

My Ref: Local Plan Examination
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Inspectors Louise Crosby & Elaine Worthington
C/o Louise St John Howe, Programme Officer

Dear Inspectors

Re: St Albans City and District Council Local Plan – Inspectors’ Post Hearing Letter to the Council of 14 April 2020

1. Thank you for the Inspectors’ post-hearing letter to the Council of 14 April 2020 (ref ED40) which sets out the Inspectors’ interim views following the first week of the Examination.
2. The Council is grateful for the opportunity to respond to those interim conclusions. It has taken advice from leading Counsel and considered the options which would be available to address the various matters that you have raised. The letter has been carefully considered both by officers and the Council’s cross-party Planning Policy Committee.
3. This letter sets out the detail of the Council’s response. In summary, the headline points are as follows:
 - 3.1. The Duty has been met in respect of the SRFI in the light of the lack of any alternative locations for it. The Council is proposing main modifications which acknowledge the status of the SRFI and would remove the PSGV allocation.
 - 3.2. The Duty has been met in respect of the potential for other authorities to meet St Albans’ housing needs in the light of all South West Hertfordshire authorities’ positions, understood by all of the authorities prior to the submission of the Plan that there was no opportunity to meet other authorities’ needs outside the Green Belt or AONB within their areas within the Council’s plan period.
 - 3.3. The requirement for formal statements of common ground is based in guidance, is not a legal requirement and is capable of being addressed through the plan process.
 - 3.4. The conclusions so far reached on the SCI need to be read subject to the Local Development Scheme. This makes clear that there would be no preferred options stage. Further, in the light of the procedural steps that have been provided for, including the current examination process, there would be no prejudice to third parties if the examination continued.



3.5. The issues on soundness, including the matters which need to be revisited under the Sustainability Appraisal and Green Belt review, are capable of being addressed through the examination.

4. This letter adopts the structure of the Inspectors' letter.

Duty to Co-Operate ("the Duty") on the SRFI

5. The Council is willing to accept the Inspectors' conclusion that the SRFI is a strategic matter for the purposes of s. 33A of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").
6. The Duty contained in s. 33A of the 2004 Act is one of "co-operation" on the strategic matter in issue with relevant authorities under s. 33A(1) (the Council "must co-operate" with relevant authorities in respect of the "preparation" of a development plan document "so far as relating to a strategic matter").
7. However, this co-operation is defined by the terms of s. 33A(2) which requires the Council to "engage constructively, actively and on an ongoing basis" in respect of a strategic matter. The Duty is therefore defined as an act of engagement, but it must be a real engagement (hence the adjectives in s. 33A(2), "constructive", "active" and "ongoing") which must have regard to the content of any discussion, including whether the engagement has at least the realistic potential to achieve a positive outcome.
8. There is no legislative sense behind a construction of the Duty which requires (and would result in a finding of a failure to achieve) discussion for no purpose. An interpretation of the legislation which requires there to be some real (as opposed to fanciful) potential behind any engagement is consistent with the Government's approach towards the Duty in the NPPF which highlights the relationship between the Duty and a "positively prepared" plan:

26. Effective and on-going joint working between strategic policy-making authorities and relevant bodies is integral to the production of a positively prepared and justified strategy.

9. Such a principle is also apparent in general public law. Under s. 31(2A) of the Senior Courts Act 1981, a Court will be required to refuse relief for an otherwise successful judicial review of a public law decision if, had the error of law not occurred, the decision would not have been substantially different. The Courts are required, therefore, to look to the substance of the decision. This approach is also supported by the Court of Appeal decision in *Samuel Smith Old Brewery (Tadcaster) v Selby District Council* [2015] EWCA 1107, in which the Court drew an analogy between the Duty and the general public law obligation on an authority to co-operate with other

authorities in order “to make reasonable enquiries in relation to relevant matters affecting the performance of their duties” (para. [44] of the Judgment) – this reiterates the need for some real potential substance behind the engagement (only “reasonable” enquiries of matters that will “affect” – i.e. in substance, affect – their duties).

