

# North Essex Section 1 Local Plan Sustainability Appraisal: Implications of the Heathrow Court of Appeal Decision

## Introduction

A submission has been made to the North Essex Section 1 Local Plan Examination (EXD/091) by CAUSE and Matthew O'Connell, which, in summary, states that:

*“The Heathrow Court of Appeal ruling of 27 February 2020 has significant implications across the national planning sphere... It gives rise to a high likelihood that the North Essex Authorities Section 1 Plan (if found sound by the Inspector) would be successfully challenged in the courts on similar grounds, around failure to consider climate change appropriately.”*

The submission raises a series of detailed points with respect to the preparation of the North Essex Section 1 Local Plan, and its accompanying Sustainability Appraisal (**SA**). It is contended that, in light of the Heathrow judgment, the Section 1 Local Plan, and its supporting evidence base, does not properly consider climate change. The criticisms are focussed on the lack of specific reference to, and direct consideration of, the Climate Change Act 2008 and the Paris Agreement (and the targets / phasing therein), and the purported failure to quantify or meaningfully address emissions arising from Local Plan.

The Inspector has requested the North Essex Authorities (**NEAs**) provide their view on the implications of the Heathrow judgment for the North Essex Section 1 Local Plan.

This paper has been prepared by LUC, as authors of the Additional SA, on behalf of the NEAs in response to that request, with input from Dentons, as lawyers advising the NEAs.

## Heathrow judgment

The Court of Appeal in the Heathrow case<sup>1</sup> found that the Secretary of State had not complied with his duties under section 5(8) of the Planning Act 2008 when designating the Airports National Policy Statement. In failing to do so, the Court held that that Secretary of State had acted unlawfully. Under section 5 of the Planning Act 2008 a national policy statement (**NPS**) must give reasons for the policy set out in the statement. Section 5(8) provides that *“the reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change”*.

The Section 1 Local Plan is not a NPS, and nor is it a document to which the Planning Act 2008 applies. Specifically, it is not a document to which section 5(8) applies and, as explained more fully below, there is no direct equivalent of the section 5(8) duty in relation to local plans. As a result, the Heathrow judgment itself does not have any direct bearing on the Section 1 Local Plan.

As noted in paragraph 4(i)(a) of EXD/091, the question is whether there is a requirement to take government policy relating to climate change into account in the context of the preparation of a local plan (which there clearly is), and whether the NEAs have had proper regard to climate change in accordance with their legislative duties, having regard to the relevant policies.

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<sup>1</sup> [2020] EWCA Civ 214

## Relevant legislative framework

The North Essex Section 1 Local Plan has been drawn up under different legislation to that considered by the Court of Appeal – namely the Planning & Compulsory Act 2004, and the Town and Country Planning (Local Planning) (England) Regulations 2012. Section 19(1A) of the Planning & Compulsory Purchase Act 2004 includes a requirement that:

*“Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change”.*

The NEAs, when exercising their plan-making functions, are required by section 39(2) of the Town and Country Planning (Local Planning) (England) Regulations 2012, to do so with the objective of contributing to the achievement of sustainable development and for that purpose must have regard to national policies and advice contained in guidance issued by the Secretary of State in relation to local development documents (section 39(3)).

The requirement is to have regard to national policies. This does not require a forensic analysis of each policy and nor does it require the authorities to act in accordance with any particular policy. This is a less prescriptive requirement than that in section 5(8) which requires an explanation of how government policy has been taken into account.

CAUSE and Mr O’Connell refer to paragraph 94 of the 2012 NPPF which states: *“Local planning authorities should adopt proactive strategies to mitigate and adapt to climate change, taking full account of flood risk, coastal change and water supply and demand considerations.”* That is an overarching requirement and was taken into account, along with the rest of the NPPF, in decisions relating to the Section 1 Local Plan.

The Planning Practice Guidance provides guidance on how local planning authorities should identify appropriate mitigation measures in plan-making. It notes that:

- Robust evaluation of future emissions will require consideration of different emission sources, likely trends taking into account requirements set in national legislation, and a range of development scenarios.
- Information on carbon emissions at local authority level has been published by the government for 2005 onwards, and can be drawn on to inform emission reduction options. Information is also available on GOV.UK on how emissions are reported against the national target to reduce the UK’s greenhouse gas emissions by at least 80% (from the 1990 baseline) by 2050.
- The distribution and design of new development and the potential for servicing sites through sustainable transport solutions, are particularly important considerations that affect transport emissions. Sustainability appraisal should be used to test different spatial options in plans on emissions.
- Different sectors may have different options for mitigation. For example, measures for reducing emissions in agricultural related development include anaerobic digestion, improved slurry and manure storage and improvements to buildings. In more energy intensive sectors, energy efficiency and generation of renewable energy can make a significant contribution to emissions reduction.

