



North Essex Authorities (NEAs) Section One Shared Strategic Plan

Matter 5: Delivery Mechanisms and State Aid

Further Hearing Statement

December 2019

MATTER 5 – DELIVERY MECHANISMS AND STATE AID

INTRODUCTION: Questions for the North Essex Authorities and NEGC Ltd

The questions in this section address issues of delivery models and State Aid. The NEAs case is that:

- The draft Local Plan does not prescribe a delivery model. As is entirely normal in Local Plans it allows for development to be brought forward by private sector developers. For each of the garden communities there are developers who confirm their view that development is deliverable and viable.
- Given the nature and scale of the developments, and to test their robustness, the NEAs have also considered the possibility of a public sector body taking the master developer role. This is an approach for which the Government legislated, promoting Locally Led New Town Development Corporations, and, since the first Examination hearings, have published regulations and supporting guidance. As Councils the authorities have incorporated NEGC Ltd to explore the opportunities and to stand ready, if necessary, to bring forward the garden communities perhaps using the LLNTDCs. Development Corporations have a long pedigree delivering large scale new settlements. NEGC Ltd has carried out a significant level of analysis across all garden communities to demonstrate their deliverability and viability.
- The level of information and evidence that has been provided by the NEAs, the private sector developers and NEGC Ltd on viability and deliverability is significantly greater than has been provided in support of other draft Local Plans.
- The possibility of either private sector or public sector delivery is a sensible and prudent approach. It gives confidence that the draft Local Plan proposals are deliverable and viable.
- There is no plausible basis for suggesting that the identification of a site in a Local Plan or an outline of possible delivery models can constitute State Aid. When sites are brought forward the State Aid implications of the proposed approach to delivery will, as always, be considered. There is no plausible basis for suggesting that there is even a risk of State Aid.

- The suggestion that the grant of HIF support could amount to State Aid has no evidence to support it. In any event the lawfulness of that Government decision must, in the absence of a successful challenge, be presumed.

Delivery Mechanisms

1. A number of participants argue that delivery of the proposed garden communities could be more effective if it were led by private-sector developers than by a public-sector body. Please respond to these arguments.

5.1.1 The Section 1 Local Plan is delivery model blind.

5.1.2 There are private-sector developers interested in each of the garden communities, each of whom believes that the proposals are viable and deliverable.

5.1.3 The NEAs have made clear that they believe a Locally Led New Town Development Corporation (LLNTDC) may also be an appropriate model for delivering the garden communities. The NEAs consider that a public-sector delivery body and, in particular, a LLNTDC offers the following advantages over a private-sector developer:

- Administrative cohesiveness and control. As all three of the garden communities are likely to be cross-boundary, a close working relationship will be needed between the relevant authorities.
- Long-term commitment to delivery. The garden communities are a long-term project that require a long-term commitment. The public sector is likely to be better placed to continue to deliver high quality development throughout the inevitable economic cycles on a project of this scale.
- A clear and direct ability to use compulsory acquisition powers for the purposes of delivering the new community, if required.
- Statutory duties to embed stewardship principles from the outset of development and to secure good design, sustainability and community participation.

- The ability to ensure coordinated funding and delivery of strategic infrastructure.
- An ability to equalise infrastructure requirements and land values in a way that reflects the proper planning principles set out in the draft Local Plan.
- Through the use of an LDO, and with public land ownership, an ability to ensure that the standards of development continue to meet best practice ambitions.

5.1.4 The NEAs have not made any decision about the delivery model, and it may be that different models are used in different communities. If a private sector master developer can deliver the ambitions in the Local Plan then there would be no role for an LLNTDC in relation to that garden community. Conversely a publicly led developer, perhaps through an LLNTDC, provides confidence to the NEAs that there is a mechanism to secure delivery of the Local Plan aspirations if a master developer does not bring forward appropriate proposals at the right time.

2. Is there justification for the proposed requirement in policy SP7 criterion (ii) for new models of delivery to be deployed where appropriate?

