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# Local Plan Examinations Webinar

14 May 2020

Michael Bedford QC, Wayne Beglan and Robert Williams

# Today's Team



**Michael Bedford QC – Chair  
Practical Matters, DCOs & Waste  
Planning**



**Wayne Beglan – Duty to Co-operate**



**Robert Williams – SA at  
Examinations**

# Our Local Plan experience (over the past few years – promoting and objecting)



- Central Bedfordshire Local Plan
- Craven Local Plan
- Epping Forest Local Plan
- Forest Heath Single Issue Review
- Forest Heath Site Allocations Local Plan
- Guildford Local Plan
- Harlow Local Plan
- Hart Local Plan
- Huntingdonshire Local Plan
- Luton Local Plan
- North Hertfordshire Local Plan
- North Essex Authorities Local Plan
- Nuneaton & Bedworth Borough Plan
- Tandridge Local Plan
- Tonbridge & Malling Local Plan
- Uttlesford Local Plan
- Vale of White Horse Local Plan
- Waverley Local Plan
- Welwyn Local Plan
- West Sussex Joint Minerals Local Plan



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## Duty To Co-Operate

Wayne Beglan

May 2020

# The race to 2023 – the DTC hurdle



- Continues to cause plans to fail – sometimes in highly controversial circumstances
- Binary nature – pass or fail
- No prescriptive guidance as to when met, or not met
- Caselaw demonstrates MOPJ for examining inspector – so difficult to overcome adverse finding

# Binary = derailing



- The soundness tests do not permit consideration of omission sites by inspectors
- So, often indirect attacks are employed by larger omission sites
- Similar approach can be used in criticisms of SA by omission sites, often twinned



# A recap on the Legislation – the duty



- S.33A PCPA 2004
- “**must** co-operate . . . in maximising effectiveness . . .  
.[of activities undertaken]”
- “requires the person-(a) to engage **constructively, actively and on an ongoing basis . . .**”
- “have regard to the activities of a person . . .”

# A recap on the Legislation – the persons



- LPA
- County council that is not an LPA
  - Highways
  - Education, etc
- Bodies of a Prescribed Description
- Also consider LEP and LNPs
- The Prescribed Bodies include:
  - Highways Authorities
  - EA
  - Historic England
  - Natural England
  - CAA
  - HCA
  - CCG's
  - Mayor of London

# DtC limited to Strategic Matters



“(4) For the purposes of subsection (3), each of the following is a “**strategic matter**”—

- (a) sustainable development or use of land that has or would have a **significant impact** on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas, and
- (b) sustainable development or use of land in a two-tier area if the development or use— (i) is a county matter, or (ii) has or would have a significant impact on a county matter.”

- Re-occurring case examples of Key Strategic Matters
- Spatial strategy
- Housing
- Employment
- Green Belt
- Infrastructure

# What a difference 7 years makes



## 2012

- For plans submitted before
- NPPF 2012 - §§178-181
- PPG 2014
  - “make every effort to secure co-operation . . .”
  - “produce effective and deliverable policies . . .”
  - “robust and comprehensive”

## 2019

- For later plans
- NPPF 2019 - §§24-27
- PPG 2019
  - “produce, maintain and update” SoCG
  - “proportionate” and “concise”  
”detailing key information”
  - SoCG “the means [to demonstrate DTC compliance]” c.f. ID:61-031

