

MAIDSTONE BOROUGH COUNCIL LOCAL PLAN & REGULATION 19 CONSULTATION

Legal Submissions

Introduction

1. These Legal Submission are provided in support of the representations made on behalf of Lenham Parish Council (“LPC”) in response to the proposed submission draft of the Maidstone Borough Local Plan (“the LP”) published by Maidstone Borough Council (“the Council”) under regulation 19 of the Town and Country (Local Planning) (England) Regulations 2012.
2. Specifically, they address the lawfulness of the Sustainability Appraisal (“SA”) of the LP, and the Sustainability Appraisal Report prepared by LUC dated September 2021 (“the SA Report”) which has been published for consultation as part of the Reg 19 consultation.

Legal principles applicable to assessing the legal adequacy of a Sustainability Appraisal of a local plan

3. Regulation 12(1) – (3) provide:
 - “(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
 - (2) The report shall identify, describe and evaluate the likely significant effects on the environment of–
 - (a) implementing the plan or programme; and
 - (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
 - (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–
 - (a) current knowledge and methods of assessment;
 - (b) the contents and level of detail in the plan or programme;
 - (c) the stage of the plan or programme in the decision-making process; and

- (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.”

4. In *Flaxby Park Limited v Harrogate Borough Council* [2020] EWHC 3204 (Admin), Holgate J summarised the applicable principles when assessing whether a local planning authority has complied with the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004 (“the 2004 Regulations”) when undertaking strategic environmental assessment (“SEA”), and in particular the adequacy of the environmental report prepared as part of the SEA as required by Regulation 12 (i.e. what is referred to in plan-making as a sustainability report).
5. The following are the key principles identified in *Flaxby*:
 - (1) There is a wide discretion given to a local planning authority in deciding what information “may reasonably be required”, taking into account current knowledge and methods of assessment, the contents and level of detail in the plan, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at other levels in that process in order to avoid duplication of assessment. This gives the local planning authority a wide range of autonomous judgment on the adequacy of the information provided (*Plan B Earth v Secretary of State for Transport* [2020] PTSR 1446 cited in *Flaxby* at [136]).
 - (2) The standard of review as to the nature and amount of information required is the conventional *Wednesbury* standard and the Court will not substitute its own view on the nature and amount of information included: *ibid* (referring to *R (Blewett) v Derbyshire County Council* [2004] Env. L.R. 29).
 - (3) There is a distinction between a failure by an authority to give any consideration at all to a matter which it is expressly required by the 2004 Regulations to address, namely whether there are reasonable alternatives to a proposed policy, which may amount to a breach of the Regulations,

as opposed to issues about the non-inclusion of information on a particular topic, or the nature or level of detail of the information provided to or sought by the authority, or the nature or extent of the analysis carried out. All these latter matters go to the quality of the SEA undertaken and are for the judgment of the authority, which may only be challenged on grounds of irrationality: *Spurrier v Secretary of State for Transport* [2020] PTSR 240

- (4) The identification and treatment of reasonable alternatives is a matter of “evaluative assessment” for the authority subject to review only on public law grounds. An enhanced margin of appreciation should be given to decisions which involve, for example, the expert evaluation of a wide variety of complex technical matters or scientific, technical, or predictive assessments: *Flaxby* at [131].
 - (5) The question as to whether there has been comparable or equal treatment of alternatives or between alternatives (or a lack of equivalence) is again subject to review only on irrationality grounds: *Flaxby* at [135].
6. For the reasons set out below, the SA Report is inadequate, primarily because there has been a failure to assess reasonable alternatives to the spatial strategy proposed in the LP.

The LP’s Spatial Strategy

7. The spatial strategy is contained in Policy LPRSS1. At para. 5, it proposes that the Maidstone urban area will be the focus for development in the borough. It then goes on to identify at paragraphs 6 and 7:
- (1) 2 new Garden Settlements at Lenham Heath (Heathlands) and Lidsing;
and
 - (2) 2 “strategic development locations” (“SDLs”).