5.2.1 At the heart of the NEAs' strategic vision are the garden communities. The scale and nature of garden communities requires planning and investment over a longer period than existing models of housing delivery. Best practice in building, housing need, sustainability, financing and other areas will change over time. The approach to delivery will have to be sufficiently flexible to cope with such changes. The Section 1 Local Plan Vision explains that the residents will live in high quality, innovatively designed homes accommodating a variety of needs and aspirations. The NEAs are aware that modern methods of construction, including offsite manufacture and onsite techniques, may help to deliver that vision. At the heart of garden communities is a need to focus on the engagement and participation with existing and future communities. That will require greater collaboration between those delivering the communities, the planning and other authorities and the public. For these reasons the way in which delivery works is unlikely to be the same as existing models of delivery – there will need to be greater

partnership, more flexibility, longer term planning and a focus on lifecycle quality.

- 5.2.3 The proposed wording of policy SP7 recognises that new models of delivery should only be used "where appropriate"; that wording recognises that in some cases the 'traditional' models of delivery, may be appropriate, but in other cases the overall vision and policy objectives may be more appropriately met through new models of delivery.

3. What is the evidence which supports the statements about the value of land acquired under compulsory purchase powers in:

(a) paragraphs 12-15 of the NEAs' Position Statement on Delivery Mechanisms [EB/084]?

- 5.3a.1 Where land is acquired compulsorily the compensation to be paid is assessed in accordance with what is termed the Compensation Code. The Compensation Code is the term given to the legislation, case law and guidance which governs compulsory purchase valuations.

- 5.3a.2 Section 5 Land Compensation Act 1961 sets out "rules for assessing compensation". Paragraphs 12 - 15 of EB/084 refers to the "no scheme principle". Section 6A Land Compensation Act 1961 explains that the principle is that:

(a) any increase in the value of land caused by the scheme for which the authority acquires the land, or by the prospect of that scheme, is to be disregarded, and

(b) any decrease in the value of land caused by that scheme or the prospect of that scheme is to be disregarded.

- 5.3a.3 The comments in paragraphs 12 – 15 regarding values are based on valuation and legal advice received by the NEAs regarding the application of the 'no scheme' principle. There is no contrary evidence.

(b) paragraphs 17, 18 & 43 of the Viability Evidence by Avison Young submitted with the comments of NEGC Ltd on the June 2019 Hyas Viability Assessment Update [EB/086]?

5.3b.1 Paragraphs 17, 18 and 43 refer to work being carried out by Avison Young's specialist compulsory purchase team to assess the cost of acquiring the necessary land and buildings within each community. That work has involved the preparation of a Property Costs Estimate (PCE) which itemises the cost of acquiring the known interest in the land. As explained in paragraph 43, that work has been carried out by applying the Rule 2 approach under section 5 of the Land Compensation Act 1961. Allowances have been made for compensation for disturbance and appropriate statutory loss payments.

5.3b.2 Disclosure of the detailed workings of the PCE would be likely to prejudice any negotiations to acquire land so that has not been made publically available. The estimated total compensation payable to acquire all the land and related property required for each community has been provided in order to inform the viability modelling. There is no contrary evidence.

4. Would the NEAs and NEGC Ltd please respond to each of the points on the use of compulsory purchase powers made in CAUSE's Land Acquisition Strategy paper, submitted with CAUSE's comments on EB/084?

5.4.1 The CAUSE statement includes various comments which relate to the delivery strategy more generally and, in particular, the phasing of payments. The table sets out the below the NEAs' response to CAUSE's paper, specifically on the use of CPO powers.

CAUSE comment regarding use of compulsory purchase powers	NEAs' response
Insufficient information is included in the evidence base regarding the land acquisition strategy	If necessary, compulsory purchase powers would be used to deliver the garden communities. However, where possible, and in line the CPO Guidance, land should be acquired

	<p>by consent. At this stage negotiation by consent is the NEAs' primary strategy. However, if the Local Plan is sound and the proposed DPDs/masterplans are settled there is no reason to believe that compulsory acquisition powers would not be available to deliver the garden communities in accordance with the development plan.</p>
<p>The threat of CPO is largely hollow</p>	<p>The NEAs as planning authorities have compulsory acquisition powers. A Locally Led Development Corporation, if the garden communities were to be delivered via that mechanism, would also have compulsory acquisition powers. The necessary powers are available to acquire land compulsorily. The NEAs do not accept that this is an empty threat.</p>
<p>It will be difficult to demonstrate a compelling case in the public interest to justify the making and confirmation of a CPO where landowners are willing to deliver housing on their land</p>	<p>Where land owners and developers are willing to provide comprehensive development of the garden community in accordance with an agreed masterplan, of an appropriate quality, on programme, with the participation of the community and in accordance with the development plan there will be no need for the use of CPO powers. The NEAs would work in partnership with such willing land owners and</p>

developers to deliver the garden communities. If land owners are not willing to work in that way then the NEAs would need to consider the use of CPO powers. If the garden community is not otherwise being delivered, and could be delivered by the NEAs (perhaps working in partnership with others) or by an LLNTDC) then the use of CPO powers would be entirely appropriate.

