

Examination of Epping Forest District Local Plan (2011-2033)

Dandara Ltd Hearing Statement for Matter 1: Legal Compliance

- 1.1 This Hearing Statement has been prepared by Dandara Ltd (ID: 19LAD0129) in response to the MIQs raised by the Inspector for discussion in weeks one and two during 12th to 26th February 2019. This Statement should be read alongside Dandara Ltd's representations to the 2017 Submission Version Local Plan and supplemental representations to the 2018 Site Selection Evidence Base.

Issue 2, Question 2(f)

“Does the absence of Appendix B of the Site Selection Report (and potentially other documents) at the Regulation 19 stage contravene the requirements of the SCI? If so, what are the implications of this for the test of legal compliance?”

- 1.2 Section 19(3) of the PCPA 2004 states that ‘in preparing the Local Development Documents ... the Authority must also comply with their Statement of Community Involvement’. The 2013 EFDC SCI (SCI EB104) states at para. 8 that:
- “There are a number of studies which are used as background evidence to the main Local Plan document. The studies are used to help guide the policies that are going to be in the final document and perhaps identify options that are not feasible. These will be available from the Council offices or on the Council’s website **when they are finalised**”.*
- 1.3 The SCI recognises that the Local Plan will be informed by background evidence studies that both guide policy decisions and identify options that are not considered feasible. It acknowledges the important role that evidence base studies play in guiding and informing Local Plans including decisions not to progress with certain options, including housing allocation sites.
- 1.4 The Inspector is aware that Appendix B of the Site Selection Report (SSR), which set out detailed assessments for all residential sites, was unavailable during the Regulation 19 consultation period. It was made publicly available on 14th March 2018 after the consultation period closed on 29th January 2018.
- 1.5 We are aware of the conclusion of the Judgement in *CK Properties (Theydon Bois) Ltd v EFDC EWHC 1649 (EB127)* that the latter part of para. 8 of the SCI had been satisfied as a matter of fact as Appendix B of the SSR was made available on 14th March 2018 once finalised. However, the fact that Appendix B was not finalised until over 6 weeks following the close of the Regulation 19 consultation period, fundamentally conflicts with the earlier parts of para. 8 of the SCI which explain that such evidence base studies help guide and inform the content of the Plan including both allocations and omissions. The SSR is a key evidence base document that did not properly inform the preparation of the Regulation 19 Plan.
- 1.6 Appendix B of the SSR contains detailed assessments of all potential housing sites being considered through the Local Plan process and allows the reader to understand why certain sites are considered to be suitable for development and why others are not. Importantly, the assessment criteria for each site are consistent so it is possible to make direct comparisons between different sites.

1.7 There is significant detail contained within both our Regulation 20 representations and the supplemental representations to the 2018 SSR Evidence Base regarding the implications of Appendix B not being available during the Regulation 19 consultation period. We will however reiterate here our principal concerns regarding SCI conflict:

(1) Prejudicing Regulation 19 Consultees

1.8 Regulation 19 of the TCP (Local Planning) (England) Regulations 2012 requires an LPA to make a copy of each of the proposed submission documents available in accordance with Regulation 35 before submitting a Local Plan for examination. Appendix B of the SSR is a proposed submission document as defined in Regulation 17 and was unavailable at the time of the Regulation 19 Local Plan being published for public consultation and remained unavailable throughout the entire publicity period.

1.9 Appendix B of the SSR was required for respondents to the Regulation 19 consultation to understand why the Council chose certain housing sites for allocation whilst considering others unsuitable. In the absence of Appendix B, it was impossible for any interested party to rationally understand why the Council concluded that certain sites should be included in the draft Plan and others not. It also raises the question why the Council could publish selected sites within their Regulation 19 Plan but were not able to simultaneously publish information about omission sites. Why was this the case if all sites were assessed collectively in an objective manner?

1.10 Whilst the Judgement in CK Properties focused on whether the absence of Appendix B of the SSR prejudiced the ability of an individual site promoter to understand why a housing site was excluded from allocation at Regulation 19 stage when it was previously included within an earlier Regulation 18 iteration, we wish to draw the Inspector's attention to another prejudicial outcome associated with the absence of Appendix B.

