



Epping Forest Local Plan

Examination Hearing Statement

Matter 1 – Legal Compliance

Prepared by Strutt & Parker on behalf of City & Country

January 2019

Context

1. Strutt & Parker have made representations on behalf of City & Country (Stakeholder ID 19LAD0020) throughout the preparation of the Epping Forest Local Plan, in respect of two sites:
 - Land at Bowes Field, Ongar (site reference SR-0120)
 - Land at Sheering Lower Road, Lower Sheering (site reference SR-0121)
2. Participation in the plan-making process included representations on the Local Plan Submission Version (LPSV) (Regulation 19) consultation: representations ID 19LAD0020-1 (in respect of Bowes Field, Ongar); and 19LAD0020-2 (Sheering Lower Road, Lower Sheering).
3. Land at Bowes Field, Ongar is proposed to be allocated for development through the LPSV (allocation ONG.R2) as part of the West Ongar Concept Framework Plan Area.
4. Land at Sheering Lower Road, Lower Sheering (SR-0121) has been rejected for allocation through the plan-making process, albeit – in our view – based on erroneous assessment of the site, and without justification.
5. This Hearing Statement is made in respect of the Epping Forest Local Plan Examination Matter 1 – Legal Compliance, and concerns Issue 4 (Has the Plan been informed by an adequate process of Sustainability Appraisal (SA)? Have the requirements of the SEA Directive and Regulations been met?).
6. This Hearing Statement seeks to avoid repeating matters already raised within our representations on the Regulation 19 iteration of the Local Plan.
7. This Hearing Statement addresses Issue 4 of Matter 1 only, and the questions: has the Plan been informed by an adequate process of Sustainability Appraisal (SA)? And, have the requirements of the SEA Directive and Regulations been met?

8. The above question has been asked within the context of the consideration of the legal compliance of the Local Plan. Accordingly, our following response is framed within this context.
9. The LPSV was submitted for examination before 24 January 2019 – the deadline in the 2018 National Planning Policy Framework (NPPF) transitional arrangements for Local Plans to be examined under the 2012 NPPF. As such, these representations are made within the context of the 2012 NPPF; and references to the NPPF refer to the 2012 version, unless stated otherwise.
10. Four appendices accompany this Hearing Statement:
 - Appendix A: LPSV Supplementary Representations in respect of Sheering Lower Road, Lower Sheering (SR-0121).
 - Appendix B: LPSV Supplementary Representations in respect of Bowes Field, Ongar (SR-0120).
 - Appendix C: Kendall vs Rochford District Council [2014] EWHC 3866 judgment.
 - Appendix D: Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin) judgment.

Issue 4

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

Question 1

Is the SA comprehensive and satisfactory and has it sufficiently evaluated reasonable alternatives? In particular, I understand that a “dispersed” pattern of development was pursued as a result of the Community Choices consultation. Were alternative distributions considered through SA, such as a more concentrated pattern, or different dispersal patterns?

11. The requirement to undertake SA in respect of the Local Plan derives from the European Directive 2001/42/EC (SEA Directive), the relevant aspects of which in relation to plan-making are transposed into UK law through the Environmental Assessment of Plans and Programmes Regulations 2004 (Statutory Instrument 2004 No.1633) (SEA Regulations).
12. The SEA Regulations (Regulation 12) require preparation of an Environmental Report, that all reasonable alternatives be considered and assessed to the same level of detail as the preferred approach, and list the elements which should be included within the Environmental Report.
13. In addition, Regulation 16 of the SEA Regulations that the reasons for the selection of preferred alternative, and the rejection of others, be made set out (Regulation 16).
14. The Council’s preparation of the SA does give rise to concerns in relation to legal compliance. We set out our concerns in our LPSV representations and urged the Council to take action to address these to ensure the Local Plan would be legally

compliant. However, the Council has yet to take such actions. Nevertheless, it is not too late for the defects in the SA process to be cured.

15. An Environmental Report which seeks to meet the requirements of the SEA Regulations has been produced for the Local Plan (EB204: Sustainability and Equalities Impact Appraisal Non-Technical Summary (AECOM December 2017) (the 'LPSV SA'). As such, this requirement of the Regulations has been met.
16. However, we have a number of concerns relating to the LPSV SA.
17. Firstly, it is noted that the LPSV SA placed reliance on a separate document (the Report on Site Selection and makes a number of references to this separate report. This document (EB805) was not available in its entirety during the consultation period on the LPSV. Our concerns in respect of this are set out within our LPSV representations (paragraphs 2.1 to 2.10 of LAD0020-2) and we do not repeat these here.
18. In respect of the Report on Site Selection, in our view it robustly demonstrates why sites which *have* proposed to be allocated in the LPSV have been selected. The SA/SEA process has considered such sites in detail, and demonstrates that they are sustainable.
19. However, we do not consider that it has provided adequate reasons why those that have not been allocated have been rejected. This is of particular relevance given the LPSV claims the District cannot accommodate the District's housing needs in full.
20. As set out within our Supplementary Representations in respect of SR-121 (Lower Sheering) (provided here for completeness as **Appendix A**) once the Report on Site Selection referred to by the LPSV SA had been published, three elements were – to summarise our representations – particularly notable:
 - There were a number of factual inaccuracies in the assessment of Site SR-0121.

