

Luton and South Bedfordshire Joint Committee
Date: 24 June 2011
Agenda Item No. 8

AUTHOR	Lachlan Robertson
SUBJECT	Report of the current and future status of the Regional Strategy (RS) and its implications on the Core Strategy Examination.
PURPOSES	To advise the Joint Committee of the current legal position.
RECOMMENDATIONS	<p>That the Joint Committee considers that in the light of recent Court of Appeal judgements and also the legislative changes proposed in the Localism Bill currently before Parliament, which seek to revoke the Regional Strategies, that the Joint Committee resolves either:</p> <ol style="list-style-type: none">1. to continue with the Core Strategy as submitted on the 8 March 2011;2. to seek a deferral of the Core Strategy from the Planning Inspectorate to undertake appropriate focussed changes and consequential public consultation; or3. to seek a withdrawal of the Core Strategy from Examination from the Secretary of State under Section 22(2)(b) of the Planning and Compulsory Purchase Act 2004. <p>Should Recommendation 2 be accepted, then in addition:</p> <ol style="list-style-type: none">4. that the Joint Committee convenes on the 29 July 2011 to receive a detailed focussed changes report; and5. that the Joint Committee receives and determines the timetable for this deferral as requested by the Inspector.

REASON FOR RECOMMENDATIONS	It is considered that the recent Court of Appeal judgement has substantially altered the position of Core Strategy in respect of the Regional Strategy and that several options are available to the Committee on how to proceed.
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1. BACKGROUND

- 1.1 The Joint Committee agreed to publish the Luton and southern Central Bedfordshire Core Strategy on the 22 October 2011. This was settled as a policy document during the period when national policy was changing. At the time of its publication it was known that the Regional Strategies across the Country had been abolished.
- 1.2 The Regional Strategy for the Luton and South Bedfordshire Joint Committee area is the East of England Plan 2001 - 2021, published in May 2008. This Plan is complemented by the earlier Milton Keynes South Midlands Sub-regional Strategy 2005 from which it draws policies relevant to this area.
- 1.3 Following the general election in May 2010, the Department for Communities and Local Government issued a letter on the 27 May 2010 announcing that it was the new Coalition Government's intention to abolish Regional Strategies. The letter went on to say:
- "Consequently, decisions on housing supply (including the provision of travellers sites) will rest with Local Planning Authorities without the framework of regional numbers and plans."*
- 1.4 On the 6 July 2010, a further letter from the Government's Chief Planner formally revoked the Regional Strategies across the Country. In the accompanying guidance to local planning authorities, the letter stated:
- "Where local planning authorities are currently bringing forward development plan documents they should continue to do so. Authorities may decide to review and/or revise their emerging policies in the light of the revocation of Regional Strategies. Where authorities decide to do this they will need to ensure they meet the requirements for soundness under the current legislation."*
- 1.5 The Joint Committee followed this advice and agreed to publish the Core Strategy according to this guidance on 22 October 2010.
- 1.6 However, the Government's revocation of the Regional Strategy was challenged on behalf of Cala Homes, and a judgement was issued which re-instated the Regional Strategies in November 2010. Again advice was issued by the Government's Chief Planner which stated:

“The effect of this decision is to re-establish Regional Strategies as part of the development plan. However the Secretary of State wrote to Local Planning Authorities and to the Planning Inspectorate on 27 May 2010 informing them of the Government’s intention to abolish Regional Strategies in the Localism Bill and that he expected them to have regard to this as a material consideration in planning decisions.”

- 1.7 Again, this was challenged by Cala Homes and a further judgement was issued on the 7 February 2011.
- 1.8 Following this series of legal challenges it is now clear that the Regional Strategy remains extant and that the Core Strategy will need to be in general conformity with it. It is also clear that the Government is pursuing the necessary legal changes through the Localism Bill and procedural requirements to ensure that Regional Strategies are abolished. It has been suggested from the relevant Government Department, that the Localism Bill will be enacted by the end of November 2011 and that in addition the Regional Strategies will be revoked at that time.
- 1.9 The fact of the legal challenges have been referred to by a number of parties in the representations that were made to the Plan following the consultation period earlier this year and most recently in detail by the submission of two legal opinions by Mr Peter Village QC. These opinions may be found on the shapeyourfuture.org website¹.
- 1.10 The Planning Inspector presently examining the Core Strategy has asked explicitly: “Is the CS in “general conformity” with the Regional Strategy.” The full text of his concerns and the JTU reply can be found in the letters reproduced in Appendix 1.2
- 1.11 However, since that request, a recent Court of Appeal judgement³ issued on the 27 May 2011 has clarified the matter of whether or not local planning authorities are entitled to have regard to the Government’s intention to revoke Regional Strategies when making planning decisions. In the case where a local planning authority is considering a significant planning application, the answer is yes. In the case of preparing Development Plan Documents (such as the Core Strategy) the answer is no. To quote from the judgement:

“24. This “valuable element of flexibility” (see Lord Clyde’s speech in the City of Edinburgh case cited in para. 6 above), given to the local planning authority when determining planning applications, is to be contrasted with the lack of flexibility when the authority is preparing its development plan documents. It must have

¹ <http://www.shapeyourfuture.org.uk/ExploratoryMeeting.html>

² See Appendix 1: Summary of the Inspector’s concerns paras 5 – 8 and JTU Letter 6 May 2011 paras 11 – 32.