Before making a CPO the relevant authorities would need to be satisfied that there is a compelling case in the public interest.

The Section 1 Local Plan envisages the comprehensive planning and development of the garden communities. Para. 144 of the CPO Guidance sets out the factors that the Secretary of State is expected to consider where there are other proposals for the use of land contained within a CPO promoted by a LLNTDC (and it is assumed that similar factors would be considered in relation to a LPA promoted CPO). Those factors include whether the alternative proposal may, if implemented, affect the delivery of the new town which the LLNTDC was designated to deliver. As a result, any proposals would be

	<p>expected to be part of a comprehensive redevelopment and deliver the policy objectives in full.</p>
<p>Disagree with the NEA's view that there is limited hope value. Argue the existence of promotional agreements is evidence of hope value.</p>	<p>Promotion agreements are not strong evidence of market value. They reflect a sum that might conditionally be paid at some point in the future. They often also assume that the land owner carries the holding costs until the land is drawn down. They are also not necessarily reflective of the cost of delivering a fully policy compliant scheme.</p> <p>It is noted that if the value proposed in the option or promotion agreement reflects the garden community "scheme" then, in the case of a CPO, that value would be disregarded.</p> <p>It is also noted that even if the scheme was not disregarded the value of the land would have to take account of planning policies, including the requirements in the garden community policies. The value of the land for CPO purposes would be the residual value after the application of those plan policies.</p>
<p>Failure to consider the financial implications of a contested CPO</p>	<p>The NEAs understand and accept that any CPO, whether by the NEAs as LPAs or by an LLNTDC, is likely</p>

	<p>to be contested. That assumption is built into the delivery programmes.</p> <p>A legal challenge to the decision by the Secretary of State to confirm a CPO could be brought. That is the same for any CPO. There is no reason why any special risk would apply in this case.</p> <p>It is often the case with a CPO that the compensation is paid after the land has been taken and development commenced. That creates a cost risk until the compensation has been finally agreed or determined. The NEAs or an LLNTDC would have to rely on the professional advice that they have received in relation to the compensation that would be payable and believe that that would be an acceptable risk.</p>
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Questions for all participants, including the NEAs and NEGC Ltd

5.

(a) If the Section 1 Plan is neutral as regards who will be responsible for leading delivery of the proposed garden communities, how will the NEAs be able to ensure through their development management powers that any garden community proposal that comes forward meets all their policy aspirations for the garden communities?

5.5a.1 The NEAs would assess any application against the policy requirements of the Section 1 Local Plan and the DPD. As with any application, it would need to exercise its planning judgement when determining whether those

aspirations were satisfied. The NEAs believe that, if necessary, the combination of planning agreements and planning conditions would be able to secure compliance with the Local Plan and DPD policies. The form of conditions and obligations would have to reflect the scale and nature of the garden community developments and would have to build in, for example, the ability for standards to be improved over time to meet future best practice and to allow for changing tenures to meet shifting housing needs or the need to deliver housing quickly (as proposed in the Letwin Review).

5.5a.2 The NEAs are considering the scope to use to use a Local Development Order to consent development once the DPD is in place. If an LLNTDC is the delivery vehicle then an LDO would be likely to be used. An LDO would allow the NEAs or LLNTDC to change requirements to meet changing standards.

(b) In this regard, do any further amendments need to be made to policy SP7 paragraph 3 (beginning “The Councils will need to be confident ...”) and/or to policy SP7 criterion (ii)?

5.5b.1 The NEAs do not think any amendments are needed.

(c) Should the Section 1 Plan instead specify that delivery of the proposed garden communities should be led by a public-sector local delivery vehicle, a Locally Led New Town Development Corporation, or a private-sector developer?

5.5c.1 The NEAs position remains that the Section 1 Local Plan should be delivery model blind. This will enable each community to be developed using the model most appropriate to the specificities of that site. The potential use of an LLNTDC is, however, considered to be a credible option.

6.