- The site's capacity was – based on a flawed assessment – deduced to be fewer than 6 dwellings. The site was rejected on the basis that it was not considered capable of accommodating at least 6 dwellings (as confirmed within Appendix B1.6.6 (EB805P)).
 - Our representations on the Regulation 18 iteration of the Local Plan, in which we had explained the factual inaccuracies in the assessment of site in the previous iteration of the Report on Site Selection (the 2016 report – EB801), had not been accounted for.
21. As set out within our LPSV Supplementary Representations at paragraphs 2.23 and 2.24, concerns in respect of legal compliance arise given flaws in the approach to the assessment of this site; and the fact such assessment work was relied upon by the SA.
22. Site SR-0121 was purported to have been rejected on the grounds it was not considered capable of delivering more than 6 dwellings. Given the specious reasoning applied in the rejection of this site, the legal requirement for SA to give the reasons for the rejection of alternatives cannot said to have been met in this instance – in effect, the Report on Site Selection (relied upon by the LPSV SA) simply confirms that Site SR-0121 *should* be allocated. The automatic rejection of sites considered capable of delivering fewer than 6 dwellings is of particular concern given: 1) the LPSV fails to meet objectively assessed needs in full, and EFDC's justification for this appears to be perceived lack of sufficient sustainable and deliverable sites to achieve this; and 2) the District is predominantly Green Belt, and the NPPF is clear that the Green Belt boundary should only be altered through the preparation of a Local Plan – sites currently in the Green Belt (regardless of size) cannot be brought forward unless allocated through the Local Plan. Reconsideration of smaller sites has, cumulatively, the potential to make a meaningful contribution to reducing the shortfall in housing supply.
23. We also made LPSV Supplementary Representations in respect of how Site SR-0120, Land at Bowes Field, Ongar (copy provided as **Appendix B** for completeness). Within these submissions, we raised issues regarding how the

site had been assessed, as well as concerns in respect of the SA process. We recognise, however, that issues in respect of how the site has been assessed would not affect how this site would be treated by the Local Plan – the site is proposed for allocation and corrections to the Report on Site Selection would only suggest the site was even more suitable for allocation. This is relevant vis-à-vis the SA and legal compliance as, as confirmed in the judgment in the case of *Kendall vs Rochford District Council* [2014] EWHC 3866 (Admin) (copy provided as **Appendix C**) *if* there has been in a breach in the SEA Regulations, it is still necessary to consider whether this would have affected the plan. We note the following from the aforementioned judgment:

“It is necessary, first of all, to focus on the precise nature of the breach of the SEA directive in this case. The breach can only be looked at in the context of the whole process, as it must be, once it has been seen for what it actually was. And only then can one judge whether any real prejudice flowed from it, and whether the outcome of the process might conceivably have been different if it had not occurred.” (Paragraph 116).

“This does not mean that there was no breach of the SEA directive, only that any harm done by the breach that did occur was, in my view, fully repaired within the plan-making process itself and well before the plan’s eventual adoption. The breach, such as it was, did not result in [the claimant] or anyone else being denied the substance of any right arising under European law...” (Paragraph 121)

“Is it conceivable that the outcome of the plan-making process would have been different if the breach had not occurred? I cannot believe that it is. The way I have put this question corresponds to what the court said in paragraph 52 of its judgment in *Altrip*. But if the touchstone here is whether the council has shown that the outcome would inevitably have been the same, my answer is no different. I am satisfied that the outcome would inevitably have been the same.” (Paragraph 123).

Curing defects in the SA process to ensure legal compliance

24. Whilst defects in the SA process have not prejudiced proposals in respect of Site SR-0120 they have clearly resulted in the unjustified rejection of site SR-0121 at Lower Sheering. Whilst corrections to the process would inevitably result in Site-0120 being proposed for allocation still; such corrections – particularly in the context of the LPSV’s failure to meet development needs in full – should identify SR-0121 as sustainable (and deliverable, given the function of the Report on Site Selection) for residential development.
25. As established through the judgment in the case of Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin) (copy provided as **Appendix D**), defects in the SA process can be cured through additional SA work. The judgment also confirms such additional work can be undertaken post submission and after the examination has commenced.
26. As such, we are of the view that the Local Plan can be made legally compliant and that it is not irretrievably flawed. We consider it is particularly important to ensure this Local Plan can be made to be legally compliant given the severity of the District’s housing needs; the fact that only a fraction of these needs can be met without Green Belt release; and that alterations to the Green Belt are only possible through the Local Plan process. We consider that to remedy the LPSV is of far greater preference than to simply reject the plan, as it has robustly identified and proposed sites for allocation which will at least assist in alleviating the District’s current housing shortage.
27. We suggest the following action is required to be undertaken before the Local Plan can be considered legally compliant in relation to SA. We consider this an expedient approach to ensure a legally compliant Local Plan is in place for the District:
 - a. The site assessment work undertaken to date be updated to address factual inaccuracies and other matters raised during previous consultation stages in respect of sites which have been rejected. Sites should not be rejected on

the basis that they are not considered capable of delivery a certain number of dwellings.

- b. Updated site assessment work to be integrated into the SA process.
- c. Decision-makers to consider the results of the updated site assessment work, and reconsider rejection of sites based on the previous, flawed, evidence.
- d. Revised SA, or Addendum to the LPSV SA, to be produced in which site assessment work is fully integrated, and in which the reasons for the rejection or selection of sites is set out.
- e. List of modifications to the LPSV be prepared, accounting for the revised SA / LPSV SA Addendum, and published for consultation alongside the revised SA / LPSV SA Addendum, in accordance with Regulation 13 of the SEA Regulations.