10. Therefore, when determining whether there is in any given case a material defect in the overarching Duty, it is necessary to have regard to whether any discussion could rationally achieve any realistic positive result. If it could not, the failure to discuss that issue could not logically lead to the conclusion that, even though the Duty was engaged, there has been any failure to comply with it, particularly when the Duty is to be considered in respect of plan preparation as a whole.
11. In the context of housing, for example (and which is dealt with further below), when assessing whether there has been a failure in the Duty for not expressly discussing the avenues available for securing housing delivery in a neighbouring authorities’ area, if there is no real potential to achieve such a result given the particular factual context, it could not be said that there has been a failure to “constructively engage”; in such circumstances, any engagement, if it took place, could have no constructive result and would be empty of substance. Turning to the particular issues in this case, and the approach to the SRFI, in the light of the history, any discussions as to alternative locations for the SRFI would have been meaningless. There is, and was, no realistic potential for any alternative location for the SRFI to be identified from discussions with neighbouring authorities.
12. The Council acknowledges that there is a very considerable history to the identification of the Radlett site for an SRFI. This process, involving two Secretary of State-determined inquiries, resulted in planning permission being granted in 2014 on the basis that there was no other location for an SRFI within the relevant (and agreed search area) to serve this part of the Country (known as the ‘north-west sector’ and London; in the decision letter dated 14 July 2014, it was stated:

The Secretary of State agrees with the Inspector’s analysis at IR13.112 – 13.115. He agrees with the Inspector that the assessment of alternative locations for an SRFI conducted by the appellant has been sufficiently methodical and robust to indicate that there are no other sites in the north west area of search which would be likely to come forward in the foreseeable future which would cause less harm to the Green Belt (IR13.114).
13. This is also the position of Network Rail, which supports the identification of the Radlett site. The Council does not question the Secretary of State’s decision; through the plan process, it has only considered whether the proper balance for a sound plan is in favour of housing over the delivery of the SRFI.

14. The lack of an alternative location for an SRFI is also a reflection of the very constrained nature of neighbouring authorities' areas which is clearly indicated by their respective positions on their ability to meet other authorities' housing needs (which point is returned to further below).
15. It is also noted that the Inspectors acknowledged the strength of the evidence as to the unavailability of alternative locations: "it seems that the Radlett site in St Albans is the only realistic option and there is robust and compelling evidence to demonstrate that the SRFI needs to be located there" (para. 82 of the Letter).
16. In circumstances where the only realistic option for an SRFI to meet London and the north-west quadrant is the Radlett Site, inevitably any engagement with any other authority prior to the submission of the Plan would not have led to an alternative site being identified and would have been meaningless. The question as to whether there is any alternative site for the SRFI has been conclusively answered through the above processes and there was therefore nothing left to engage with others on.
17. The issue surrounding the SRFI is not, consequently, a Duty issue. Rather, it is a soundness question relating to the appropriateness of placing housing need over the very special circumstances justifying the SRFI. As has been stated above, the Council has reconsidered this issue and has concluded that it is appropriate to seek a main modification of the Plan which would remove the PSGV broad location policy and include a policy supportive of the SRFI and a broad location policy for the SRFI. The Council accepts that the balance in this case, in order for the plan to be sound, should be in favour of the SRFI since there is the potential to identify alternative sites for housing in the Green Belt but no realistic alternative location for the SRFI, as the Inspectors noted.
18. Since the Council accepts that this should be the proper conclusion in the assessment of the competing needs of the SRFI and housing, the discussions with other authorities would, again, have been without substance. This approach also addresses the actual problem with the plan at the present time, namely, the identification of the PSGV against the SRFI.

