

NEA Response to the CAUSE/SERCLE Legal Opinion

Background

1. This note is prepared by Dentons on behalf of the North Essex Authorities (the NEA) in response to the legal opinion prepared by Martin Edwards, instructed by CAUSE and SERCLE, dated 12 January 2018 (the Opinion).
2. The note comments on the assertions in the Opinion. In many cases the Opinion contains views expressed without evidence. Where it does so we have simply noted that. The remainder of the points are dealt with briefly on the basis that the points raised do not, in themselves, raise issues of substance that have not already been considered and addressed either in the Evidence Base or elsewhere.
3. For the record it should be noted that:
 - a. the NEA each recognise the importance of separating land owning and planning functions, and the risk of the perception of conflict of interest, and have sought to address this properly throughout the planning process;
 - b. the NEA have not been influenced in the planning process by the prospect of any financial benefits that might arise from the use of one of the proposed delivery models;
 - c. the NEA accept that the exercise of CPO power may be necessary to deliver the garden communities. If so it will have to be justified in the public interest;
 - d. the NEA accept that if CPO is used then they will be required to pay compensation at, effectively, market value. Whether acquired voluntarily or compulsorily the NEA believe that the land values will be consistent with the delivery of the garden communities;
 - e. the NEA have set up a delivery structure through NEGC and separate local development vehicles capable of delivering the garden communities. The NEA have been exploring the possibility of using a locally led new town development corporation and believe that it also offers a workable model. The NEA remain willing to work with partners, including land owners and those with an interest in the land, to deliver the garden communities in other ways if that secures the appropriate quality of development, infrastructure, long term stewardship arrangements and other planning and delivery benefits identified in a locally led model.

Pre-amble to the Opinion

4. Paragraphs 3/11: the Opinion asserts that the described delivery mechanism has no "*statutory legal basis of framework to underpin it.*" The basis for that view is not explained. In any event the view is incorrect. Paragraph 11 repeats the claim while simultaneously identifying the Localism Act 2011 as part of the statutory justification for the described delivery mechanism. It is clearly within the powers of local authorities to promote, procure, deliver and dispose of development and infrastructure.
5. Paragraph 5: the Opinion asserts that there is no evidence of co-operation with other local planning authorities or utilities. It does not appear that the author has considered the Evidence Base material on co-operation. The engagement with neighbouring authorities, and utility and infrastructure providers is detailed in the Duty to Cooperate Statements (ref: SDBDC/005, SDCBC/005 and SDTD/022). The discharge of the Duty to Cooperate in respect of these bodies is evidenced in Statements of Common Ground between the North Essex Authorities and

Anglian Water (ref: SCG/002), Essex County Council, Highways England, Greater Anglia (ref: SCG/017), Maldon District Council (ref: SCG/008) and Uttlesford District Council (ref: SCG/009). A letter has also been issued by Network Rail confirming their on-going discussions with Essex County Council.

6. Paragraph 8: the Opinion asserts that because the garden community proposals have emerged and evolved over time there is doubt about the adequacy of the Sustainability Appraisal. The alleged flaws are not explained. As the Courts have repeatedly found Sustainability Appraisals can and should change throughout the plan development process as the underlying policies and proposals respond to consultation and the continuing development of the evidence base. The evolution of the garden communities proposals for each of the three authorities is explained in the Garden Communities Topic Paper (ref: EB/028). The garden community proposals, rightly and in line with paragraph 159 of the NPPF, evolved out of an assessment of the land available to meet the identified needs of the respective areas. The iterative approach taken to the Sustainability Appraisals is reflective of that. The North Essex Authorities: Strategic Section One for Local Plans: Draft Publication (Regulation 19) Draft Sustainability Appraisal – June 2017 (ref: SD/001) includes at Annex C a history of the Sustainability Appraisal process for Section 1. It is clear from this that the proposals have been properly assessed, including an assessment of the form proposed in the Draft Submission Local Plan.
7. Paragraph 12: the Opinion quotes from a Committee report relating to the proposed delivery vehicle. The quoted report does not take or to influence any planning decision. On the basis of that non-planning report the Opinion asserts that the planning process may have been "*influenced*" improperly by financial considerations. There is no evidence for that assertion which is contradicted directly by the advice in paragraph 4.8 of the quoted report, itself quoted earlier in the Opinion (paragraph 5).
8. Paragraph 13: the Opinion asserts that the report quoted (which does not relate to planning matters) glosses over the issue of conflict of interests. In fact the issue of the perception of conflicts is "*rightly mentioned*" as paragraph 13 itself admits.
9. Paragraph 14: the Opinion asserts that the NEA have not given early or adequate consideration to the prospect of a locally led new town development corporation. It is asserted that this might have been because of a desire to "*avoid*" ministerial scrutiny. There is no justification or evidence for the statement. It is wholly inaccurate and is refuted. The NEA have been actively exploring the possibility of a locally led new town development corporation. The examination has evidence of the representations by NEA submitted in response to the recent DCLG consultation on draft regulations. A link to the Tending committee report is attached.
<https://tdcdemocracy.tendingdc.gov.ukconsultation>

Specific Issues

10. Paragraphs 16 – 29 of the Opinion make assertions in five general areas.

Land Values

11. It is implied that the NEA is "*unclear*" about land values. No evidence is given for this assertion. The NEA are well aware of land owner expectations. They are well aware of the RICS advice on how land should be valued. They are well aware of the basis for compensation if land has to be compulsorily acquired. They appreciate the reasoning in the *Myers*, *Bloor* and other cases to which reference is made in the Opinion which affect the basis on which land compulsorily acquired should be valued. They are also aware of the statutory refinements to CPO valuation assumptions made in relation to locally led development corporations. Advice on these issues

has been provided by Garden City Developments, by Arcadis, by Hyas and by Dentons. Further work is being procured from GVA.