8. One of the SDLs, Invicta Barracks, is described as having the potential to deliver c,1300 new homes – paragraph 5.28.
9. The other SDL, identified at paragraph 5.21 as the “*Leeds Langley Corridor (potential)*” in the settlement hierarchy, is described at paragraph 5.30 as follows:-

“The Leeds-Langley corridor will be safeguarded to enable the potential future delivery of an improved transport connection linking M20 J8 and the A274. It is not currently known whether and what quantum of development will be needed to help create the business case for this new route, and as such this Plan seeks to ensure that any development that takes place within this corridor does not act to sterilise this opportunity.”

Policy LPRSP5(A) Potential Development in the Leeds Langley Corridor

10. Policy LPRSP5(A) states that land within the corridor will be safeguarded for “potential” future development, “*which will be required to provide a quantum of enabling development which will meet its own and future highway needs and to provide connectivity between M20 Junction 8 and the A274*”.
11. It further provides that:-

“Development proposals which come forward in the defined corridor will be assessed for their potential to prejudice the delivery of a new highway. Proposals for new residential and commercial development coming forward in the defined corridor will need to be accompanied by a masterplan demonstrating how the development of the site potentially contributes to or does not inhibit the delivery of a Leeds Langley relief road.”

12. The supporting text sets out the business case for a Leeds-Langley relief road, and the conclusion reached by the Council that “*as standalone projects the route alignments considered had limitations in regard to being able to make a strong enough business case for funding*”. However, it also notes that the results of a study commissioned by the Council that concluded that:-

“that an approximate quantum of growth in the region of 3,995 residential units would be capable of funding a scheme without third party funding, should this be unavailable.”

13. It then states (emphasis added):-

“6.89 ... local landowners have identified a significant amount of land within the vicinity of the potential highway intervention for mixed use development.

6.90 At the current time, the delivery of a new road is not confirmed by the local Highways Authority. Discussions are ongoing however regarding how a scheme may be designed.”

14. The conclusion at paragraph 6.92 is that (emphasis added):-

“Discussions between KCC, MBC, local landowners and other stakeholders will continue, with the potential for a future Development Plan Document to be produced to guide development of the route in partnership with landowners & KCC. It will also be expected that development at the scale anticipated to fund and deliver a scheme will bring forward the normal range of other associated infrastructure. However, there is no new development proposed by this plan within the safeguarded area at the current time.”

Failure to assess reasonable alternatives to the spatial strategy

15. The Council’s decision not to identify the Leeds Langley Corridor as an area for new development is unjustified. In particular, merely proposing this area as having the “potential” as a SDL without having properly investigated whether in fact it should be proposed in the plan as an SDL is unsound. That particular point is addressed in LPC’s main Reg 19 submission.

16. However, the flaw goes further than resulting in an unsound plan. It also renders the SA that has been carried out inadequate and contrary to the 2004 Regulations.

17. These submissions focus on the extent to which the Council properly assessed the Leeds Langley corridor as a potential location for growth, rather than merely as an area to be safeguarded for future development. For the reasons set out below, it is submitted that:-

- (1) the identification of the Leeds Langley Corridor as a strategic growth location was a reasonable alternative to a policy that merely safeguarded it for future development;
- (2) the SA Report has not included any such assessment of such an alternative; and

- (3) as a consequence, the SA Report has also failed to assess reasonable alternatives to the spatial strategy and in particular the “2 Garden Settlement” strategy that forms a central part of the spatial strategy.

The SA of Garden Settlements

18. Two assessments are noted in the SA Report in which various possible locations for a garden settlement are considered. The reports containing those assessments were prepared by Stantec: one is dated April 2020 and titled Maidstone Garden Communities Suitability Assessment (“the April 2020 Report”), the other is dated August 2020 and titled Maidstone Garden Communities Deliverability and Viability Assessment (“the August 2020 Report”).