The Duty – Housing Allocations and the Green Belt

19. The substance of the Inspectors' concern as to satisfaction of the Duty in respect of housing need is that there is "no mention of the question being asked to as to whether any of the neighbouring authorities could take any of St Albans' need (that would otherwise require the release of Green

Belt land)” (para. 17). This concern is supported by the lack of SoCGs documenting discussion between authorities (ibid.). The concerns which have been identified relate, therefore, to the Council’s failure to demonstrate, evidentially, the relevant engagement.

20. Before addressing the ways in which the shortcomings in the evidence can be addressed, it is necessary to revisit some of the housing supply context in the strategic housing market area (“SHMA”). It is a matter of public record that all of the authorities in the SHMA (“the South-West Hertfordshire authorities) are facing considerable difficulties in meeting their housing numbers. This is the case, for example, for Dacorum District Council; as the Inspectors are aware, this Council specifically indicated the need for consideration by St Albans to meet Dacorum’s need, not the other way round. The reality of the position is that it has always been clear that none of the South-West Hertfordshire authorities have the ability to meet any other authorities’ housing requirements on non-Green Belt Land (or AONB in the case of Dacorum) within the St Albans plan period – this is a matter of clear agreement between the South-West Hertfordshire authorities, was a common understanding between them and underpinned the discussions which took place between the Councils prior to submission of the plan.
21. Again, therefore (as has been indicated above), specific evidence of such a discussion would have disclosed nothing other than the lack of any real or rational potential for alternative locations for housing: they would have been without substance. Consequently, there was no error in the Duty process arising from discussions around the housing issue.
22. This conclusion would apply with equal, if not more, force to any housing which is to be considered as a result of the proposed de-allocation of the PSGV since the pressure on the St Albans Green Belt would increase, rather than decrease.
23. Turning to the absence of SoCGs documenting discussions, this is a matter which is capable of being addressed through the examination process. Such SoCGs would be capable of confirming that there was, at the time of submission, no other locations for the siting of housing on non-Green Belt land (or, as above, AONB land) during the plan period in the South West Hertfordshire authorities’ areas.
24. The lack of SoCGs is not a legal failing of itself; the Government’s position on SoCGs is set out in guidance in the NPPF and the substance of the issue is whether there is sufficient evidence of compliance with the Duty – there is no specific guidance that such evidence can only be provided by SoCGs; indeed the PPG states that the examination will consider “all available evidence

including statements of common ground” (paragraph: 031 Reference ID: 61-031-20190315). As a result, the lack of SoCGs is not fatal to the Plan.

The Duty – conclusions

25. There is a clear route for the Inspectors to find compliance with the Duty. The assessment of compliance with the Duty does not require authorities to engage in an academic exercise which has no real content because the answer is already known – such engagement would serve no purpose. In respect of the SRFI, the Council acknowledges that there is and was no alternative location within other authorities’ areas for an SRFI. As a result, there would inevitably have been no real potential substance in any discussions with other authorities about alternative locations for it. Given the particularly pressing demands placed on all the relevant SHMA authorities, the same lack of any real potential outcome applies to concerns about discussing alternative locations for St Albans’ Green Belt housing requirements. Further evidence to justify such a conclusion is capable of being obtained through the examination process should this prove necessary.

Other Legal Issues – The Statement of Community Involvement (“SCI”)

26. The Inspectors have reached the interim conclusion that the Council failed to comply with the SCI because it set up a reasonable expectation that the Council would undertake a Preferred Options consultation on the Plan prior to its submission (the Letter, para. 27). The Inspectors have indicated, however, that the issue is whether any party has been prejudiced as a result of that step. The Inspectors have also indicated that consideration would have to be given as to whether this could be resolved during the examination (the Letter, para. 28).

27. The question whether there is a reasonable expectation of a preferred options stage in the present case is akin to the concept of a “legitimate expectation” in public law. Whether such an expectation is “legitimate” or reasonable is required to be considered against the particular factual context.

28. In the present case, the SCI was supplemented by a further document, the Local Development Scheme (“the St Albans LDS”) dated November 2017 (CD0027).

