relevant to the issues arising here. We consider that the Cannock Chase SAC can properly be described as both an open space and probably also a recreational facility. We consider that the additional open spaces on developments to which you refer in your note and the prospective SANGS would also fall within these definitions.

Accordingly, CIL can be used for the *provision, improvement, replacement, operation or maintenance* of open space and/or recreational facilities.

(b) amended by Regulation 63 CILR 2010

This has raised the question in our minds of whether the items in Annex C of the Request for Advice (i.e. Appendix 1 of the Cannock Chase SAC mitigation report – Indicative Costings) would amount to expenditure upon provision, improvement, replacement, operation or maintenance of infrastructure, or not. In many cases, particularly for those items in the Appendix that relate directly to physical works (e.g. the heath land fragmentation items, the provision of fencing, habitat management and providing the SANGS), we consider that they do. It is the broader items, covering what might be described as management items (e.g. visiting local stables, liaison with cycling groups, school visits, strategy reviews) that we are less certain about. Such activities might perhaps fall within the ambit of “operations” for the purposes of regulation 59, but one would not generally think in terms of “operating” an open space such as the SAC in the same way as one would, for example, operate a railway.

There is no definite answer to this question of definition and the point has not been tested by the courts or discussed in any DCLG documents, so far as we are aware. It could be raised as part of the current DCLG consultation (“Consultation on Community Infrastructure Levy further reforms”) if you wish.

However, it is likely that on account of further changes proposed in the current DCLG consultation document, draft regulation 123 lists will need to be made public at an earlier stage and be produced at the same time as draft charging schedules. This is proposed in order to provide better evidence at an earlier stage to support the proposed levy rates at examination. In this way, although a regulation 123 list could still readily be changed, it would be subject to scrutiny at the examination. As part of that process, views can be expressed upon the appropriateness of including items concerned with the management (as opposed to the improvement or maintenance of the open spaces) on a draft regulation 123 list. The point is particularly relevant to the continued use of planning obligations –upon which see further below.

Finally, we have considered whether the application of CIL by a charging authority to the SAC, open spaces and SANGS, (whether in its area or not) would support the development of its area as this is another requirement of regulation 59. As the overall purpose of the measures proposed is to allow development to take place in a controlled fashion, which otherwise would not be appropriate on account of harm to the integrity of the SAC, we think that this requirement is met.

Bullet Point 2: In the period up to April 2014 what are the prospects of large numbers of Section 106s which are either very generally worded or targeted at specific mitigation projects passing the three tests in the CIL Regulations based on the evidence of the need to mitigate harm?

The three requirements in regulation 122(2) CILR 2010 are derived from well-established planning policy upon the use of planning obligations and are as follows:

- necessary to make the development acceptable in planning terms,
- directly related to the development,
- fairly and reasonably related in scale and kind to the development.

Any section 106 obligation relating to a planning permission subject to the CIL regime (i.e. most buildings – see regulation 6 of CILR 2010) must, after 6 April 2010, meet all three requirements if the planning obligation may constitute a reason for granting planning permission. This is the case whether or not the LPA has established a CIL charging regime.

The basis upon which an interim policy or guidance would be founded is that the cumulative effect of housing development would be detrimental to the integrity of the SAC and that as a result housing development must be subject to appropriate controls if it is to be allowed to go ahead. That is a reasonable use of the planning system. It may be that one individual housing development would not itself have a substantial effect upon the integrity of the SAC but on that basis many planning controls would be hard to justify – e.g. restrictions on development of housing in rural areas or parking restrictions relating to development in urban areas. Accordingly, we consider that provided that the basis upon which the payments are required to be made under section 106 obligations for individual developments is clear and justifiable, bearing in mind the purpose of the payments (i.e. that the development makes a contribution to the harm that would be caused and the payment will make an appropriate contribution to alleviating that harm) then we consider that it is right to say that:

- (a) The payment is necessary to make the development acceptable in planning terms;
- (b) The payment does relate directly to the development (because it makes an appropriate contribution to alleviating harm it and other housing developments would otherwise cause); and
- (c) The payment is fairly and reasonably related in scale and kind to the development – (which goes to the point about the need for the mitigation procedures and payments for them to be transparent, properly worked through and justifiable).

