Strategic Planning & Research Unit

For and on behalf of
Peer Group PLC

Epping Forest District Council Local Plan Examination
Response to MIQ's Matter 14: Infrastructure and Delivery

Ongar Park Estate
North Weald Basset

Prepared by
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MATTER 14: INFRASTRUCTURE AND DELIVERY

Issue 1: Will Policy D1 be effective in securing the infrastructure necessary to support development before it takes place?

1) Is Policy D1 clear that any infrastructure necessary to support a development must be provided up-front/in time to serve the development?

1.1 No

2) Should Part A and the relevant supporting text explain that infrastructure and services for which contributions etc. could be sought might be derived from made Neighbourhood Plans as well as from the Infrastructure Delivery Plan? (Reps Chigwell PC).

3) In Part B, how would a potential developer find out specifically which items of infrastructure might be required as part of their scheme? Is this clear?

1.2 No

4) In Part C, is it intended that all the clauses (i)-(iv) should apply for an exception to be considered on viability grounds? If Part C(i) did not apply, would this risk development proceeding that could not be supported by infrastructure? Would this be justified?

1.3 We do not consider D 1 part C to be sound as it is not effective, in particular

a. In part (i) it is not clear what the Council considers to be meant by harm. Furthermore, it suggests that the default position is that development must mitigate all harm (i.e. full mitigation) whereas not all harm is required to be mitigated. The 2012 Framework paragraph 118 suggest that harm can be caused and not mitigated, paragraph 152 refers mitigating or compensating.

b. In part (iii) the Council can only require such investigations to be proportionate with the scale of the application and scale of the infrastructure issue.

c. In part (iv) any obligations agreement entered into by the Council and applicant must be in conformity with the CIL regulations. We do not consider this policy to be justified. Secondly it is not effective, how would such an obligation be monitored?

   This relates back to paragraph 6.17 of the plan that refers to s106 agreements including "clawback" Clauses that seek to ensure:

   "Fullest possible compliance with local plan policy is achieved where the viability improvs before completion".

   This policy in effect proposes that the council should be able to open up viability agreements during the construction of a site in order to share in the profits generated by the development.

   It is our view that this is not in accordance with the framework paragraphs 204 – 206, which suggest agreements maybe revisited to prevent applications from being stalled but not to allow the council to profit share.

   It is noted that such arrangements are particularly inappropriate for single phase developments as suggested by the following appeal decisions (in the context of the 2012 Framework).

1.4 The following are a summary of inspector's conclusions on this matter in the context of the 2012 Framework and Guidance.

Appeal decision APP/V2635/A/14/2217840

Paragraph 36 – looks at the Council's proposal that the s.106 should be subject to a clause to allow the review of the affordable housing contribution on completion of the scheme or, say, after half of the flats have been sold. The Inspector states: 'However, this would be contrary to the advice in the RICS Professional Guidance GN 94/2012 Financial Viability in planning (GN). GN paragraph 3.6.4.1 explains that such re-appraisals are generally suited to phased schemes over the longer term, rather than a single phase scheme to be implemented immediately, which requires certainty. The PPG also advises that viability assessment in decision-taking should be based on current costs and values. Whilst the PPG includes a proviso concerning phased delivery in the medium and longer term, it says that planning applications should be considered in today's circumstances.

Appeal decision APP/N0410/1/13/2207771

*12. Paragraph 8.12 of the Council's Affordable Housing Supplementary Planning Document (SPD) indicates that an overage should normally be included in obligations where a reduced contribution is appropriate. The implication of this is that any profit margin achieved above 20% of gross development value would be partially '**clawed back**' by the Council at a rate of 40% of any additional revenue achieved. This is a clause that would now be insisted upon following the publication of the SPD in July 2013.*

*13. The PPG confirms that viability assessment in decision-taking should be based on current costs and values. Where a scheme requires phased delivery over the medium and longer term then changes in the value of development and in the costs of delivery may be considered. However, the proposal for 39 flats with an estimated build time of 18-24 months does not fit that description. The Council noted that others had entered into obligations on this basis but **this does not form one of the tests at paragraph 204 of the Framework.***

*14. There is furthermore **nothing in national planning policy or guidance that supports this approach** for a scheme of this size. Developers operate in a high risk environment and an overage would introduce post implementation uncertainty. It is also likely to hamper the competitive return referred to in the Framework and the PPG. In this case, the developer has been attempting to bring development forward for over 10 years. The Government is seeking to boost significantly the supply of housing and such a clause would be likely to act as a serious disincentive to the implementation of the proposal.*

15. Whilst contrary to the SPD the omission of an overage clause does not make the development unacceptable in planning terms.