12. It is important to note that none of the sites proposed as locations for garden communities are presently allocated for development, other than the prospective allocation for a garden community. The existing market value of that land will reflect that development uncertainty. If allocated then on an open market sale the value of the land will reflect all proper planning requirements, the need for all landowners to combine to deliver a comprehensive garden community, and the requirement to fund, at an appropriate time, a major part of the infrastructure costs¹. The value of any land parcel will also reflect the time at which it might be developed. In the same way that a cost to be paid in 20 years has limited present cost, the value of land that will not be developed for 20 years is also limited.
13. If the land is compulsorily acquired then, again, market value has to be paid in compensation albeit with the valuation taking place in a "no scheme" world, where the value of the land has to disregard the scheme underlying the CPO. At the top end of the compensation value range, if the "no scheme" world assumes that a garden community or major housing development would otherwise be possible in the absence of a CPO then that would broadly reflect the values outlined above. Any residual value would again have to assume that planning policy requirements are met. At the bottom end of the value range, if development would not otherwise be permitted in the absence of a garden community, then the value will be closer to existing use value. In most cases in relation to the garden community locations this will be agricultural value. As the *Myers* case indicates when considering planning assumptions there might be some "hope" value to reflect longer term development prospects and the nature of this "hope" value will differ between sites, and parts of sites. Clearly, over large sites the values of land will be different dependent on what the plots might otherwise have been used for.
14. In short, on either a voluntary or compulsory acquisition, the market value of land will adjust to reflect planning assumptions and programme. After extensive advice the NEA are confident that the garden communities can be delivered at appropriate land values.

Planning Gain

15. This section of the Opinion appears to imply that there are unspecified difficulties with the use of "*planning gain*". The NEA are aware of the law and policy on planning obligations, and the potential issues associated with ensuring that proper planning obligations are sought, managed and enforced.
16. The Opinion poses a question in paragraph 18 about how a proposal not included in the plan will be refused. Since any such proposal will not be in accordance with a recently adopted development plan then, subject to other material considerations, a refusal would simply be in accordance with the development plan.
17. Similarly in paragraph 19 the Opinion asks what approach will be taken to development proposals outside but near to the garden community proposals. Any such proposal will be addressed on its

¹ Land prices adjust to have regard to the need to meet planning policy requirements. This is clear in the RICS guidance on valuation (see for example the definition of Site Value (for scheme applications) in the document Financial Viability in Planning <http://www.rics.org/Documents/Financial%20viability%20in%20planning.pdf>) This point was also made clear in the Crossrail 1 CIL examination (see paragraph 8 of attached document).

It follows that a proper market value valuation or CPO compensation might lead to value levels lower than land owner expectations. As a consequence it is wrong, in principle, to assume minimum land values other than the existing use value + a premium.

merits but if it is outside the area allocated for development then, subject to other material considerations, it will be dealt with in accordance with the development plan.

18. In paragraphs 19/20 the Opinion raises, but does not address, the implications of the *Aberdeen* and *Forest of Dean* cases. It asserts, again, that the perception may be that planning permission is being bought and sold. There is no evidence to support that contention.
19. The NEA are confident that the law, including recent case law, continues to allow proper planning obligations to be sought, managed and enforced. They have had professional advice from Dentons on these issues.

Community Infrastructure Levy

20. The Opinion notes the existence of CIL. The NEA are aware of CIL.
21. They are confident that the policy requirements in the garden community policies set an adequate framework for securing the right quality of development and the proper programming of the necessary infrastructure. Depending on the final form of delivery mechanism CIL will continue to be explored as a further tool to secure appropriate contributions to infrastructure.

Compulsory Purchase

22. In paragraphs 23 – 27 the Opinion makes the correct point that any exercise of compulsory purchase powers will have to be justified as being in the public interest. It is agreed that as part of any such justification for a CPO issues relating to viability and deliverability will have to be addressed.
23. The NEA are aware of those requirement and if other mechanisms are not securing the delivery of the garden communities the NEA have agreed in principle that compulsory purchase powers, either under the Planning Acts or other powers will be explored and, if necessary, used to deliver the plan proposals.

Human Rights

24. In paragraphs 28 – 29 the Opinion asserts without any argument, evidence or legal basis that the Local Plan may inadvertently "*deprive land owners of the open market value of their land*". The Local Plan cannot and does not have that effect. If acquired any land will be acquired voluntarily or compulsorily. Either an agreed price or proper compensation will be paid. If the reference is to the effect on land values of proper planning policy it is difficult to see how the application of planning policy can be described as a deprivation of anything to which the land owner was entitled. No law gives a land owner a right to a minimum land value.
25. The Opinion correctly notes the importance of Human Rights. Any future CPO would have to be justified in the public interest and confirmed by the Secretary of State. The Courts have been quite clear that the CPO process properly accommodates and addresses questions of Human Rights.

Dentons
24 January 2018