1.11 As set out in detail in Dandara Ltd's Regulation 20 representations and supplemental representations to the 2018 SSR Evidence Base, land being promoted for housing at Temple Farm, Roydon was incorrectly assessed within the evidence base informing the Regulation 18 Local Plan. This error is explained in detail within Section 4.0 of our Regulation 20 representations and effectively saw the wrong site area being assessed, assumed forty developable hectares rather than six, despite evidence submitted to the Council by Dandara Ltd associated with their 'Epping Forest Developer, Landowner and Promoter Survey 2016'. At a meeting held on 21st November 2016 the Council apologised for this error and committed to reassessing the site prior to the publication of the Regulation 19 Local Plan and without prejudice to the draft allocations previously proposed at Regulation 18.

1.12 Following the publication of the Regulation 19 Plan, it was impossible for Dandara Ltd to understand whether the Council had rectified its acknowledged error in assessing the site associated with the Regulation 18 Local Plan evidence base as Appendix B of the SSR was not available. This absolutely prejudiced the ability to understand and respond to any reasoned justification given by the Council for the exclusion of land at Temple Farm during the Regulation 19 consultation period compared against proposed allocations.

1.13 Furthermore, and fundamentally, the absence of Appendix B did not, by virtue of being unavailable during the Regulation 19 consultation, affect all stakeholders equally. Those site promoters whose land had been correctly assessed within the earlier 2016/17 SSR could continue to understand and respond to the reasons why their site(s) was included or

excluded for allocation. Such clarity was not available to Dandara Ltd who, at the time of writing their representations to the Regulation 19 Local Plan, knew neither whether the correct site area had been assessed nor the reasons why the site was excluded.

(2) Informing the Local Plan and Key Evidence Base Documents

- 1.14 As confirmed within CK Properties, it is fact that Appendix B of the SSR was published on 14th March 2018 once finalised. In direct conflict with para. 8 of the SCI, if Appendix B was only finalised on 14th March 2018, it could not have fully and properly informed decisions made within the Regulation 19 Local Plan, including in relation to housing allocations. This calls into serious question the value and purpose of the SSR if decisions on which sites to allocate and which to exclude are being made months in advance of the completion of this supposedly key evidence base document. It also raises the question of why the Council didn't simply delay consultation on the Regulation 19 Plan until the full evidence base was available in line with the SCI.

(3) Informing Member Decisions

- 1.15 As explained in the preceding paragraph, as Appendix B of the SSR was published on 14th March 2018, then it follows that when Members met on 14th December 2017 to approve the Regulation 19 Plan for consultation, they would have been unable to objectively and transparently consider the proposed housing allocations against reasonable alternatives, 'omission sites', due to the absence of Appendix B which is fundamental when making an informed judgement regarding the planning merits of individual sites. Members were being asked to approve the Plan for consultation when they were unable to understand the assessment process that resulted in some sites being proposed for allocation and others excluded.
- 1.16 We do not consider that the preparation of the Local Plan accords with the 2013 SCI. The absence of Appendix B of the SSR during the Regulation 19 consultation period means that a core evidence base document whose sole purpose was to objectively and consistently inform decisions on which sites should be chosen for allocation was unable to properly inform the preparation and content of the Plan as it progressed from Regulation 18 to Regulation 19 as required by para. 8 of the SCI.
- 1.17 The absence of Appendix B prejudiced the ability of all stakeholders to understand the rationale and assessment methodology behind those housing sites chosen for allocation and those excluded. We have given the specific example of land at Temple Farm, Roydon to demonstrate that the level of prejudice was not equitable across all respondents as those who did not have a site assessed within the earlier 2016/17 SSR or had a site incorrectly assessed, had absolutely no way of knowing why a site was or was not included for allocation within the Regulation 19 Plan.
- 1.18 Whilst the Council retrospectively gave an opportunity for affected respondents to formally comment on Appendix B of the SSR, Dandara Ltd firmly believes that the Regulation 19 Local Plan was prepared contrary to the SCI due to the absence of a core evidence base document which is absolutely fundamental for officers and Members to make fully informed, objective and consistent decisions on which sites to allocate for housing. We do not therefore consider that the Local Plan satisfies the legal compliance test under Section 20(5) (a) of the PCPA 2004 and Sections 17-22 of Part 6 of TCP (Local Planning) (England) Regulations 2012.