³ <http://www.bailii.org/ew/cases/EWCA/Civ/2011/639.html>

regard to the relevant regional strategy (among other specified matters), and whether or not it is precluded from having regard to other matters which are not listed in paragraphs (a)-(j) of section 19(2) of the 2004 Act, the end-product, the local development documents, "must be in general conformity" with the regional strategy: see section 24(1) of the 2004 Act. Development plan documents must be submitted for independent examination by a person (in practice a Planning Inspector) appointed by the Respondent, and one of the purposes of that examination is to determine whether the development plan document satisfies the requirement of general conformity in section 24(1). It would be unlawful for a local planning authority preparing, or a Planning Inspector examining, development plan documents to have regard to the proposal to abolish regional strategies. For so long as the regional strategies continue to exist, any development plan documents must be in general conformity with the relevant regional strategy."[emphasis added].

- 1.12 The Core Strategy as eventually published was written after the Secretary of State had issued his decision to revoke the Regional Strategies. It was stated explicitly in the original report to the Joint Committee on the 24 July 2010 that it was written with that revocation in mind. This is reflected within the text of the Core Strategy itself which states:

"The Regional Spatial Strategies are earmarked for abolition. Therefore, this Core Strategy provides plans for delivery of the natural growth of this area rather than the targets set in the Regional Spatial Strategy (sic) for this area."

- 1.13 This is a significant judgement in the context of our Core Strategy. The Inspector issued a note drawing attention to the relevant part of the judgement quoted above. This note is attached as Appendix 3.
- 1.14 It is considered that this legal development has consequences which the Joint Committee may wish to consider before it makes the decisions flagged in the previous agenda report, paragraph 2.2.

2. IS THE CORE STRATEGY IN "GENERAL CONFORMITY" WITH THE REGIONAL STRATEGY?

- 2.1 The responsibility for preparing a development plan that must have regard to the Regional Strategy⁴ lies with the Joint Committee. The Court of Appeal judgement highlights that there is no flexibility in performing that responsibility. It is necessary for the Plan to be prepared without reference to the intended revocation of the Regional Strategy. The options that are available are as follows and it will be necessary for the Joint Committee to consider the risks of each in the light of that judgement.

⁴ Section 19 of the Planning and Compulsory Purchase Act 2004

Option 1: To continue with the Core Strategy, unaltered.

Option 2: To seek a deferral to allow the Core Strategy to be altered.

Option 3: To withdraw the Core Strategy.

- 2.2 In respect of Option 1, the Inspector has raised a number of significant concerns about the soundness of the Core Strategy. There is a substantial risk that if the Plan were progressed without alteration, then it would be found unsound by this Inspector.
- 2.3 In respect of Option 2, it is possible to seek a deferral of the Hearings that would allow appropriate focussed changes to be made to the Core Strategy. This option underlay the content of the response made by the Head of the Joint Technical Unit to deal with the Inspector's specific issues as he set them out in his letter of the 15 April 2011. In that letter, the Inspector asked specifically this question: to what extent is the Core Strategy in general conformity with the Regional Strategy? He was not aware of the Court of Appeal judgement at the time the question was asked.
- 2.4 Whether or not the Core Strategy is in "general conformity" with the Regional Strategy is a matter to be examined and determined by the Inspector. Unfortunately there is no specific guidance on what "general conformity" means. Nevertheless, a reasonable definition may be that the Core Strategy may be considered to be in general conformity with the Regional Strategy if there is no significant inconsistency or omission in the Core Strategy which would cause significant harm to the implementation of the Regional Strategy.
- 2.5 The list below gives three areas where a Core Strategy may be questioned on its "general conformity". They are referred to specifically by the Inspector:
- The amount of housing provided.
 - The amount of jobs provided.
 - The timescale of the plan.
- 2.6 In respect of the housing numbers issue, the JTU prepared and submitted additional evidence to the Inspector. This is in the form of Background Paper 1 – Housing Numbers which can be found in Appendix 2. This concluded that the overall amount of housing provision is broadly similar to that set out in the Regional Strategy. This is supported by the views of the former Head of Planning for the East of England Regional Assembly that are included in the form of a letter that can be found in Appendix 1⁵.
- 2.7 Nevertheless, the paper also explores the changes that have occurred in the planning context since the 2008 Regional Strategy was approved and concludes that a locally derived amount of housing can be justified.