# The Main Cases. . .



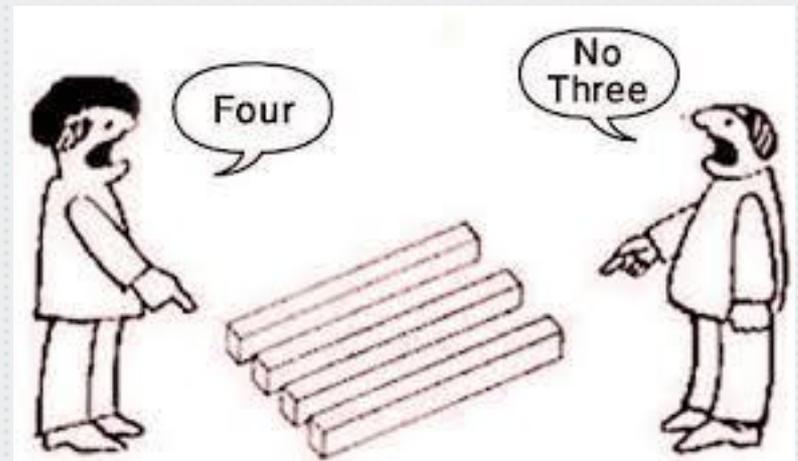
- Zurich (2014) – “strategic matters”, “joint approaches”
- Selby DC (2015) – “sword of Damocles”
- Central Beds (2015) – “reasonable to conclude”
- Barker Mill Estates (2016) – “knowing the answer”
- St Albans (2017) – “impasse” on the correct HMA

# Not a duty to agree . . .



## In case of disagreement

- Demonstrate engagement
- On constructive, active and ongoing basis
- Decision makers must be involved in discussions
- Identify parameters of what has been agreed, and what is left outstanding



# But a strong motivator to agree . . .



## In case of agreement

- Record
- Make it as specific and detailed as circumstances allow
- Something that looks like “we agree to agree [later] . . .” has little force



# There is no “mirror principle”



- CBC vs Luton vs CBC
- Assessment of DTC is:
  - Matter of Planning Judgment
  - Judged against background as a whole
- So, one HMA authority failing does not mean others in same HMA must necessarily fail

# And some other headlines from the reports . . .



- It need not be DTC failure that authorities in HMA have agreed a mistaken position – Woking unmet need: **Waverley, Guildford**
- Can be DTC failing to rely on “impasse”. Can be DTC failing for insufficient engagement re SRFI and locating unmet needs beyond the GB: **St Albans 1 and 2**
- Can be DTC failing to not “formally” seek early assistance for newly emerging unmet need, even if unlikely neighbours could assist: **Sevenoaks**
- Can be DTC failing to say “we cannot meet our own need” and therefore cannot assist our neighbour (re Green Belt): **Chiltern & South Bucks**
- It need not be DTC failure that authorities in HMA are not meeting exported unmet need in full: **Luton and Central Beds**

# Pay particular attention to: Outcomes



- The lens: Always looking to Plan Policies – how has DTC shaped these?
- And done so (if appropriate) from an early stage

# Outcomes 2



- Outcomes can include:
  - What is agreed;
  - Identifying what is not agreed and how it may be addressed
  - Identifying common parameters / methodology / approach for studies / evidence base
  - Agreeing conclusions from studies

# The importance of audit



- DTC tested by reference to available evidence
- Means detailed record keeping is required
- Should be done over time
- DTC annual statements can be useful (see PPG / regulatory requirements); and maintaining indexed internal record over time
- Chronology useful, but may not be sufficient: Use primary material

# The future



- Unfortunate that DTC bringing a number of plan processes to a halt, with withdrawal and “clean slate”
- Future options:
  - A power in the inspector to secure compliance;
  - Yet more prescriptive guidance
  - A return to more EM – early indications of likely failure due to DTC



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# Sustainability Appraisals at Examinations

Robert Williams



# Role of SA at Examination

# Dual-role of the SA



- At examination, inspectors focus on SA for two main reasons:
  - (1) To assess whether the SA is **legally adequate**;
  - (2) When determining whether the plan is **sound**
- In practice, the intensity of focus on the SA varies from plan to plan (and inspector to inspector)

# 1. Legally Adequate?



- Obligation on INS to determine legal compliance of the plan (s.20(5)(a) PCPA 2004) has been interpreted as including assessing whether the SA is **legally adequate**
  - In particular, whether it meets the requirements of the SEA Regulations/Directive
- Not unusual for there to be detailed legal argument on this matter before the inspector

## 2. Soundness – as a matter of law



- As a matter of **law** the SA process is procedural in nature. It informs decision-making, rather than dictating outcomes.