Issue 3, Question 3

“Has the Duty to Cooperate, as required by S33A of the Planning and Compulsory Purchase Act, been met?”

- 1.19 Para. 178 of the 2012 NPPF is clear that LPAs have a duty to cooperate on planning issues that cross administrative boundaries, particularly in respect of the NPPF ‘strategic priorities’ which includes housing.
- 1.20 PPG recognises that the DtC is not a duty to agree but “... *Local Planning Authorities should make every effort to secure the necessary cooperation on strategic cross-boundary matters before they submit their Local Plans for examination*”. It goes on to state that Local Planning Authorities will “... *need to bear in mind that the **cooperation should produce effective and deliverable policies** on strategic cross boundary matters*” (para. 001, ref ID: 9-001-20140306).
- 1.21 The most up-to-date SHMA for the West Essex and East Hertfordshire Authorities dates from July 2017 entitled ‘*Establishing the Full Objectively Assessed Need*’ (EB407). The SHMA identifies an OAN for the Authorities of 51,700 dwellings over the period 2011-33 which for EFDC equates to 12,573 or 572 dpa. The March 2017 MoU ‘*Distribution of Objectively Assessed Housing Need across the West Essex/East Hertfordshire Housing Market Area*’ (EB1202) includes at Figure 5 housing growth associated with the preferred spatial option which would see the delivery of 51,100 new homes across the HMA which is 600 homes short of the full OAN identified in the 2017 SHMA. Crucially for this examination, the EFDC contribution falls 1,173 units short of their identified 2017 SHMA OAN.
- 1.22 As explained within Section 8.0 of our Regulation 20 representations, Dandara Ltd has significant concerns that the constituent HMA Authorities alighted on a ‘preferred spatial option’ which, rather than being open to review and ongoing assessment, was ‘fixed’ when the MoU was signed in March 2017.
- 1.23 As an example, para. 3.3 of the MoU explains that the ‘preferred spatial option’ which delivers 51,100 homes “*is higher than both the established OAHN within the published 2015 SHMA (46,100), and the number suggested by the 2012-based CLG household projections alone (49,638 dwellings)*”. However, at the time of the MoU being signed in March 2017, the 2016 SHMA update had been published (EB406) and, based on the 2014-based household projections, had advised of an increased OAN for the HMA of 54,608. This SHMA update is dated August 2016 but there is no reference within the MoU, signed some seven months later, of the increased OAN nor a commitment to revisit the ‘preferred spatial option’.
- 1.24 Whilst OAN will be considered separately under Matter 3, Dandara Ltd considers that one of the driving forces behind the commissioning of a further SHMA update dated 2017, despite their being no change to the 2016-based demographic baseline assessed through the 2016 SHMA, was to align the OAN more closely with the 51,100 ‘preferred spatial option’ figure agreed through the MoU.
- 1.25 Fundamentally, whilst we understand the value of establishing broad ‘spatial option’ figures at HMA level, we do not consider that these can be treated as fixed and must be informed by constantly evolving site availability and assessment work at LPA level.

- 1.26 The Inspector will be aware of ‘omission sites’ being promoted through the Local Plan process and we consider that for the Plan to be found sound, given the HMA and District-level OAN shortfall, the Inspector must be satisfied that there are no additional housing sites in EFDC. Our Regulation 20 representations clearly demonstrate that this is not the case and, giving the example of Temple Farm, Roydon, there are inherently sustainable, deliverable sites that would result in little harm to Green Belt purposes but have been excluded due to a flawed site assessment process.
- 1.27 The Regulation 19 Plan is not considered to be sound as it has not been positively prepared, with an absence of effective and deliverable policies to address unmet housing need within the HMA. The evidence base does not justify why a higher housing delivery figure could not be accommodated within EFDC nor that the constituent HMA Authorities have engaged with other Authorities outside the HMA to accommodate the housing delivery shortfall.

Issue 4, Question 1

“Has the Plan been informed by an adequate process of Sustainability Appraisal (SA)? Have the requirements of the SEA Directive and Regulations been met?”