## SEA Directive

CAUSE and Mr O’Connell do not suggest that there has been a breach of section 19(1A) or section 39. The crux of their criticisms (raised in section 5) is the alleged failure to take into account the Paris Agreement and the Climate Change Act 2008 in the SA.

Article 5(1) of the SEA Directive stipulates that where a SA is required a report must be prepared, which includes the information referred to in Annex I of the SEA Directive.

Article 5(2) makes clear that that the report "*shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.*"

The information required by Annex I(e) information includes: "*the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation.*" The SEA Directive requires the "*environmental protection objectives*" to be included. It does not require each and every relevant international or domestic policy to be referenced by name.

### Consideration of climate change in the SA

At all stages of the SA process the NEAs have had regard to climate change and environmental protection policies.

#### Original SA

The original SA, prepared by Place Services (June 2017) accompanied the Reg 19 publication draft of the North Essex Section 1 Local Plan. It was designed to meet the reporting requirements of the SEA Directive/Regulations, including providing baseline information and international and national policy objectives, as well as identify the significant effects of implementing the Section 1 Local Plan and reasonable alternatives.

- Annex A (Plans and programmes) includes reference to several international and national policy documents that highlight the need to reduce carbon emissions. The main aims and objectives are summarised.
- Annex B (Baseline information) includes a detailed section (11) on Climate and Energy, which sets out the carbon emissions for each by district by source (industry and commercial, domestic and transport)
- The SA Framework includes a specific objective (SA objective 10), which was '*To make efficient use of energy and reduce contributions to climatic change through mitigation and adaptation*'.
- The Framework for Assessing Garden Community Options used a different set of objectives. Several of those have direct or indirect links seeking to contribute to climate change mitigation. For example, Objective 4 (Transport) included four criteria that sought to appraise how well Garden Community proposals would achieve sustainable modes of transport, and Objective 9 (Environmental Quality & Sustainability) included two criteria that related to low/zero carbon technologies and innovation beyond zero carbon in building standards through construction design.
- All spatial strategy or policy alternatives were appraised against either SA objective 10, or those objectives used for appraising the Garden Communities that had direct or indirect links to contributing to reductions in carbon emissions.
- Cumulative and synergistic impacts of Policies SP1 to SP7 in the Section 1 Local Plan were appraised against SA objective 10 (Climate) in Chapter 6 of the SA Report. Cumulative and synergistic impacts of Policies SP8 to SP9 (the three Garden Community policies) were appraised

against the Garden Community objectives as described above, which directly and indirectly addressed climate mitigation considerations.

- Section 7.2 of the original SA Report included an appraisal of the sustainability of Section One as a whole against each SA objective, including SA objective 10 (Climate).
- Reference was made to climatic factors throughout Appendix 1 (Appraisal of the Garden Community Options and Alternative Permutations). This was directly focused on zero-carbon/energy-positive technology to ensure climate resilience (Objective 9), but also indirectly through the findings of the appraisal in relation to transport (Objective 3), which would have an indirect relationship with carbon emissions, although this was not explicitly brought out.

The original SA Report was a qualitative, rather than quantitative assessment, typical of many SAs of Local Plans. That was a reasonable approach to take given the strategic nature of the Section 1 plan. To quantify the effects would have required transport modelling of not only the preferred spatial strategy, but every other reasonable alternative, in order to provide consistency in approach. That would have been wholly disproportionate, and is not required by Article 5(2).

### Additional SA

The Additional SA was produced by LUC in July 2019. Its purpose was to carry out further SA work with respect to reasonable alternative strategic sites and spatial strategies to address specific concerns that the Inspector had with regard to these aspects of the original SA.

As such, the Additional SA did not provide, and nor did it need to provide, new sections on plans and policy reviews and baseline information, although it did use the most up-to-date spatial baseline data to inform the appraisal of effects.

The Additional SA used the SA objectives in the SA Framework as the basis for the appraisal. This included SA objective 10 (To make efficient use of energy and reduce contributions to climatic change through mitigation and adaptation).

Paras 3.121 and 3.122 of the SA Report noted that:

*“All strategic sites are of a scale that should be able to include renewable energy technology to provide at least 20% of the projected energy requirements of major developments, as well as requiring appropriate energy conservation measures and providing for sustainable urban drainage, resulting in minor positive (+) effects.*

*“Carbon emissions from transport was not assessed under [objective 10], because accessibility and use of sustainable modes of transport were assessed under a number of other SA objectives (e.g. SA objectives 3, 4, 5, 7 and 8) whereby those strategic sites that scored positively under these objectives might also be considered to perform well under SA objective 10 with respect to carbon emissions.”*

The many factors that influence carbon emissions are reflected in Table 2.4 (Site appraisal criteria linkage to SA framework), which shows that 12 site appraisal criteria can be linked to SA objective 10 (Climate change). This reflects the PPG advice that robust evaluation requires consideration of different emission sources.