*“By contrast [to the Habitats Directive] the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature... The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process.”*

**(Spurrier v The Secretary of State for Transport [2019] EWHC 1070)**

## 2. Soundness – in practice and policy



- But **in practice** SAs often form a key part of the evidence-base against which the **soundness** of the plan is tested
  - In particular, whether ‘the most’ (NPPF, 2012) or ‘an’ (NPPF, 2019) ‘**appropriate strategy**’ when considered against reasonable alternatives.
- Recognised in PPG:

*“[The SA] can help make sure that the proposals in the plan are appropriate given the reasonable alternatives. It can be used to test the evidence underpinning the plan and help to demonstrate how the tests of soundness have been met”*

# 3. Soundness – examples



- **Bedford Borough Local Plan - sound**

*“In conclusion the Sustainability Appraisal documents clearly show how the overall amount of housing growth and the distribution of that growth across the Borough, as set out in the plan, were selected against reasonable alternatives and were appropriately informed by consideration of their likely effects on sustainability objectives.”*

- **Hart Local Plan – policy unsound**

Having concluded that the SA did not allow for a ‘suitably robust comparison of reasonable alternatives’ to the New Settlement, the inspector explained: *“As a result, I consider that Policy SS3...[is] not justified, as, on the currently available evidence, it cannot be determined that it represents the most appropriate long-term growth strategy”*



# Core Principles

# (Some) Core SA Principles



## The Plan

- Identify, describe and evaluate likely significant effects
- Information required set out in Sch 2 to SEA Regs...
- Only so far as “may reasonably be required” taking account: (i) current knowledge; (ii) contents of plan; (iii) stage of plan; (iv) extent to which more appropriate assessed at different level.
- But no requirement for “full information”
- Reasons for preferred option required

## Reasonable Alternatives

- Alternatives to meeting the objectives of the plan, not alternative plans
- “Reasonable alternatives” does not include all possible alternatives.
- Reasons must be given for selecting alternatives dealt with
- Reasonable alternatives must be assessed in a comparable manner to the preferred option



**Whose judgment is it anyway?**

# Whose judgment is it anyway?



- Legal challenges on SA grounds face a high bar. They tend only to succeed if: (i) LPA's fail to give any consideration to a matter expressly required by the SEA Regulations; or (ii) LPA has acted irrationally (or contravened other public law principles)
- Courts exercise supervisory jurisdiction. Not interested in planning merits.
- Inspectors examining plans are not in the same position as Courts. They are making planning judgments (through the prism of 'soundness').
- Yet, clear that INS regularly defer to the planning judgments made by LPAs, so long as they are rational, consistent and explained.

# Whose judgment is it? – example



- **Harrogate Local Plan**

*“That people disagree with the assessment of specific effects, and decisions about specific sites (or, indeed, broad locations), is completely unsurprising. I would go so far as to suggest that it is inevitable given that, although supported by relevant technical or expert evidence, many of the SA conclusions involve a significant element of planning judgement. I am satisfied that the conclusions reached are reasonable ones and that any omissions, errors or inconsistencies that may exist do not result in the SA being fundamentally, or even substantially, flawed”*



**To what extent can defects in the SA be cured?**

# To what extent can defects be cured?



- As a matter of law, defects in SAs are capable of being cured post-submission for examination (up to adoption): ***No Adastral New Town Ltd v Suffolk Coastal DC (approving Cogent LLP v Rochford District Council)***
- There is some dispute as to whether fundamental defects in the SA can be cured at a late stage, given the importance of the consultation on the SA being sufficiently “early” to influence the final form of the plan (see ***Re Seaport Investments***)
- In practice, examining inspectors tend to (or at least should) pay close regard to post-submission SAs to ensure that (a) they have been objective; and (b) that the LPA has not approached them with a ‘closed mind’
- **Eg Hart LP** which concluded that a post-submission SA was not robust.