The April 2020 Stantec Report

19. At section 5, the April 2020 Report sets out the key reasons for the selection (and subsequent discounting) of the Leeds Langley Corridor. It states at page 19 (emphasis added):-

“5.1.33 As currently proposed the scheme is not a single integrated garden community and cannot currently be delivered as such. This is because to be suitable as Garden Communities a comprehensive approach is needed to secure the road.

5.1.34 However, the area has the potential to be considered as a suitable location for future growth as part of a significant strategy for the whole of this part of Maidstone. As such development here could deliver multiple benefits to Maidstone and the transport network. We also understand that there may be the possibility that the Langley Heath element could be considered as an urban extension. Further work, particularly on the relief road, and its likely timings for its delivery is required if it is to be developed into a realistic growth area in the future. The location should be progressed to the next stage subject to further work required to address the key issues identified above and specifically:

- ☐ The site boundaries, areas to be included and landownership
- ☐ The relief road’s route, timing and cost and relationship with the sites
- ☐ The design, taking into account constraints and opportunities

- How it will provide and deliver a comprehensive scheme
- Detailed evidence to fill gaps and provide more information”

The August 2020 Stantec Report - Garden Communities Part 2 August 2020.

20. The only reason for excluding the Leeds Langley Corridor as a reasonable alternative is set out on page 2 (emphasis added):-

“2.1.3 Following early discussion about the Leeds Langley Corridor it was agreed by land promoters in the area that while there may be merit in exploring the potential of a new Garden Community as a part of the options appraisal of the corridor, there was unlikely to be a specific, worked up, garden settlement proposal available for analysis at the current time. As such this site will be considered as a potential Broad Location by the Council for inclusion within the Plan, and is not assessed in this report.”

21. This conclusion is reflected in Chapter 4 of the SA which states at paragraph 4.22 that “*the Council decided to consider the location as a potential Broad Location rather than garden settlement for inclusion within the Plan*” (page 39).

Failure to assess Leeds Langley Corridor as a potential broad location for growth

22. It is clear that the Leeds Langley Corridor was not at any stage (whether prior to or subsequently to the recommendations by Stantec) assessed as a “potential Broad Location” i.e. as a broad location for growth rather than as a specific Garden Community, as explained below.
23. First, the growth location categories assessed by the Council are set out at Table 4.2 of the SA Report. These were identified before the conclusion in the Stantec Report in August 2020 to discount the Leeds Langley Corridor and did not include the Leeds Langley Corridor. The SA Report states at paragraph 4.8 (page 35) that “*these options*” were assessed in the following 2 documents:
- (1) Options for Spatial Strategy, Site Allocations and Garden Settlements SA Report (November 2020) (“the November 2020 Report); and

- (2) the Spatial Approaches in the Topic Paper Options (August 2020) (“the Options Document”).
24. The November 2020 Report was consulted on at Reg 18 stage. There is no assessment in that document of the Leeds Langley Corridor as a “broad location” for growth, nor is there any explanation as why it was not considered as a reasonable alternative to the original initial strategy options identified in Spring 2020 (i.e. RA1, RA1a and RA2a). Nor was there any reconsideration of the initial strategy options (which were based on the growth locations identified at Table 3.1), given that the Leeds Langley Corridor was by then being considered as one potential location for broad growth.
25. Likewise, the Options Document does not assess the Leeds Langley Corridor. There is a reference to RA4 (described as the Eastern orbital road corridor focus) but the Options Document does not contain any specific assessment of the Leeds Langley Corridor as a broad location for growth.
26. Second, the SA of Policy LPRSP5(a) itself makes clear that no such assessment was carried out. The SA Report at paragraph 7.168 asserts in relation to Policy LPRSP5(a) that “*no reasonable alternatives existed to the LPRSP5 suite of policies*”. The fact that no actual assessment of the Leeds Langley Corridor as a growth area (as opposed to a safeguarded area for the link road) is also clear from Table 7.6 of the SA Report which is titled “SA Findings for Policy LPRSP5(a): Development in the Leeds-Langley Corridor” (SA Report page 116). That sets out a series of question marks for this location against the SA objectives, because the “*nature, scale and type of such development is not known at this time*”.