Appeal decision APP/V2635/W/15/3004252

*10. A suggestion made by Councillors when assessing the appeal and by those speaking on behalf of local residents at the Hearing was that some form of **'clawback'** clause or deferred contingency payment should be agreed with the Appellant. This would mean that if finances at a later date in the development process were more favourable than now expected a contribution could be forthcoming.*

11. However, Government guidance on viability assessments entitled Section 106 affordable housing requirements: Review and appeal emphasises the need for viability evidence to be based on current costs and market values. In contrast though a 'clawback' clause or similar would be introducing a further assessment of viability

based on costs and sales returns at some time in the future. In my opinion this would inevitably introduce uncertainty into the project's funding arrangements that, in turn, could have implications on the overall viability. While stronger arguments for such a clause may exist in relation to multi-phased schemes that is not the case here as the development is almost certainly to be completed in a single phase. Therefore, a ***'clawback'*** *clause or similar* ***would be contrary to Government guidance*** *and would not be suitable.'*

Appeal APP/N0410/A/14/2228247

8. The disagreement between the parties relates to the Council's request for an ***overage clause*** *to be included within the UU. This clause would require a viability review to take place and subsequent additional contribution to be paid to the Council should the viability review demonstrate an increase in the viability of the development. The appellant has argued that this request is not reasonable or necessary in accordance with the tests identified within Regulation 122 of the Community Infrastructure Levy Regulations 2010.*

9. The Council accepts that the overage clause requirement is not part of the development plan. The requirement for such a clause is referred to in paragraph 6.15 of the South Bucks District Council Affordable Housing Supplementary Planning Document (SPD) 2013. This paragraph states, amongst other things, that the Council will normally require an overage clause as part of the UU and that this approach reflects the objectives of the Core Strategy which are to maximise the amount of new affordable housing.

10. The Planning Practice Guidance (PPG) was published in March 2014 and post-dates the SPD. Paragraph 17 of this document is clear that viability assessment in decision taking should be based on current costs and values and planning applications should be considered in today's circumstances. The only exception to this is where a scheme requires a phased delivery over the medium and longer term and in this case, changes in the value of development and changes in costs of delivery may be considered. The appellant confirmed at the Hearing that the proposal would be undertaken as a single phase development. The construction programme identified by the appellant cannot be regarded as medium to long term. In this way, I am of the view that the PPG supports the appellant's case.

11. The appellant has referred to a recent appeal decision within South Bucks District Council (appeal reference APP/N0410/A/13/2207771) which supports the approach taken by the appellant in connection with this appeal. The Council do not agree with this approach. I agree that whilst the approach maybe contrary to the guidance contained within the SPD, the omission of the overage clause does not make the development unacceptable in planning terms.

12. The Council argued that the overage clause is not prohibited by the Framework and the SPD supports the overall objectives of the Council which include maximising affordable housing contributions from market housing development proposals. Furthermore, the Council put forward various arguments at the Hearing in relation to post development uncertainty. I have considered all of these issues in detail. However, they are not central to the conclusion I have come to above, namely that the request for the ***overage clause is at odds with the guidance contained within the PPG and would not accord with the provisions of Regulation 122 of the Community Infrastructure Levy Regulations 2010 and the tests for planning obligations set out in the Framework****.*

13. Taking the above matters into account, I am unable to conclude that the ***overage clause*** *sought would be necessary, related to the development and fairly related in*

scale and kind. As such, it ***would not accord with the provisions of 4 Regulation 122 of the Community Infrastructure Levy Regulations 2010 and the tests for planning obligations set out in the Framework****."*

1.5 In conclusion reference to the appropriate Planning Practice Guidance, CIL test, NPPF paragraph 204, the guidance 'Section 106 affordable housing requirements: review and appeal' and the RICS guidance, then the use of "clawback" clauses in 106 for single phase developments would appear to be unenforceable and hence unsound as the policy would be ineffective.