- 1.28 PPG advises that *“the Sustainability Appraisal needs to compare all reasonable alternatives including the preferred approach ... the development and appraisal of proposals in Local Plan documents should be an iterative process, with the proposals being revised to take account of the appraisal findings”* (para: 018, ref ID: 11-018-20140306).
- 1.29 Para. 6.15 of the 2017 SA (EB204) explains that the Co-op Member Board (CMB) considered six options for accommodating development across the HMA from circa 48,300 to 56,250 new homes alongside variations in the number to be delivered in and around Harlow. The CMB subsequently reported to AECOM who authored the SA that their preferred spatial option was to deliver 51,000 new homes across the HMA with 11,400 in EFDC.
- 1.30 The SA then assesses the CMB ‘preferred spatial option’ alongside six alternatives. The 2016 ‘SA of Strategic Spatial Options for the HMA’ (EB203) concludes that *“the [preferred] spatial option was identified as the most sustainable choice for the HMA”* (Section 4.3). We do not consider that the assessment undertaken by the SA is either independent nor sufficiently robust and has been pre-judged by the clear preference of the commissioning Authorities that the ‘preferred spatial option’ is considered the most sustainable option.
- 1.31 Taking the six reasonable alternative spatial options considered within the ‘SA of Strategic Spatial Options for the HMA’ we would make the following observations:
- (1) Only one of the six reasonable alternative growth options is able to deliver housing growth in excess of the CMB preferred spatial option of 51,000 at 57,400. This significantly limits the ability of the SA to consider reasonable alternatives that may be able to achieve OAN;
- (2) The only reasonable alternative considered for EFDC that could achieve OAN solely considers the option of additional housing growth in Harlow (pg. 6 of EB203). There is no assessment of the potential for locations outside Harlow to deliver additional housing that could assist with meeting OAN. As an example, the housing capacity of the ‘larger villages’ across all six reasonable alternatives is either nil or a fixed 146;

(3) Whilst six reasonable alternative growth options are considered within the ‘SA of Strategic Spatial Options for the HMA’, this assessment does not appear to include the 51,000 preferred CMB figure to allow a direct comparison of SA impacts to be made;

(4) There is a concern that as the SA is very much focused on assessing a housing target agreed and established at HMA level via the CMB, there is insufficient granular assessment of reasonable alternatives at a LPA specific spatial scale. For example, only one of the six reasonable alternative growth options considered for EFDC on pg. 6 of the ‘SA of Strategic Spatial Options for the HMA’ considers changes to housing growth levels outside Harlow and even then, considers one marginal increase to housing delivery in Loughton / Buckhurst Hill from 892 to 1,101;

(5) Whilst the 2016 SA (EB202) does consider five EFDC specific reasonable alternatives, these are all premised on the CMB agreed 11,400 housing target as a fixed value (Appendix III, pg. 56). The reasonable alternatives within the 2016 SA therefore only focus on where the 11,400 homes could be located, not higher growth options to meet OAN;

(6) Para. 7.6 of the December 2017 SA (EB204) explains that “it was not considered necessary to revisit alternatives for the level and distribution of growth for the HMA set out in the signed MoU (March 2017)”. We find this conclusion unsound given that the HMA figure was unable to meet OAN, with a significant shortfall in EFDC, and that all efforts should have been made to consistently consider reasonable alternatives to ‘leave no stone unturned’ when trying to deliver OAN.

- 1.32 Dandara Ltd considers that the SA has not satisfied the requirements of the SEA Directive and Regulations by failing to consider reasonable alternatives that can achieve higher levels of housing delivery without reliance upon Harlow which is constrained by infrastructure. Whilst Option F considers higher housing numbers, the principal difference relates to additional Harlow fringe sites rather than assessing alternative spatial growth options that, recognising infrastructure limitations of Harlow, consider alternative sustainable locations. It is considered that there are opportunities associated with settlements such as Roydon which benefit from mainline train services into the centre of Harlow thus benefitting from job, services and retail opportunities without adding to existing infrastructure capacity constraints.
- 1.33 It is not possible having regard to the SA to understand whether a higher growth option could be delivered without conflicts arising with para. 14 of the NPPF as the SA simply concedes to the direction of the CMB’s ‘preferred spatial strategy’ to deliver circa 51,000 new homes across the HMA in direct conflict with PPG advice that SAs represent an independent auditor of an iterative Local Plan preparation process. The SA in this case fails to discharge these obligations, simply advocating the ‘preferred spatial strategy’ with no meaningful assessment of whether a higher housing target could be achieved without conflict with para. 14 of the NPPF.