(a) Would the existence of a viable alternative master developer with control over land allocated for a garden community restrict the ability of the Secretary of State to confirm a CPO on that land (see paragraphs 8.10-8.11 of the consultation response to EB/084 from Carter Jonas on behalf of L&Q, Cirrus Land Ltd and Gateway 120)?

5.6a.1 If there is an alternative viable master developer genuinely able to deliver a proposed garden community comprehensively and in accordance with the development plan, throughout economic cycles, that would clearly be relevant to the decision of the Secretary of State about whether or not to confirm a CPO

(b) If so, what are the implications for delivery of the garden communities in accordance with the NEAs' policy aspirations?

5.6b.1 Paragraph 143 of the CPO Guidance sets out the factors that the Secretary of State can be expected to take into account in deciding whether to confirm a compulsory purchase order made by LLNTDC. Paragraph 143 notes that any decision about whether or not to confirm a compulsory purchase order will be made on its individual merits. The factors which the Secretary of State can be expected to consider include the appropriateness of alternative proposals (if any) put forward by the owners of the land or other persons. That is one factor, amongst others, that the Secretary of State will consider.

5.6b.2 Paragraph 144 sets out the specific factors that the Secretary of State is expected to consider where there are other proposals for the use of land contained within a CPO. These include:

- whether these alternative proposals are likely to be implemented, taking into account the planning position and their promoter's track record of delivering large-scale housing development
- how the alternative proposals may conflict with those of the new town development corporation
- how the alternative proposals may, if implemented, affect: (i) the delivery of a new town on land designated for that purpose; and (ii) the new town development corporation's ability to fulfil its

statutory objects (including in relation to achieving sustainable development and good design), and/or the purposes for which it was established.

5.6b.3 As a result the ability for a viable master developer to 'restrict' the confirmation of a CPO would depend on the substance of those alternative proposals and the alignment with the purposes of the Local Plan and LLNTDC.

5.6b.4 If the Secretary of State were not to confirm a CPO it would be on the basis that the garden community could be delivered without it – in which case the NEAs policy aspirations would be met.

State Aid

Questions for the North Essex Authorities and NEGC Ltd

7. Would the NEAs and NEGC Ltd please respond to the critique of EB/085 in Mr O'Connell's paper North Essex Garden Communities State Aid Considerations (also submitted by CAUSE)?

5.7.1 Mr O'Connell argues, in summary, that the Garden Communities are not viable and deliverable without breaching State Aid Rules. He considers that, consequently, the State Aid implications need to be addressed now, as this is core to the test of soundness. In short:

- there can be no legitimate suggestion that the identification and subsequent allocation of a garden community in a development plan gives rise to State Aid. Since the identification of garden community proposals is the issue being considered at the Examination the State Aid question should stop there. It is noted that State Aid has never been a reason for a Local Plan or a development plan proposal to be found to be unsound.
- the development plan policies are delivery vehicle blind. If the private sector deliver the garden communities there can be no legitimate issue about State Aid.

- If the garden communities are delivered by the public sector then any decisions about the precise form of delivery body, funding and other issues would have to take account of State Aid requirements at the time. The NEAs have been advised that State Aid compliant mechanisms can be designed. There is no reason to believe otherwise.
 - All advice to the NEAs is that a public sector master developer would be able to access finance at a rate of 6% or less. That advice all takes account of State Aid issues.
- 5.7.2 The issues raised in Mr O'Connell's paper regarding State Aid are closely entwined with wider criticisms made, particularly by CAUSE, regarding the viability and deliverability of the garden communities. This response sets out the NEAs' response to the specific points raised in Mr O'Connell's paper but the Inspector is asked to also refer to the NEAs' comments in relation to Matter 5 more generally, and Matter 7.

State aid implications of HIF funding

- 5.7.3 Mr O'Connell asserts that the HIF funding confers a direct market advantage to NEGC Ltd and landowner/developers who, according to the HIF bid, would not otherwise be able to develop Tendring Colchester Borders Garden Community. Mr O'Connell suggests that there is no proven market failure that is preventing development. If Mr O'Connell believes that to be the case then he has an ability to challenge the decision to award HIF funding. In the absence of a successful challenge the Examination must proceed on the basis that the decision was lawful.
- 5.7.4 In any event the NEAs' view is that the award was properly justified. The link road from A133 and the A120 serves a wider public purpose – namely linking those two roads. It is not simply an access road to development land. To date the market has not been willing to intervene to deliver that link road and unlock the development potential of the adjacent land. That is where the market failure arises.
- 5.7.5 The HIF programme is being administered by Homes England specifically for the purpose of 'forward funding' infrastructure that relates to housing growth. The NEAs are required to ensure that that any HIF funding is spent in