29. Before considering the content of the St Albans LDS, it is relevant to note that the Local Development Scheme is statutorily required to set out the timetable for the preparation of a local plan (see s. 15(2) of the 2004 Act); this necessarily requires a statement of the specific steps for

plan preparation, including whether a preferred options stage will be carried out. The Statement of Community Involvement sets out the policy as to the involvement of interested parties in the plan-making processes (see s. 18(1) of the 2004 Act) and does not need to set out the specific stages in the consultation process.

30. The St Albans LDS was thus legitimately able, and statutorily required, to address specifically the stages in the plan process. The LDS (page 3 – Timetable – Key Stages) explicitly stated that there would be only one stage in the consultation process prior to submission, with no preferred options stage:

Timetable – Key Stages:
<ul style="list-style-type: none"> • Statutory Public Consultation on Draft Plan (Regulation 18) – Jan/Feb 2018 • Publication / Statutory Public Consultation on Pre-Submission Draft Plan (Regulation 19) – Sept 2018 • Submission to Secretary of State (Regulation 22) – March 2019 • Examination (Regulation 24) – Summer 2019 • Estimated Date for Adoption (Regulation 26) – Spring 2020

Regulations as set out in the Town and Country Planning (Local Planning) (England) Regulations 2012

Table 1: Local Development Scheme 2017 - 2020

	Main Evidence Completion	Consultation	Pre-submission Publication	Submission	Examination	Adoption
Local Plan	Spring 2019	Jan/Feb 2018	Sept 2018	March 2019	Summer 2019	Spring 2020

31. At the very least, the St Albans LDS made clear that the SCI was setting out the general legislative stages (which can include a preferred option stage), but that the specific process was modified in respect of St Albans’ plan.

32. By contrast to the St Albans LDS, while the SCI identified a preferred options stage (see table 1), it indicated it was general in nature:

2.14 DPDs and SPDs are prepared in distinct, sequential, stages to enable the public to engage and inform the documents as they develop. These may vary between different types of planning document and be subject to review or change over time, so the diagrams below reflect the current general position (including the Council’s own internal procedures used for document preparation and adoption). Figures 2 and 3 are indicative in nature and provide a general outline of processes followed and consultation stages/opportunities. [emphasis added]

33. In the light of the St Albans LDS, no party (and a party relying on the SCI must be taken to be aware of all the published documents produced by the Council on the local plan) could legitimately have relied solely upon the terms of the SCI without being aware of the modifications contained in the LDS.

34. As the Inspectors have said, even if the final conclusion is reached that the SCI was the operational document, it will be necessary to consider whether any party has been prejudiced by relying on its terms. As a result of the extent of the representations which have been made in the local plan process to date and given the scale of housing which will need to be sought in the light of the Council's suggested main modification removing the PSGV policy, it could not be said that any party has been denied a full opportunity to set out their objections to the plan, including putting forward alternative sites for housing. The absence of a preferred options stage has not, therefore, prejudiced any party.

35. As a result, there could not be said to be any legal basis for concluding that the plan must be withdrawn.

Soundness

36. The Inspectors' concerns in respect of soundness relate principally to the following matters:

36.1.1. The failure to properly evaluate smaller areas (below the 500/14 ha threshold) within the Green Belt review ("GBR") (para. 37) and the subsequent Council assessment (para. 38), particularly given that the discounting of small sites occurred in 2013/14 when the housing requirement was lower (para. 42);

36.1.2. The failure to properly consider previously developed land to accommodate the Council's needs (paras. 46 – 48);

36.1.3. Not adequately evaluating sites which were taken forward, particularly in respect of the PSGV site (paras. 49 – 53);

36.1.4. The lack of detail in respect of the deliverability and viability of compensatory improvements for the broad locations (paras. 54 – 56);

36.1.5. The failure to establish that the plan is justified as an appropriate strategy, taking into account reasonable alternatives and proportionate evidence as a result of the failure in the Sustainability Appraisal's ("SA") consideration of alternative strategies.

