

OPINION

Introduction

1. I am asked to advise as to whether the North Essex Authorities (the NEAs) can, as a matter of law, adopt their Section 1 Local Plans separately to, and in advance of, their Section 2 Local Plans. The relevant background is as follows.

Background

2. I am instructed on behalf of Braintree District Council, Colchester Borough Council, Tendring District Council and Essex County Council. The first three authorities are referred to as the NEAs. The NEAs have been working together to plan for strategic cross-boundary issues across the North Essex area. On 9 October 2017 the three NEAs individually submitted draft Local Plans to the Planning Inspectorate for examination. Each of the draft Local Plans contains two sections:
 - (a) Section 1 which includes policies on strategic cross-boundary issues including infrastructure, housing numbers and proposals for three new Garden Communities. The drafting of Section 1 is common to all three Local Plans; and
 - (b) Section 2 which includes individual site allocations and development management policies which are specific to the relevant authority.
3. Section 1 has been subject to a joint examination by a single Inspector. Examinations for each of the three Section 2 Local Plans will take place separately, most likely in 2019. In a letter dated 8 June 2018 the Inspector considered that further work was

required in respect of the evidence base supporting Section 1 and policy changes were needed before the Plans could be found sound. The NEAs are considering the next steps in the light of that letter.

4. Examinations for each of the three Section 2 Local Plans will take place separately. It is anticipated that new Inspectors will examine some or all of the Section 2 Local Plans. Given that Section 1 sets out the strategic policy framework, including in particular housing numbers and employment figures, the examination of the Section 2 Local plans is not expected to progress until the Section 1 Local Plans have been found sound, or can be made sound with modifications.
5. A core element of Section 1 is the proposal for three proposed Garden Communities providing between 29,000 and 43,000 homes in total, with 7,500 homes to be delivered within the Plan period (to 2033). If adopted, Section 1 would establish the in-principle acceptability of the proposed Garden Communities.
6. The Local Development Scheme of Braintree District Council (May 2018) refers to Parts 1 and 2 of its Local Plan. The timetable clearly shows separate steps for the preparation of each, with separate adoption. The LDS of Colchester Borough Council (November 2017) refers to Parts 1 and 2, with separate examination of each, but a single Inspector's report, and adoption of both in September 2018. The LDS of Tendring District Council (October 2017) refers to 2 Parts, with separate examinations and Inspector's reports. The timetable for adoption seems to suggest adoption of Section 1 in June 2018, with adoption of Sections 1 and 2 in September 2018.
7. Given the inevitable gap in time between the decision on Section 1 and any decision on Section 2, each of the NEAs would, if legally possible, like to adopt Section 1 as

soon as a decision on soundness has been issued. Advance adoption of Section 1 would have distinct planning advantages in terms of filling the existing policy vacuum, reflecting the revised NPPF requirements to ensure that, as a minimum, authorities have a plan detailing the strategic priorities for their area in place and enabling the NEA's to progress the development and delivery of the garden communities (if these remain part of Section 1).

Analysis

8. By way of overview, it is my clear opinion that the preparation of the Section 1 Local Plans thus far, and their adoption as envisaged, complies with the Planning and Compulsory Purchase Act 2004 and the Town and Country Planning (Local Planning) (England) Regulations 2012. The analysis should seek to identify any provision in this statutory framework which either (1) expressly prevents separate adoption or (2) would operate such that separate adoption would be contrary to the overall scheme of the statutory framework. For shorthand, I will label any provision which might operate adversely to the intended adoption as a "contrary provision".

9. Section 15 of the Act deals with the Local Development Scheme. Sub-section (2) provides that the Scheme must specify the local development documents which are to be development plan documents, the subject matter and geographical area to which each development plan document is to relate, which development plan documents (if any) are to be prepared jointly with one or more other local planning authorities, any matter or area in respect of which the authority have agreed to the constitution of a joint committee under section 29, "the timetable for the preparation and revision of the development plan documents" and such other matters as are prescribed. It will be seen that the timetable for adoption is not a matter which must be specified in the

LDS. Section 19(1) provides that development plan documents must be prepared in accordance with the Local Development Scheme. I refer to this further below.