The Leeds Langley Corridor as a reasonable alternative to the spatial strategy premised on just one broad location for growth

27. The key question, which is not addressed in the SA Report, is whether the Leeds Langley Corridor should have been assessed as a reasonable alternative as part of the spatial strategy in LPSS1 and not merely safeguarded for the link road.

28. The assertion made at paragraph 7.168 of the SA Report (i.e. that there was no reasonable alternative to merely safeguarding the route) is clearly flawed because an obvious alternative to safeguarding the Leeds Langley Corridor was a policy that identified it as a growth area (as Stantec did in 2020). In other words, despite the consultants advising the Council on its SA that the Leeds Langley Corridor should be assessed as a broad location for growth, the Council has failed to do so.
29. The failure not to consider the Leeds Langley Corridor as a broad location for growth as part of the spatial strategy is plainly irrational. What appears to have occurred, despite clear evidence commissioned by the Council recommending that the Leeds Langley Corridor should be assessed as a broad location for growth in August 2020, is that the Council continued with its original initial spatial strategy options identified in the spring of that year without revisiting that original strategy.
30. Nor is there any doubt that the Leeds Langley Corridor is a reasonable alternative because subsequent work post-dating the SA Report commissioned by the Council into the Leeds Langley Bypass in the Leeds Langley Bypass Report dated September 2021 (“the Bypass Report”) confirmed that there is a significant amount of developable land in this location.
31. The primary purpose of the Bypass Report was to assess whether there was any available information demonstrating a viable business case to support funding for a Leeds Langley bypass. This was in light of the current adopted plan policy LPR 1 requiring reconsideration of a possible bypass. The Bypass Report concluded that:-
- (1) as a stand-alone bypass scheme, external funding would be unlikely to come forward because it was unlikely to service or facilitate housing growth and the benefits were too localised and narrowly focused;

- (2) there was an indicative alignment which could enable development at the southern and northern ends of the route, and that headline viability work showed that the scale of development “is likely to be able to deliver the route.”; and critically,
 - (3) there is a significant amount of land promoted in the area at the southern and northern ends of an indicative alignment and that it *“it is reasonable to assume that around 100ha in each location could be developable within each area (subject to more detailed testing)”* (paragraph 4.1.4).
32. The Bypass Report was referred to as part of the supporting justification for Policy LPSP5(A), which stated that:
- “This work was to identify variations to the previously considered alignments and would release sufficient enabling development to support the delivery of the road. The Study concluded that an approximate quantum of growth in the region of 3,995 residential units would be capable of funding a scheme without third party funding, should this be unavailable.”
33. Inexplicably, instead of carrying out the detailed testing recommended by its consultants, the Council has only safeguarded the route and suggested that this matter should be considered in a development plan document at some point in the future. It did not consider or assess in the SA the Leeds Langley Corridor as a reasonable alternative to the policies in the LP as a broad location for growth. This is despite the fact that doing so it would deliver a significant amount of housing and would clearly facilitate the delivery of the Bypass which, as a “standalone” scheme, would not be viable. The Council’s approach to the SA of the LP in this regard has been irrational.

Conclusion

34. The SA Report is deficient and does not comply with the requirement under the 2004 Regulations to assess reasonable alternatives, essentially because the Council when undertaking the SA of the LP has failed to assess the Leeds Langley Corridor as a reasonable alternative to:-

- (1) the initial strategy options considered in the summer of 2020 (i.e. No Maidstone or Maidstone plus 4 garden settlements); and/or
- (2) the refined spatial strategy options considered at Table 4.4 on page 39 of the SA Report; and/or
- (3) the actual spatial strategy adopted in Policy LPRSS1; and/or
- (4) Policy LPSPR5(a) of the submission draft of the LP.

Dated 6 December 2021

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