37. Each of these issues is capable of being dealt with through the examination process. The GBR process can be revisited to capture both additional strategic and smaller-scale parcels of land. The Council's evaluation of the results of this process will be capable of considering the appropriateness of strategic and smaller sites and meet the concerns expressed by the Inspectors. Evidence relating to the availability of previously developed land would also be capable of being obtained. It is to be recalled that the GBR process did identify strategic and smaller parcels of land which would be capable of further consideration.

38. The Council would not seek to limit consideration of sites coming forward or their ability to add to or replace existing locations identified in the plan. However, it is notable that the objections to the plan did not seek to say that the identification of strategic sites as a matter of principle was wrong; they were concerned with the evaluation and assessment of alternative strategic sites both strategic and small-scale.

39. The result of this process is likely to lead to other potential changes which could be the subject of further modifications. The replacement of sites during a local plan process is not uncommon; the key issue is whether third parties would be able to voice their views on the approach that has been adopted. This would, of course, be readily achievable.

40. The GBR process and re-evaluation by the Council would be accompanied by an updated sustainability process which would be capable of overcoming the current issues identified by the Inspectors.

Evidence Base

41. With regard to the need for heritage impact assessments of the Broad locations (para. 89), these are capable of being carried out and factored into the reappraisal process. The same is true of the Traffic Impact Assessment. It is notable that HCC (as Highway Authority) considers that this is capable of being dealt with through the plan process.

42. At the least, these are issues which should only lead to the recommendation to withdraw the Plan once the evaluation process is completed.
43. With regard windfall data (para. 89) and an updated SHMA (para. 91), these are also capable of being obtained; the Council expects that this data will establish the levels of windfall included in the Plan is justified. Even if it does not, the identification and appraisal of strategic and smaller sites will be capable of meeting any shortfall. Again, therefore, this issue is capable of being addressed through the examination process.

Overall Conclusions

44. For the above reasons, the Council would ask that the Inspectors conclude that, with the main modification on the SRFI referred to above, the Duty has been satisfied and that there are no other legal reasons for recommending that the plan is withdrawn at this stage.
45. The remaining soundness and evidence base issues are each capable of being addressed through the examination process without prejudice to any other party.
46. The result of this approach is that the Plan process will continue. We would respectfully suggest that, given the lack of effect on third parties, it would be in no parties' interest for the examination to end. Withdrawal of the Plan will lead to a further, very considerable elongation of the Council's overall plan-making process, to the detriment of the local area and its residents.
47. The Council's concerns are reflected by the substantial number of third parties who are publicly stating that the examination process should continue. Other significant parties who have indicated their support for the Examination to continue include: Helioslough, the Crown Estate, Hertfordshire County Council (Property), Cala Homes, Bloor Homes, Crest Nicholson, Legal & General, Hallam Land Management Limited, St Albans School Woollam Trustee Company, St Albans School Ltd, Hunston Properties Limited, Oaklands College, Pigeon (Hemel Hempstead) Ltd and Redington Developments (Chiswell Green) Limited.
48. Dacorum Borough Council have indicated their support for the Examination continuing as this would provide the opportunity to draw conclusions on a variety of issues that are relevant for its own Local Plan. Indeed all the south west Herts Authorities (Dacorum Borough Council, Hertsmere Borough Council, Watford Borough Council, Three Rivers District Council and Hertfordshire County Council) have indicated their support for the Examination to continue.

49. The Council would particularly ask that the Inspectors consider the representations of Helioslough; a copy of Helioslough's representations are included as appendix 1 to this letter for convenience. This party's positions on the law and the proper approach towards the Plan mirror the Council's.

50. The Council does not consider that a hearing to further consider these questions is necessary. However, should the Inspectors wish to hear representations on these points, the Council would be happy to do so by way of virtual facilities, if necessary.

Yours sincerely,

Spatial Planning Team
St Albans City and District Council

Enc. Appendix 1 – Letter on behalf of Helioslough