

IN THE MATTER OF:

DRAFT A27 CHICHESTER BYPASS MITIGATION SUPPLEMENTARY PLANNING DOCUMENT

OPINION

I. INTRODUCTION

1. I am asked to advise Wates Developments on the draft A27 Chichester Bypass Mitigation Supplementary Planning Document (“**the Draft SPD**”). The Draft SPD has been published by Chichester District Council (“**the Council**”) for public consultation.
2. In July 2015 the Council adopted the Chichester Local Plan: Key Policies (“**the Local Plan**”) which is the principal development plan document for the district of Chichester. Subsequently, in July 2016 the Council adopted the Planning Obligations & Affordable Housing Supplementary Planning Document (“**the Adopted SPD**”).
3. The Council is in the course of promoting a new development plan document (referred to as the Chichester Local Plan 2021 – 2039 (“**the Emerging Local Plan**”)) to replace the Local Plan. The Emerging Local Plan has been published by the Council pursuant to reg. 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012 (“**the 2012 Regulations**”), but it has not yet been examined for the purposes of s. 20 of the Planning and Compulsory Purchase Act 2004 (“**PCPA 2004**”).
4. Paragraphs 4.46 – 4.54 of the Adopted SPD concern the funding of improvements to the A27 Chichester Bypass. At paragraph 4.51 of the Adopted SPD the Council sets out the cost per dwelling of funding the improvements to the A27 Chichester Bypass. This cost was derived from assessments and evidence produced during the preparation of the Local Plan (see paragraphs 4.47 and 4.50). These costs were defined for the purpose of Policy 8 of the Local Plan, which makes specific reference to the need for improvements to the A27 Chichester Bypass.
5. The purpose of the Draft SPD is to replace paragraphs 4.46 – 4.54 of the Adopted SPD. This purpose is explained in paragraphs 1.2 – 1.4 of the Draft SPD which materially provide:

'In the course of preparing the Chichester Local Plan 2021-2039, the technical evidence base covering the impact of new development in the south of the District on the A27 Chichester Bypass, and the mitigation required to address this, has been updated. This new evidence has demonstrated clearly that the approach to securing development contributions set out within the 2016 SPD is no longer sufficient to address the impact that new development coming forward now and into the future has on the capacity and highway safety of the A27 Chichester Bypass.

The purpose of this new SPD is to respond to the updated evidence base and replace the approach set out within paragraphs 4.46 - 4.54 of the 2016 SPD with a new approach that will appropriately address the impact that current and future development is having on the A27.

On adoption of this SPD, the above paragraphs of the 2016 Planning Obligations & Affordable Housing SPD will be deleted. However, in all other respects, the 2016 SPD will remain operative and should therefore be read alongside this new SPD by applicants and developers seeking planning permission within the District.'

6. In this context, Wates seek my advice on the following issues:
- (a) Issue 1 – Whether the Draft SPD is compliant the PCPA 2004 and the 2012 Regulations.
 - (b) Issue 2 – Whether the Draft SPD is compliant with the National Planning Policy Framework (“**the NPPF**”) and the Planning Practice Guidance (“**PPG**”).
 - (c) Issue 3 – Whether the Draft SPD is premature, given that the Emerging Local Plan and its supporting evidence base is untested and subject to significant objection, such that the adoption of the Draft SPD would be unreasonable.

II. ANALYSIS

(1) Issue 1 – Whether the Draft SPD is compliant the PCPA 2004 and the 2012 Regulations.

The relevant statutory framework

7. Pursuant to s. 17(3) PCPA 2004 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. In turn, pursuant to s. 17(7), regulations may prescribe which descriptions of documents are to be prepared as local development documents and, of those local development

documents, which documents are to be development plan documents.¹ The Secretary of State has made the 2012 Regulations for the purpose of prescribing these documents.

8. Pursuant to reg. 5 of the 2012 Regulations the documents which are to be prepared as local development plan documents are prescribed. So far as material, reg. 5 provides:

'(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 cooperation 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;

(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b) where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted.'