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# Practical Matters, DCOs & Waste Planning

Michael Bedford QC

# Practical Matters



- Accept that the Perfect Plan does not exist
- But a Plan MUST meet the DtC at submission
- It MUST be informed by SA/SEA
- It MUST be HRA compliant
- The LPA MUST think it is sound at submission
- The Inspector MUST think that there are Main Modifications which will make an unsound Plan sound
- Otherwise the Plan and Examination will be a waste of time/money for all concerned

# Practical Matters: before the Examination



- Choose a generous Plan Period
- Ask/resolve difficult questions early on
- Set a budget sufficient to produce the evidence base and to allow it to be tested robustly
- Be pro-active not just reactive on site choices
- Be realistic in what can be delivered by both private and public sectors
- Keep it simple: what, where, when, how
- Build in resilience: it won't all happen

# Practical Matters: at the Examination



- Employ an experienced Programme Officer
- Know the evidence base and how to sign-post it
- Ensure delegated authority to suggest changes
- Create a core team (including under-studies)
- Book your consultants
- Keep MIQ responses focused (but cross-refer to the evidence base)
- Be accurate, reliable, consistent, and ‘straight’

# Practical Matters: Covid adjustments



- The Planning Update WMS of 13 May encourages digital/virtual working, including for plan-making
- PINS is still reflecting on the details but has a wider 'digital' agenda and procedural changes will reflect that
- Two examinations will trial digital hearings in June, with others following in June/July/August.
- One trial is expected to be South Oxfordshire (!!)

# Practical Matters: Covid adjustments



- Hybrid examinations are likely: written questions (closer to DCOs than just MIQs) plus focused digital/virtual hearings on key matters
- NB: right to be heard limited to Reg.19 parties on their Reg.19 reps. Others attend merely as observers
- Microsoft Teams is likely to be PINS' preferred format
- Monologues can work in virtual formats

# Practical Matters: Covid consequences



- Covid has altered the economy big-time
- Examinations already under way may get by on the existing evidence base and the fall-back promise of 'early review'
- Plans still in preparation will need to review the evidence base (e.g. viability, e.g. modal shift, e.g. employment land needs, e.g. delivery rates)
- Until MHCLG changes the Standard Method, Covid alone is unlikely to be sufficient 'exceptional circs' to depart from the St. Method

# Local Plans and Waste Planning



- S.36(5), s.37, & s.38 TCPA 1990 formerly had a bright line distinction and prohibition
- But under the PCPA 2004 the difference is simply between a LDS (s.15) and a Minerals/Waste LDS (s.16), and the need for a DPD to reflect the LDS (s.19)
- Thus waste matters can be directly included in a non-waste local plan if foreshadowed in the LDS
- But DtC problems if that happens without the waste planning authority's agreement

# Local Plans and Waste Planning



- The PPG recognises that waste matters may be addressed to some extent in a non-waste plan:

*“While such [non-waste] authorities may not have the planning functions in respect of the preparation of Local Plans covering waste...they must have regard to national planning policy for waste and are expected to help deliver the waste hierarchy. This might include:*

- *Working constructively with waste planning authorities to identify and protect those sites needed for waste management facilities. Local planning authorities should consider the need for waste management alongside other spatial planning objectives”*

*(ID28-010-20141016)*

*“Opportunities for land to be utilised for waste management should be built into the preparatory work for Local Plans to the level appropriate to the local planning authorities planning responsibilities”*

*(ID28-018-20141016)*

# Local Plans and DCOs



- NPPF para 5 cross refers to the system of National Policy Statement for DCO development
- It recognises that DCO development may be a material consideration when plan-making but adds nothing further
- The recent Thanet Examination (Report 22 March) illustrates one approach: neutrality
- The Inspector added a need for plan review, depending on the outcome of the DCO examination (air freight at Manston).



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Q&A



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