

OPINION

Introduction

1. An examination is about to be held into the draft Development Sites DPD submitted by Ealing LBC (“Ealing”). Policy OIS 7 deals with Greenford Green. It proposes to allocate land owned by Segro Plc as a “strategic industrial location”. In this Opinion I explain (a) why the draft DPD cannot lawfully be adopted with any such allocation and (b) if, nonetheless, that were to happen, the policy would be quashed on an application to the High Court. Before I identify the three legal flaws in the approach taken by Ealing, I will summarise the relevant legal principles.

Legal principles

2. The correct interpretation of planning policy, including policies contained in development plans, is an objective question, and not a matter of planning judgment nor a matter which a planning authority is entitled to determine from time to time. Ultimately, in the event of a dispute, the interpretation of policy is a question of law for the Courts to decide (see the Supreme Court in Tesco Stores Ltd v. Dundee City Council [2012] PTSR 983 at paras.17-20:-

“...planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.”

These principles have also been applied by the High Court when considering whether a local authority decision to adopt a policy document complies with the Planning and Compulsory Purchase Act 2004 and regulations made thereunder (see eg. R (Wakil) v. London Borough of Hammersmith and Fulham [2013] 1 P & CR 13; [2012] EWHC 411 (paras.76 to 82).

3. A local development document must be “in general conformity” with the London Plan (2011) (section 24(1)(b) of the 2004 Act). The Mayor may give an opinion as to the general conformity of an LDD with the London Plan (section 24(5)) and if he states that a document is not in “general conformity”, then he must be taken to have made representations seeking a change to the document (section 24(7) of the 2004 Act). However, the legislation does not require the draft LDD to be changed merely because of the Mayor’s opinion. The merits of that opinion have to be examined to see whether it is well founded.

4. The purpose of the statutory examination is to determine whether the Development Sites DPD (inter alia):-

(a) satisfies sections 19 and 24(1) and any regulations under sections 17(7) and 36; and

(b) is sound.

In order to be “sound” a plan must comply with the requirements of paragraph 182 of the NPPF.

5. By regulation 8(4) and (5) of the Town and Country (Local Planning) (England) Regulations 2012 a draft local plan document, such as the Development Sites DPD, must be consistent with the adopted development plan, unless it contains a “policy” which is intended to supersede another policy in the adopted development plan, in which case it *must* also state that fact and identify the superseded policy.

6. The principle underlying the legislation is that the local planning authority is not entitled to make alterations to a draft local plan once it has been submitted for examination. The Inspector may not recommend a draft local plan for adoption unless satisfied that the

document satisfies the requirements of sections 19 and 24(1), as well as the regulations to which I have referred, and is “sound” (section 20(7) of the 2004 Act). Subject, to sections 20 (7B) and (7C), where the Inspector is not so satisfied, a recommendation must be made that the draft plan is not adopted (section 20(7A)). As an alternative to the obligation to recommend non-adoption, if the local authority makes a request under section 20(7C), the Inspector must recommend modifications that would make the draft plan both sound and compliant with the statutory requirements to which I have referred (section 20(7B) and (7C)). Modifications under section 20(7C) are referred to as “main modifications” (section 23(2A)). Where that procedure is followed, the local authority may only adopt the plan with those modifications (together with any “minor” modifications satisfying the test in section 23(3)(b)).

7. Where the legal requirements set out above are not satisfied an application may be made to the High Court under section 113 of the 2004 Act to quash the plan or part thereof (or to remit the plan subject to directions as to how to proceed) (section 113(7) to (7C)).
8. The draft policy OIS 7 is legally flawed on three separate grounds. In this Opinion I will summarise my reasoning as to why that is so.
 - (a) **The Draft policy OIS 7 is inconsistent with the adopted development plan**
9. The adopted development plan for Ealing currently comprises part of the Unitary Development Plan (adopted in 2004 and “saved” in part), the London Plan (2011), and the Development Strategy 2026 (or Core Strategy DPD) (adopted on 3 April 2012).
10. At the time of the 2004 UDP, policies 2A.7 and 3B.5 of the then London Plan provided that:-

- (i) the Mayor would promote strategic employment locations set out in Annex 2 as a strategic reservoir of industrial capacity;
- (ii) Annex 2 referred to “12 - Ealing Northolt, Greenford, Perivale (parts)” as a SEL by name only;
- (iii) Boroughs were to identify the SEL’s in UDP’s.

The London Plan did not designate the boundaries of SEL’s. That was left to the UDP’s.

11. The 2004 UDP designated the GSU site as a “major employment location”, but not as a strategic employment location. The whole of Segro’s interests (the Wincanton and the Tata sites) were shown as an opportunity area, not as a major employment location or SEL. Notes on Opportunity Site 80 demonstrate that Segro’s land was treated differently from the nearby site 79. The southern part of site 80 was shown as “mainly offices, some mixed uses including housing and local centre uses”. The northern part of the site was shown as major employment, including factories, warehousing and offices.

12. In summary policy 2.17 of the London Plan (2011) provides:-
 - (i) SIL’s will be promoted and, where appropriate, protected. SIL’s are designated in Annex 3 and “illustrated” in Map 2.7;
 - (ii) Reference 41 in Annex 3 (p.289 of the Plan) identifies “Northolt, Greenford, Perivale (parts)” as a “preferred industrial location”. Map 2.7 is schematic and the Plan does not identify the boundaries of SIL’s;
 - (iii) SIL boundaries were to be identified in LDF’s.