9. Further, pursuant to reg. 6 of the 2012 Regulations, any document of the description referred to in reg. 5(1)(a)(i), (ii) or (iv) is a local plan.² However, any other document referred to in reg. 5 (except an adopted policies map or a statement of community involvement) which is not a local plan is a supplementary planning document. The effect of this provision is that a supplementary planning document is a document which falls within reg. 5(1)(a)(iii) or (1)(b) of the 2012 Regulations: see **R. (Miller Homes Limited) v Leeds City Council** [2014] EWHC 82 (Admin) at [16(v)].

¹ Pursuant to s. 26 PCPA 2004, the provisions of Part 2 of the PCPA 2004 concerning the preparation of local development plan documents applies to the revision of such documents.

² See also the definition of 'local plan' in reg. 2(1).

10. Whether a document falls within one of the categories prescribed in reg. 5(1) is a question of law: see *Miller Homes* at [25]. In answering this question, the following questions are relevant:
- (a) The word ‘*regarding*’ in reg. 5(1)(a) is an ordinary English word which signifies a relatively loose relationship between the document and the matters specified in reg. 5(1)(a)(i) – (iv): see *Miller Homes* at [23].
 - (b) There may be a degree of overlap between one or more of the categories in reg. 5(1)(a)(i) – (iv): see *R. (Skipton Properties Limited) v Craven District Council* [2017] EWHC 534 (Admin) at [77].
 - (c) Any document falling within the categories in reg. 5(1)(a)(i) – (iv) must contain statements which constitute policies and may contain other statements, or a subordinate or explanatory nature, which are not policies: see *Skipton Properties* at [79].
 - (d) For the purposes of reg. 5(1)(a)(iv) it is not necessary to identify a development management policy which is separate from the statements in issue (although this is permissible); instead the statements in issue could themselves contain development management policies: see *Skipton Properties* at [93(1)].
11. The preparation of supplementary planning documents is governed by Part 5 of the 2012 Regulations. It is not necessary to recite those regulations, but pursuant to reg. 8(3) of the 2012 Regulations, any policies contained in a supplementary planning document must not conflict with the adopted development plan.

The comparative scope of the Local Plan and the Draft SPD

12. In considering this issue, the critical starting point is the scope of the relevant policies in the Local Plan and the comparative scope of the Draft SPD.
13. As to the Local Plan, the Draft SPD seeks to align itself with Policies 8 and 9: see paragraphs 3.5 – 2.7 of the Draft SPD.
14. Policy 8 concerns transport and accessibility. In the first part of Policy 8 the Council commits to improve the transport network by inter alia ‘*[p]lanning to achieve timely delivery of transport infrastructure needed to support new housing, employment and other*

development identified in this Plan'. It is important to note that this commitment relates to the development identified in the Plan; that is to say, the development in the plan period to 2029 and, in respect of housing specifically, the delivery of 7,388 houses by 2029 in accordance with Policy 4. In the second part of Policy 8, the Council states that measures *'will be developed to mitigate the impact of planned development on the highways network'*. Again, this is linked to the development identified in the Plan. One of the specified measures is a package of improvements to junctions on the A27 Chichester Bypass.

15. Policy 9 concerns development and infrastructure provision. In the first paragraph of Policy 9 the Council commits to ensure that new infrastructure *'is provided to support the development identified in the Local Plan'*. Like Policy 8 this commitment relates to the development identified in the Plan. Further, Policy 9 specifies 5 criteria which all development must satisfy. The second criterion is to: *'[p]rovide or fund new infrastructure, facilities or services required, both on and off-site as a consequence of the proposal'*. The fifth criterion is (where appropriate) to *'[f]und or contribute to improvements to increase the effectiveness and efficiency of infrastructure, facilities or services'*.
16. By comparison, whilst the Draft SPD is concerned with funding essentially the same improvements to the A27 Chichester Bypass as are referred to by Policy 8, there is an important distinction in the scope of the two documents. As I have explained, the Local Plan focusses on development within the plan period to 2029 and – in respect of residential development – as planned for in Policy 4. By comparison, the Draft SPD is focused on development in the plan period of the Emerging Local Plan to 2039 and development that is planned for (and identified) in the Emerging Local Plan, i.e. some 9,360 from the area of the Distract to the south of the National Park: see paragraphs 1.7, 2.13, 3.3 and 4.9 – 4.5 of the Draft SPD.
17. I note that the Draft SPD also refers at paragraph 2.8 to the Chichester Bypass junctions as being already over capacity. However, this does not alter my analysis in the preceding paragraph because the essential justification for the Draft SPD is to mitigate the impacts of future development, in particular through the Emerging Local Plan: see paragraph 2.13 of the Draft SPD.
18. Having regard to these matters, I consider that there is a reasonable basis for concluding that the Draft SPD does not accord with the statutory framework for two independent reasons.