accordance with all applicable legal requirements, including State Aid. They will continue to monitor that throughout the development of the project. The NEAs recognise that the delivery mechanisms will either have to be State Aid compliant, fit within an appropriate exemption or approval sought from the Commission. The NEAs are confident, based on the advice received, that the expenditure of the HIF funding will be in accordance with State Aid requirements.

Delivery mechanism and state aid implications

5.7.6 Mr O'Connell refers to the PwC Report [EXD/064] which he considers "remains of absolute relevance". The background to the PwC report is explained in EXD/064. As explained in that document, the PwC report is historical and was never used to inform the Local Plan process. In addition, there are elements of that report which the NEAs did not agree with at the time it was prepared, and continue to disagree with. It was never part of the Local Plan evidence base relied upon by the NEAs. In any event, the comments from the PwC Report referenced by Mr O'Connell simply highlight that the State Aid implications of the particular delivery model considered in that report would need to be considered; there is no suggestion that arrangements could not be structured to address any State Aid implications.

Relevance to soundness

5.7.7 Mr O'Connell argues that to demonstrate that the draft Local Plan is deliverable and the proposals viable, there is a need for the State Aid issues to be addressed now.

5.7.8 The NEAs' Position Paper on State Aid [EB/085] was informed by independent legal advice. That advice informed the statement in paragraph 6 that "*there is no reason to be believe, and certainly no evidence to suggest, that a state aid compliant approach to delivery cannot be achieved*". Contrary to Mr O'Connell's assertions, to the extent that it is necessary, the NEAs have meaningfully considered the State Aid implications during the preparation of the Section 1 Local Plan.

- 5.7.9 As noted, the Section 1 Local Plan is delivery model blind. The NEAs recognise and acknowledge that State Aid issues will need to be considered when the detailed delivery arrangements are decided. Doing so now, in advance of a decision being taken on those detailed arrangements, would be premature. However, the legal advice received to date by the NEAs gives no reason to believe that a State Aid compliant approach to delivery cannot be achieved.
- 5.7.10 All local plans, no matter the quantum of housing that it provides for, are assessed against the same soundness test. The Section 1 Local Plan is not subject to any additional or enhanced soundness test. In that context it is relevant (as noted in EB/085) that State Aid rarely arises in relation to a policy or plan-making unless aid is a direct and inevitable consequence of the policy.
- 5.7.11 Obviously the nature of the evidence base is likely to vary depending on the substance of the plan in question. Mr O'Connell considers that EB/085 does not provide a sufficiently full and precise evidence base. Paragraph 31 of the NPPF requires the preparation of local plan policies to be underpinned by relevant and up-to-date evidence, which "*should be adequate and proportionate, focused tightly on supporting and justifying the policies concerned*".
- 5.7.12 It is not proportionate to expect the NEAs to set out for each potential delivery mechanism how the State Aid implications can be addressed. Instead it can, properly, assume that State Aid implications (if any) will be considered by the relevant body at the time decisions are being made about delivery vehicles and financing. The evidence base prepared by the NEAs in the form of the position statement is adequate and proportionate.
- 8. What is the NEAs' and NEGC Ltd's response to Mr O'Connell's view that a real interest rate of 8%-12% would necessarily apply to debt incurred by the garden community development vehicles in the first 10 to 20 years of the garden community projects (pp8-10 of his paper)?**

- 5.8.1 The Local Plan is delivery model blind.

- 5.8.2 If the garden communities are delivered by the private sector then the evidence from the developers is that the financing costs included in the Viability Assessment Update are appropriate. On that basis a rate of 6% to borrow for investment is considered realistic.
- 5.8.3 It is noted that if the NEAs or the LLNTDC develop then they could be using CPO powers to acquire the land. That will provide a significant asset base and will be security for any debt financing that is required. As noted above, the acquisition cost of that land will reflect the "no scheme world". The land once assembled will have a marriage value, even taking account of the full policy requirements, likely to be in excess of the acquisition cost. That security would assist in ensuring that interest rates are kept at or below the modelled rates.