A larger issue, and one which is touched upon in your question, is that with the coming of CIL (and whether or not an LPA is charging CIL) there will be substantial restrictions upon the use of planning obligations for **funding** or **providing** infrastructure. As the law stands currently, after 6 April 2014 or the date upon which a charging schedule takes effect (if earlier);

- (a) Section 106 obligations may not constitute a reason for granting planning permission (i.e. a s106 may not be used) if there are already in place five or more separate obligations made after 6 April 2010 in that LPA area which provide for the **funding** or **provision of an infrastructure project** or a **type of infrastructure**, (e.g. “open space”) (CILR 2010, reg 123(3)) ; and
- (b) Section 106 obligations may not be used to the extent that the obligation provides for the **funding** or **provision of relevant infrastructure** (CILR 2010 reg 123(2)). “Relevant Infrastructure” means infrastructure on a regulation 123 list or any infrastructure^(c) if there is no regulation 123 list published.

It follows from this that, taking the SAC, the new open spaces and the SANGS as types of infrastructure for the purposes of CIL, that section 106 obligations may not be used to the extent described above. For the sort of process that you have in mind, where contributions would be sought from all new housing developments, these restrictions will be very limiting and indeed are intended to

(c) for the purposes of the CIL regime – i.e. as defined in s216(2) PA 2008 as amended by regulation 63 CILR 2010

be, in view of the Government's position that CIL funding is preferable to s106 funding where infrastructure funding is concerned.

There is scope to argue that a proportion of the funding needed for the mitigation scheme is not to fund or provide infrastructure, but for its management, and as mentioned above it is not clear whether CIL receipts can be used for infrastructure management (if a different thing to its operation or maintenance). If CIL receipts cannot be used for management items under regulation 59, it should follow that section 106 can still be used to produce such funds, as regulation 123 CILR then does not apply. Unfortunately there is no clear cut answer to that, but as we have suggested above if management items are included in a draft regulation 123 list and then have to be removed on the basis that they cannot be CIL funded, that opens the way to use of planning obligations instead (without pooling restrictions).

Note that according to the current DCLG consultation document the 6 April 2014 date is likely to be replaced by a new date – 6 April 2015.

Bullet Point 3: If Section 106s can be used for financial contributions on developments where there is no "on site" solution, then could unilateral undertakings with the standard format be required to accompany all relevant applications in order to simplify/speed up the process of determining planning applications?

A standard form of unilateral undertaking would be helpful and probably welcomed by applicants, but we do not think that the use of a particular template ought to be a strict pre-requisite to the obligation being an acceptable basis upon which to grant planning permission or not. If a similarly worded unilateral undertaking could achieve the same objective, then simply because the council prefers another form of words is not a very attractive or indeed sufficient reason for refusing the application.

However, we would expect that in the vast majority of cases the developer would be happy to use a sensibly worded template, rather than have to produce a unilateral undertaking from scratch.

Note that Section 6 of the Growth and Infrastructure Act 2013 will (when brought into force) amend section 62 TCPA 1990 by adding a provision to the effect that any requirement to be submitted to an LPA with a planning application must be reasonable, having regard, in particular, to the nature and scale of the proposed development. We are concerned that such a rigid requirement would not be reasonable.

Bullet Point 4: Is there an alternative solution for developments of 50 or fewer units? We've seen an Inspector's decision where a condition has been imposed which is generally worded talking about appropriate mitigation required to be agreed prior to commencement. Conditions can't specifically ask for a financial contribution but without mentioning this, is it appropriate to explain to developers that a way of complying with the condition is most likely to be by making a financial contribution?.

One of the main purposes of the CIL regime is to require most developers to make a contribution towards infrastructure whereas, at present, under the section 106 system, a relatively small proportion of developers do. Using CIL funding as the basis for raising the necessary funds, it would be appropriate for all developers, including those with 50 or fewer units, to make the relevant CIL contribution. Assuming that the mitigation measures would have to operate by way of funds being provided to the relevant local authorities such that they organise and carry out the relevant mitigation works and activities, then we do not think, as you mention in the question, that it would be appropriate for a condition to require a financial contribution, either on its face, or pursuant to some form of

method statement, if the method statement is only likely to be acceptable if it involves a requirement to make a payment or payments to the LPA.

In the words of Condition 11/95, paragraph 83;

“No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute, except where there is specific statutory authority. Conditions requiring, for instance, the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works on land within the application site, to overcome planning objections to the development e.g. provision of an access road. Further advice on this and on agreements with developers to cover such matters is given in "Planning Obligations" (DOE Circular 16/91, WO 53/91)”.

For section 106 obligations there is statutory authority for payments to be made to the LPA by virtue of section 106(1)(d) TCPA 1990.

Bircham Dyson Bell LLP

13 May 2013