Reason 1 – The Draft SPD is a development plan document

19. The first reason is that the Draft SPD should be prepared as a development plan document, i.e. as part of the local plan, not as a supplementary planning document. The reason for this conclusion is that the Draft SPD falls within reg. 5(1)(a)(iv) of the 2012 Regulations on one of two possible grounds.
20. First, Policy 9 of the Local Plan is a development management policy. This is apparent from the fact that Policy 9 requires all development to meet the five specified criteria. In this context, the Draft SPD contains statements regarding Policy 9 which are intended to guide the determination of applications for planning permission for the purposes of reg. 5(1)(a)(iv). More specifically, the contribution prescribed by the Draft SPD (in particular at paragraph 4.23) is prescribed for the purposes of the second criteria in Policy 9 and it is intended to guide the determination of applications for planning permission because it sets out the contribution that must be provided in order for a development to comply with Policy 9.
21. I am fortified in this conclusion by *William Davies Ltd v Charnwood Borough Council* [2017] EWHC 3006 (Admin) where the adopted development plan contained broad statements requiring affordable housing and a range of dwelling sizes to be provided in new residential development (see [8] – [10]). However, the precise mix was not prescribed; instead, the Council sought to promote the required mix through a supplementary planning document (see [12]). The court held that such an approach was impermissible because the draft document fell within reg. 5(1)(a)(iv), such that it could not be a supplementary planning document. There is a close analogy with this case where the detail required to apply the broad policy statements in Policies 8 and 9 is not found in a development plan document, but instead is found in the Draft SPD.
22. Secondly and in the alternative, even if Policy 9 is not a development management policy and/or the Draft SPD does not contain statements regarding Policy 9, nevertheless in my view it is possible to construe the Draft SPD as itself containing a development management policy which is intended to guide the determination of applications for planning permission because the Draft SPD establishes that future residential development in the south of the district must make the contribution prescribed in the Draft SPD in order to be acceptable. Such a requirement is a policy that applies to development generally, i.e. it manages development, and it is intended

to guide the determination of planning applications by benchmarking their acceptability.

23. I am fortified in this conclusion by the comparable reasoning in *Skipton Properties* at [91] – [93]. Like in that case, a supplementary planning document is being used to fill a gap in development plan policy by creating new development management policies through that document.

Reason 2 – the Draft SPD is in conflict with the adopted development plan

24. The second alternative reason is that the Draft SPD is in conflict with the adopted development plan. The reason for this is that the contributions required by Policies 8 and 9 of the Local Plan are restricted to mitigating the development planned for in the Local Plan, i.e. in respect of housing specifically, the delivery of 7,388 houses by 2029 in accordance with Policy 4. Even if the Draft SPD might be said to relate to some of this planned development (see, for example, paragraph 2.8 of the Draft SPD), nevertheless the Draft SPD goes beyond that planned development to consider future development under the Emerging Local Plan. Accordingly, the basis for calculating the contributions, as well as the purpose of those contributions, is in conflict with the adopted development plan because it goes beyond the scope of Policies 8 and 9 of the Local Plan. It follows that the Draft SPD is in breach of reg. 8(3) of the 2012 Regulations, even if it is properly characterised as a supplementary planning document.

Conclusion on this issue

25. It follows that for either of these reasons I consider that there is a reasonable basis for concluding that the Draft SPD does not accord with the statutory framework.