Issue 2: Are the requirements of Policy D2 concerning health Impact Assessments (HIA) justified, effective and consistent with national policy?

1) **Is it clear in the policy wording and the supporting text that the purpose of HIA concerns wider health and well-being matters beyond health infrastructure?**

2) **Essex County Council has indicated that the Department of Health does not issue guidance on HIA. Do the references within the policy require updating? Is specific guidance on the matters to be covered required within the Plan itself?**

3) **What type of information is expected in a HIA and how will developments respond to their recommendations?**

4) **Is there value in requiring HIAs for allocated sites, or should the health impacts already have been assessed through the plan-making process?**

5) **Is the threshold for the production of an HIA at 50 dwellings proportionate?**

Issue 3: Is Policy D3 justified in requiring developers to fund improvements to utilities infrastructure where capacity issues exist?

1) **Is it correct that utility providers have a duty to provide services to new development? If so, is Part B justified?**

Issue 4: Is Policy D4 effective?

1) **For the purpose of Parts B and C, how will a developer know specifically whether and what community infrastructure is required as part of the scheme?**

2) **In relation to Part C, is it necessary to define strategic, larger and smaller developments, or is this clear elsewhere in the Plan?**

3) **What is the purpose of having separate criteria in parts G and H? Are they intended to apply to different types of development? Why is marketing required in Part H but not Part G?**

Issue 5: Are Policies D5-D7 justified, effective and consistent with national policy?

• No specific questions.

Policy D 6 Neighbourhood Planning

3.1 This is an aspiration of the Council and not a planning policy. Therefore, it cannot be considered to be effective. This policy should be deleted from the Plan.

Policy D 7 Monitoring and Enforcement

3.2 This policy is not effective, it is not at all clear how the Local Plan will be monitored. The section regarding planning enforcement is unnecessary, it is a statement and not planning policy. It is noted that this policy does not even relate to the monitoring framework in Appendix 3.

3.3 Given the justification for the timing of the submission of the plan was to avoid the council from having to plan to meet the up to date Local Housing Need then if we are unsuccessful in convincing the inspector to find the plan unsound then the plan will certainly require an immediate review.

3.4 The 2019 Framework requires local plans to be reviewed in 5 years and 5 years from the date of adoption the housing requirement figure becomes out of date (Paragraph 73), however the seriousness of the shortfall in the housing allocations compared to the emerging LHN calculation would require an immediate review to be written into the plan policy.

3.5 To be effective a policy for the immediate review will need to be written into the plan and it will need to set out a specific timescale and highlight the issues that need to be revisited. In this case both the housing requirement and green belt boundaries will require reconsideration in this early review of the plan.

3.6 Two examples of such policies in recently adopted plans are:

3.7 Luton LLP40 requires commencement of a full review in 2019 and submitted for examination by mid 2021 and lists elements that require review

3.8 Swale Policy ST2 which sets out the timescale for adoption of the revised plan (in that case 2022)

3.9 A similar policy to the Luton Policy would be required. In the case of Epping Forest the following should be identified in the policy as requiring reassessment in any immediate review:

a. The Local Housing Need
b. Housing Allocations
c. Green Belt Boundaries

Appendix 3 Measures to Monitor the Effectiveness of Policies in the Local Plan

3.10 The monitoring framework set out on page 218 onwards of the Plan is not effective, it does not establish an effective means for monitoring the success of the Plan for the following reasons:

a. The table is proposed as a minimum of what will be used, it does not seem rational to include new monitoring indicators part way through the Plan period.

b. The monitoring indicators do not all make sense. Those for SP 1 fail to identify what are they monitoring, the targets, or the implications if targets are not met. This just seems to be a list of contextual information that could be used when starting a review of the Plan. The indicators with regard to housing, do not make clear their purpose or the reason that only 75% of the annualised requirement or completion rate is met for 3 years. The housing requirements should be met on an annual basis. The Plan should clearly set out what will happen if it fails to meet the housing requirement.

3.11 To ensure the Plan is sound, we consider meaningful indicators should be used, which can be easily monitored, and the Council should clearly set out what actions it will take

if targets are not met. This is important as these will be indicators included within the Council's Annual Monitoring Report.

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