Therefore, consideration of carbon emissions from transport was addressed through consideration of the other SA objectives that all have an influence on carbon emissions. This was set out at high level in the summary of findings of the SA of alternative spatial strategies in Chapter 4 of the Additional SA.

In common with the original SA no quantitative analysis of carbon emissions, for example through transport modelling, were undertaken, either of the preferred strategy included in the Section 1 Local

Plan, or reasonable alternatives. However, quantitative assessment was used with respect to distance criteria (e.g. to services and facilities, and to sustainable transport modes, including walking distances). This is a commonly used approach for SAs of Local Plans. The Additional SA considered 23 reasonable strategic sites, each with up to 5 alternative scales of development, plus 18 reasonable alternative spatial strategies. In order to have carried out robust assessment, the transport model would have had to assess each strategic site and its various range of scales, and each spatial strategy. That is not required or proportionate for a spatial plan.

The Inspector has concluded that the RTS was not deliverable, and that two of the proposed garden communities should be deleted from the Section 1 Local Plan. Further SA work is being prepared to address the proposed main modifications. That further SA will include an appraisal of the Section 1 Local Plan as proposed to be modified against SA objective 10 (Climate). Although not required, the further SA will also make direct reference to the Climate Change Act 2008 and the Paris Agreement.

### Analysis of the approach taken

EXD/091 suggests that it is very possible that less isolated / smaller sites (including urban extensions) could perform far better than large garden communities, because they would not require large-scale sustainable transport intervention delivered over a long period of time, but instead have access to trains and existing buses from Day 1. However, it is possible that large garden communities could provide the scale required to deliver new bus services, quite apart from a rapid transit system, which could serve not only the garden communities but also other existing and planned development from an early stage in the delivery of the development, whereas smaller sites may not offer these advantages of scale.

This is why the SA work, and in particular the Additional SA, which appraised all of the strategic sites and reasonable alternative spatial strategies, focused on what it could measure with reasonable confidence, being the accessibility to services and facilities, and modes of public transport that either exist or would likely to be delivered under each alternative. From this analysis, qualitative judgements, based on quantitative information, could be made.

The SA considered the likely effects of the approach to development, including the use of low carbon technologies, in coming to reasonable judgements of effects compared to how they would otherwise arise without the policies in the Local Plan.

Considerable emphasis was placed in the appraisal on access to services and facilities, jobs, and public transport (i.e. which are ways of 'mitigating' potential carbon emissions that would otherwise occur if they did not exist or were not provided). These were reflected in a number of SA objectives, most notably SA objectives 3 (Health), 4 (Vitality and viability of centres), 5 (Economy), 7 (Sustainable travel) and 8 (Accessibility and infrastructure provision). The Additional SA clearly pointed out that those strategic sites that scored positively under these objectives might also be considered to perform well under SA objective 10 with respect to carbon emissions, and the same goes for spatial strategies. The findings of the SA in relation to these SA objectives were central in coming to conclusions as to the comparative performance of different strategic sites and spatial strategies.

### Conclusion

There is no requirement for the NEAs to specifically refer to the Climate Change Act 2008 or the Paris Agreement, and the absence of any express reference to these policies does not render the plan unsound. The environmental policy objectives of reducing carbon emissions were plainly taken into account during the preparation of the Section 1 Local Plan, and the framework against which policies are assessed in the SA.

The target in the Climate Change Act 2008 to reduce carbon emissions to at least 80% lower than the 1990 baseline by the year 2050 (and subsequently updated) is a national target. To be successfully achieved this will require a whole range of policy and fiscal mechanisms all working in tandem. Probably the most important of these is the change of source of energy from fossil fuels to renewable energy. Local Plans can encourage renewable energy production as installations in their own right but also as integral components of development proposals. However, at the strategic level, the most significant contribution that Local Plans can make is to reduce fossil fuel consumption through traffic generated by new development.

The effects on contributions to climate change were considered through the SA process, using a combination of measures. Many of these focused on access to services and facilities, jobs and sustainable transport modes (including walking), which can significantly influence travel choices and behaviour and associated carbon emissions. In doing so through the SA, the NEAs took into account climate change factors. Express reference to either the Climate Change Act 2008 or the Paris Agreement would not have changed the assessment.

It is considered that the approach adopted was a proportionate one that enabled the NEAs to come to a decision on the appropriate strategy to prefer when considered against all the SA objectives, including those relating to climate change, and other evidence base.

It should be noted that further SA work is being prepared to address the proposed main modifications. Although not necessary this will make direct reference to the Climate Change Act 2008 and the Paris Agreement. It will also reflect the Inspector's conclusion that the RTS was not deliverable, and the consequent deletion of two of the proposed garden communities from the Section 1 Local Plan. The proposed main modifications indirectly address the concerns raised that the reliance on the RTS of those two communities had not been properly modelled and assessed.