13. Policy 4.2 (Regenerate Greenford Green and Review Employment Site) of the Adopted Core Strategy is a policy to “promote regeneration proposals on key sites – including at Butlers Wharf and GSK – sites for appropriate mixed use development (including

housing and appropriate infrastructure)...” The Strategy refers to the anticipated Development Sites document as something which would simply facilitate delivery of those regeneration proposals. Policy 3.6 and footnote 85 (p.44) is similar in effect to Policy 4.2, promoting high density and mixed use development including offices and housing. Land use guidance was to be provided in an SPD for a number of sites. Thus, the Core Strategy plainly envisaged that the land use principles were settled by that document and would not be altered by subsequent documents. Equally plainly the Core Strategy decided not to allocate either Segro’s land or the GSK site as a SIL.

14. The GLA would have been consulted on the issue under section 24 as regards the “general conformity” of the Core Strategy with the London Plan. It does not appear that the Mayor objected to the allocation of the GSK and Segro sites as mixed use development sites (including housing). Clearly that allocation would be incompatible with any suggestion that they be retained as SIL. Therefore, the GLA must be taken to have been satisfied with the policy allocations in the Core Strategy, in particular the allocation of both the Segro and GSK sites as mixed use sites and not as SIL.
15. In April 2012 Ealing published a schedule of changes to the 2004 UDP proposals map, *incorporating changes from the Core Strategy*. Consistent with the allocation of the Wincanton and GSK sites as opportunity sites for mixed uses, Map 35 shows MEL to the west of the Wincanton and GSK sites, and no MEL designation on those sites.
16. Policy OIS 7 (formerly OIS 8) of the submitted Development Sites DP purports to introduce a distinction at Greenford Green between land north and south of the Grand Union Canal. The former (the GSK site) was identified for office development supported by mixed uses, whereas the Wincanton site is designated for the first time as SIL. Indeed,

the reference to SIL was not made until purported modifications submitted in February 2013, whereas the June 2012 submission edition had simply suggested protecting the Wincanton site for B1c, B2 and B8 uses.

17. The designation of Segro's land as SIL, or even as land protected for B1c, B2 and B8 development, is inconsistent with the designation of that land in the adopted development plan for mixed use development, including housing and offices. The Inspector cannot conclude that the submitted plan complies with the legislation referred to in paragraphs 4 and 5 above, and therefore cannot recommend the adoption of the DPD.

(b) General conformity with the London Plan (2011)

18. In its response (published on 9 May 2013) to "the Inspector's Initial Questions to the Council", Ealing asserts on page 4 that Segro's land has had to be designated as SIL in order to ensure conformity with the London Plan. That contention is legally flawed. The Core Strategy could not lawfully have been adopted in April 2012 unless it complied with section 24(1) of the 2004 Act. That is an overarching principle. The Mayor was consulted on the Core Strategy and no conformity issue arose in relation to the allocation of both Segro's land and the GSK site as mixed use sites, and not as SIL.
19. It must therefore follow that Ealing cannot now promote a SIL designation on Segro's land in order allegedly to achieve general conformity with the London Plan. That reasoning is inconsistent with the legal basis upon which the Core Strategy was adopted statutorily as an LDD. It follows that as a matter of law Ealing's reasoning is flawed and consequently any adoption of the draft DPD in its present form as regards policy OIS 7 would be unlawful.

20. For the same reasons the consultation opinion of the GLA (dated 3 September 2012) on the pre-submission version of the DPD is legally flawed (see also point (c) below).

(c) **The opinion of the GLA**

21. It appears from Appendix B of Ealing's Responses to the Inspector's Initial Questions that the Council believes that the designation of the land north of the canal (the GSK site) for mixed use purposes, involves a loss of land designated *in the UDP* as MEL and SIL and that Segro's land represents a compensating increase in LSIS for approximately the same amount of land. The flaw in that reasoning was compounded by GLA's consultation response of 3 September 2012, in which it was stated (para.11) that the loss of 9.13 ha of SIL to the north of the canal would be acceptable subject to the compensatory designation of land to the south of the canal (Segro's land) as SIL.

22. The stance taken by Ealing and the GLA is legally flawed in that:-

- (i) They fail to take into account the allocation in the Core Strategy of both the GSK and Segro sites as mixed use development sites which was inconsistent with any SIL designation;
- (ii) Their rationale is inconsistent with the Core Strategy and the legal basis upon which it was adopted and became part of the statutory development plan;
- (iii) Their rationale wrongly assumes that the GSK site had been designated as SIL and thus the allocation of that land in the draft DPD involves a loss of SIL calling for compensating provision of additional SIL. The GSK site has not previously been designated as SIL.

Conclusions

23. It must follow from the above analysis that the draft DPD may not lawfully be recommended for adoption unless the Inspector, at the request of Ealing, recommends main modifications under section 20(7C) removing the draft SIL designation from Segro's land and substituting a mixed use allocation in accordance with the Core Strategy and similar to that applied to the GSK site



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IN THE MATTER OF:

SEGRO PLC

SITES AT GREENFORD GREEN

**LB EALING DEVELOPMENT SITES &
DEVELOPMENT MANAGEMENT DPD's**

OPINION

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Our Ref: DJH-