10. Section 17(3) provides:

“The local planning authority’s local development documents must (taken as a whole) set out the authority’s policies (however expressed) relating to the development and use of land in their area”.

This is an important provision for present purposes. It is clear that it contains no contrary provision.

11. Section 17(7) provides (so far as relevant):

“Regulations under this section may prescribe –
(za) which descriptions of documents are, or if prepared are, to be prepared as local development documents;
(a) which descriptions of local development documents are development plan documents...”.

The regulation(s) referred to is regulation 5 of the Regulations. The definitions provision of the regulation defines “local plan” as meaning “...any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the Act these documents are prescribed as development plan documents”.

12. With the definition of “local plan” in mind, the relevant provisions of regulation 5 are as follows:

“(1) for the purposes of section 17(7)(za) of the Act the documents which are to be prepared as local development documents are –

- (a) any document prepared by a local planning authority individually or in co-operation with one or more other local planning authorities, which contains statements regarding one or more of the following –
 - (i) the development and use of land which the local planning authority wish to encourage during any specified period;
 - (ii) the allocation of sites for a particular type of development or use
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 - (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission.
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- (2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are –
 - (a) any document which –
 - (i) relates only to part of the area of the local planning authority;
 - (ii) identifies that area as an area of significant change or special conservation; and
 - (iii) contains the local planning authority’s policies in relation to the area; and
 - (b) any other document which includes a site allocation policy”.

Again, this is an important provision for present purposes. A local plan can, for example, relate only to part of the area of the local planning authority. There is no contrary provision in this important part of the statutory framework.

13. Section 19 of the Act deals with “preparation” of local development documents. I set out relevant provisions below:

“(1A) 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.

- (1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.
- (1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole)".

This is another important provision for present purposes. It contains no contrary provision.

14. I emphasised that section 19 deals with the preparation of local development documents. In Samuel Smith Old Brewery (Tadcaster) v. Selby District Council [2015] EWCA Civ. 1107, the Court of Appeal emphasised the "sequential stages" of sections 19 and 20 (and subsequent provisions). "Preparation comes to an end before examination begins. The former is an activity undertaken by the local planning authority, the latter an activity undertaken by the Inspector...": paragraph 28. I consider section 23 (adoption) below, but the LDS is a document relevant to preparation, and not to any later stage. The LDS is not a document that constrains the exercise of adoption. This is consistent with the provisions of section 15(2) referred to above.
15. Section 20 deals with the submission by the local planning authority of the Local Plan to the Secretary of State, and the subsequent examination. There is no contrary provision in section 20.
16. Section 23(2) provides:

"If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document".

There is no contrary provision here.

17. For completeness, there is no contrary provision in the remainder of the Regulations.

Conclusion

18. As noted above, it is in my opinion clear that the NEAs may lawfully adopt (subject to the recommendation of the examination) their Section 1 Local Plans.

Consequential matters

19. In the light of the principal conclusion above, it follows that there is no need arising from the statutory framework for the taking of any special precautionary steps. However, that is not to deny that good practice measures could be taken which could include:

- (a) the publication of a revised Local Development Scheme for each authority making it clear that Sections 1 and 2 will be separately adopted;
- (b) advertising a proposed change to Section 1, alongside the revised evidence/updated Sustainability Appraisal that will be needed in any event, that makes it clear that separate adoption is proposed;
- (c) securing a resolution from each authority that they intend to adopt the Sections separately, and
- (d) making sure that the issue is on the agenda at any re-opened examination.

20. With reference to (a) above, this is a sensible step, despite my above comments relating to the LDS and adoption. Since the LDS of each authority does contain a timetable for adoption, it is obviously wise to provide updated clarification. Such revision would be in performance of the duty in section 15(8)(a).

Landmark Chambers
180 Fleet Street
London EC4A 2HG
8th August 2018

C. LOCKHART-MUMMERY QC

IN THE MATTER OF:

**THE NORTH ESSEX AUTHORITIES DRAFT SECTION 1
LOCAL PLAN**

OPINION

Dentons

Our Ref: CLM-