(2) Issue 2 – Whether the Draft SPD is compliant with the NPPF and PPG

Relevant policy framework

26. Pursuant to s. 19 PCPA 2004, in preparing a development plan document or any other local development document, the local planning authority must have regard to inter alia national policies and advice contained in guidance issued by the Secretary of State and any other local development document which has been adopted by the authority. However, there is no legal requirement that a document must be consistent with or

must not conflict with national policy: see *R. (SAV Development Ltd) v London Borough of Tower Hamlets* [2021] EWHC 3211 (Admin) at [7].³

27. In respect of the NPPF, paragraph 34 provides:

'Plans should set out the contributions expected from development. This should include setting out the levels and types of affordable housing provision required, along with other infrastructure (such as that needed for education, health, transport, flood and water management, green and digital infrastructure). Such policies should not undermine the deliverability of the plan.'

28. The policy in paragraph 34 of the NPPF is reiterated in the PPG which adds the following additional guidance:

'Such policies should be informed by evidence of infrastructure and affordable housing need, and a proportionate assessment of viability. This evidence of need can be standardised or formulaic [...]

*It is not appropriate for plan-makers to set out new formulaic approaches to planning obligations in supplementary planning documents or supporting evidence base documents, as these would not be subject to examination. [...]*⁴

Conclusion on this issue

29. In my view the Draft SPD is not consistent with the guidance in the PPG because it seeks to set out a new formulaic approach to planning obligations in a supplementary planning document, thus avoiding independent examination. I note that the Council does not appear to dispute this inconsistency: see paragraph 3.3 of the Draft SPD. However, this mere inconsistency does not give rise to unlawfulness in my view because the Council has explained why it has acted inconsistently with that guidance, namely the perceived urgency in securing the contributions and the incompatibility of that urgency with the timeline for promotion of the Emerging Local Plan.

30. Notwithstanding this conclusion there is a possible argument that the Draft SPD is in conflict with paragraph 34 of the NPPF because the Council is seeking to set out the contributions expected from development (beyond that planned for in the Local Plan) in a supplementary planning document, rather than in a local plan. Further, the

³ This was an agreed point, but it is correct in my view, provided that reasons are given for departing from national policy.

⁴ Reference ID 23b-004-20190901

Council has not recognised this inconsistency or given reasons for departing from national policy. In this regard, there is a possible basis for concluding that, on adoption of the Draft SPD (and assuming no change in circumstances), then the Council will have acted unlawfully.

(3) Issue 3 - Whether the Draft SPD is premature, given that the Emerging Local Plan and its supporting evidence base is untested and subject to significant objection, such that the adoption of the Draft SPD would be unreasonable.

31. In my view it is possible to describe the Draft SPD as premature given it is predicated on distributing the costs of the improvements to the A27 Chichester Bypass across the planned growth in the Emerging Local Plan, but the amount of that planned growth is subject to change, given it is based on an untested evidence base and subject to significant objection. Further, the supporting evidence base, including the costings for those improvements, has not been examined and is subject to objection. Again, key facets in that evidence base, for example the cost of the improvements, are subject to change.
32. Nevertheless, I do not consider that the Council would be acting unreasonably as a result of this prematurity in adopting the Draft SPD, in particular having regard to the high bar faced by a challenge based on alleged unreasonableness. I reach this conclusion because although the precise contribution per dwelling may change (for example, because of changes to the housing requirement in the Emerging Local Plan or to the evidence base on the costing of the improvement works), this does not mean that it was unreasonable to proceed with the Draft SPD given the identified urgency: see paragraph 3.3 of the Draft SPD. Further, although not tested through an independent examination, the evidence relied on by the Council in formulation the draft SPD is coherent and detailed. Accordingly, in these circumstances, I do not consider that the adoption of the SPD would be unreasonable, notwithstanding the concerns about prematurity and potential recalculation of the required contribution.

IV. CONCLUSION

33. I have explained my principal conclusions above. I would be pleased to advise further on any matters arising from my advice.

MATTHEW HENDERSON

**Landmark Chambers,
180 Fleet Street,
London EC4A 2HG**

3rd November 2023