

Re Ealing Borough Council Development Sites DPD

Opinion

1. I am asked to advise in relation to a procedural matter arising out of the Examination of the Development Sites DPD (“the DPD”) submitted by Ealing Borough Council (“the Council”).
2. On 4th and 5th June 2013, the Inspector (Christine Thorby) conducted a series of hearing sessions as part of her Examination of the DPD. The first of those hearings was concerned with the Council’s overall approach and general matters before looking more closely at site specific issues raised by the DPD.
3. A significant participant in the Examination hearings was SEGRO as the owners of site OIS 7, which the Council proposed to designate in the DPD as a Strategic Industrial Location (“SIL”). SEGRO objected to the proposed designation of OIS 7 as SIL, *inter alia*, on the basis that the designation was inconsistent with the adopted development plan (including the Core Strategy where the site is allocated as a mixed use development site); was not in general conformity with the London Plan; and was not supported by any evidence of its suitability as SIL¹.
4. Prior to the hearing sessions and in the light of SEGRO’s written representations, the Inspector on 24 May 2013 sent the Council 3 written questions relating to the status of the UDP policies, how the Development Strategy dealt with the site and how/who defined the SIL boundary. The Council’s undated written responses to these questions were circulated before the hearing session and, therefore, SEGRO had an opportunity to comment on the adequacy of them orally at the Examination hearing sessions.

¹ A written Opinion by David Holgate QC dated 20 May 2013 was submitted by SEGRO to the Inspector prior to the Inquiry explaining why the allocation was legally flawed and the DPD could not lawfully be adopted. There has never been a response by the Council or the GLA to the legal points he makes in his Opinion.

5. At the end of the Examination hearing session on 5 June 2013, the Inspector indicated that she might have further questions for the Council relating to Greenford Green (i.e. where site OIS 7 is located) and on 17 June 2013 sent those questions (which related to the designation of OIS7 as SIL) to the Council. They were also subsequently published on the Council's website.
6. On 20 June 2013, Austin Mackie Associates Ltd (acting for SEGRO) asked the Programme Officer when the Council was proposing to respond, what opportunity there would be for SEGRO to comment on the Council's responses and the time frame for doing so. On 21 June 2013 the Programme Officer replied as follows:-

"The Council will publish their response to the Inspector's question early next week. The Council's response won't affect the main modifications. The Inspector questions were for the purpose of seeking clarification for her report.

The Inspector has heard from both parties and if she needs any further information, I will let you know. She is away at the moment so I can't say for definite when this will be but you will be given sufficient time to response [sic] and I will make her aware of the days you are away."
7. Although, it was indicated by the Programme Officer that the Inspector would let SEGRO know whether she needed any further information there has been no further communication except to send SEGRO the Council's responses on 11 July 2013.
8. SEGRO has considered the Council's responses sent on 11 July 2013, and it is clear that they do not in fact address the Specific question the Inspector asked and seek to provide further justification for the designation of OIS 7 as SIL. In doing so the Council also appears to introduce new evidence and arguments it has not previously advanced.
9. SEGRO has prepared its formal comments on the Council's responses and proposes to submit these separately. However, having reviewed both the Inspector questions and the Council's responses, it is readily apparent to me that the Council's responses do not answer the Inspector's specific questions and do not, therefore, assist the Council to demonstrate the soundness of the

DPD. For example, in relation to the first question, the Inspector asked the Council simply to confirm the overall extent of the reduction in industrial land over the plan period. However, the Council's response has been to introduce an unclear table which, despite the adopted CS, nonetheless appears to show that the Council simply released land without regard to the benchmark targets that it was set in the CS.

10. As regards the second question, the Inspector asked the Council whether it had carried out any *further* analysis *after* the GLA's response in September 2012 to the publication of the DPD. The direct answer to that is plainly "no" and the Council's response makes no reference to any analysis undertaken by the Council after the GLA's September 2012 response. Instead, the Council has simply re-hashed the arguments it advanced at the Examination hearing by placing reliance on the ELR (2010) and the supposed historic designation of OIS7 as industrial land; and by making an assertion that the land to the south of the canal is suitable for industrial use simply because it currently is in an industrial use.
11. The third question asks what evidence base and analysis the GLA relied on to make their comments about designating OIS7 as SIL, bearing in mind that the ELR recommended that the site should be retained as an employment site with the possibility of mixed uses. Again, the direct answer to that question is that the Council cannot identify the evidence base or analysis underlying the GLA's response and instead the Council has chosen to speculate that the Mayor's response took account of an alleged functional relationship with existing SIL to the west and the site's characteristics.
12. In her last question, the Inspector asked the Council to point to the *specific* justification for including part of OIS7 in SIL in preference to other sites in the Borough, in addition to asking whether the approach to allocation/de-allocation was justified and consistent. Without actually saying so, it is plain from its response that the Council has simply relied on paragraph 11 of the GLA's September 2012 response to justify the inclusion of SEGRO's land as SIL and has not undertaken any comparative analysis of other sites in the Borough to demonstrate that OIS7 is to be preferred for that use.

13. Moreover, paragraph 4.3 of the Council's response perversely seeks to rely on a lack of evidence to support the non-designation of OIS7 as SIL as the reason for the subsequent designation of OIS7 as SIL. This approach wrongly reverses the burden of proof and the onus is firmly on the Council to demonstrate to the Inspector that the designation of OIS7 as SIL is justified by being soundly based on evidence supporting such a designation. The Council cannot rely on a supposed absence of evidence for its non-designation as SIL as evidence that it should be designated as SIL. This is particularly important given that neither the CS nor the earlier draft DPD proposed OIS7 as SIL.
14. It is entirely possible that the Inspector simply has overlooked inviting SEGRO to comment on the Council's responses and still intends to do so once the consultation process on the Council's modifications is over. However, whether giving SEGRO the chance to comment on the Council's responses has been inadvertently overlooked or not, it is clear to me that as a matter of basic procedural fairness SEGRO must be given that opportunity.
15. It is a fundamental principle of any fair hearing that both sides affected by an administrative decision should be heard and is enshrined in the maxim *audi alteram partem*. If judicial authority is required for that basic concept, then it can be found at the highest level in the speeches of their Lordships in *Ridge v Baldwin* [1964] AC 40.
16. In the present case, SEGRO takes issue with the Council's responses which and in such circumstances the Inspector would plainly be acting unfairly and in breach of natural justice were she to take the Council's responses into account when producing her Report without also giving SEGRO an adequate opportunity to comment on them.
17. Fortunately, the Inspector's examination has not yet been completed and there is therefore an opportunity for SEGRO now to comment on the Council's responses to the Inspector's additional questions. Accordingly, my advice is for SEGRO to notify the Inspector that it wishes to comment on the Council's responses to her questions and to submit its comments in writing to the

Inspector so that they can be taken into account by the Inspector when completing her Report thereby remedying the breach of natural justice.

Dated 6th August 2013



John Litton QC

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