⁵ Appendix 1: JTU Letter – Appendix C – Letter from Adrian Cannard

- 2.8 In respect of the employment numbers issue, the JTU prepared and submitted additional evidence to the Inspector. This is in the form of Background Paper 2 – Employment which can be found in Appendix 2. This concluded that the overall amount of employment provision is an appropriate response to the policy set out in the Regional Strategy.
- 2.9 In respect of the timescale, it is for the Joint Committee to determine what timescale it wishes to plan for. However, it would generally not wish to plan for a period less than 15 years in order to ensure that an adequate plan for housing for growth in particular is prepared. The JTU response on the timescale of the plan can be found within the body of the letter responding to the Inspector’s concerns⁶.
- 2.10 This re-affirmed the Joint Committee’s previous decision that a 15 year period was a reasonable response to the uncertainty of the public funding of infrastructure and the need to provide reasonable certainty about delivering housing as expected by government policy.

3. GENERAL CONFORMITY: THE ALTERNATIVE VIEWS

A number of representations to the Core Strategy (CS) disagree that it is in general conformity with the Regional Strategy (RS). The detail of individual representations can be found on the shapeyourfuture.org website⁷, however in summary these suggest that:

- the method resulting in the requirement for 23,000 dwellings within Policy CS 1 is flawed;
- there is reference to the fact that this number is less than that provided for in the RS either within the same period up to 2026 or the period of the MKSMSRS up to 2031 and when taking into account past unfulfilled growth requirements since the RS was published in 2008;
- there is also concern that the methodology may not have taken into account the impact of migration into the plan area;
- that insufficient land for jobs has been identified for the scale of growth required in the RS; and
- that the Core Strategy should be planning for a 20 year rather than a 15 year period.

⁶ Appendix 1: JTU Letter 6 May 2011, paras 27 – 32.

⁷ <http://www.shapeyourfuture.org.uk/JointCoreStrategySubmissionDocuments.html>

JCS 3, 4.1 and 4.2

Background Papers 1 and 2 (Appendix 1) explores different methods for calculating how much housing and employment land would be required in the area. In respect of housing, different methods result in projected household change (hence no. of required dwellings) ranging from 13,100 to 23,000.

The “shortage” being referred to is calculated in the paper as 3,275 dwellings over the plan period. This is largely the result of an under-delivery of housing in recent years caused by the recession. The Planning Inspectorate issued in 2009 advice⁸ in which this issue is mentioned:

14. The economic climate is also clearly a factor that can cause great uncertainty. However DPDs, particularly core strategies, are intended to guide development over the long term. Accordingly exceptional economic conditions should not be used as an excuse for delay and plans should be based on what may be regarded as normal conditions. If exceptional economic conditions persist the monitoring arrangements should identify the implications of this and point to what changes may need to be made to the plan. The LDF system is deliberately designed to allow effective review of all or parts of a DPD as circumstances dictate. This flexibility does not appear to always be appreciated.

The Core Strategy includes a further 4,050 dwellings within the allocated urban extensions which would allow for a higher rate of delivery to make up the shortfall should economic conditions improve. The alternative view is that this is insufficient for the purpose.

In respect of migration patterns in the area, the methodology used is a “net nil migration” projection which assumes that inward and outward migration to and from the area is balanced. In fact Background Paper 1 explains that there is more out-migration from the area than in-migration to the area and how the approach of the Core Strategy responds to this.

The alternative view about the timescale is that the period of the Core Strategy should be extended beyond its current 15 year endpoint. The origin for this viewpoint lies within the Milton Keynes South Midlands Sub-Regional Strategy of 2005 (which is a component part of the Regional Strategy) which sought to, “provide a longer term perspective for the sub-region to 2031 in the form of uncommitted planning assumptions subject to later review.” However, it is noted within the representations that the Core Strategy changed tack from a 20 year to a 15 year period only upon the announcement by the Secretary of State that Regional Strategies were to be abolished.

⁸ http://www.planningportal.gov.uk/uploads/pins/ldf_learning_experience_sept2009.pdf

There is an alternative view that the Regional Strategy itself is out of date. This view is expressed clearly within the letter submitted by the previous Head of Planning for the now abolished East of England Regional Assembly. This letter can be found within Appendix 19.

The argument here in summary, is as follows:

- the 2008 RS was conceived in better economic times where there was a commitment by Government to achieving Growth in this area;
- the recession and public finance cutbacks throw into question whether the necessary infrastructure underpinning the RS can now be delivered;
- the draft replacement RS which was abandoned in 2010 would have reflected this position: possibly triggering a re-examination of the allocations;
- therefore it is reasonable to promote a Core Strategy which is more realistic about what can be delivered, transparent about the uncertainties and on a shorter timeframe to 2026 to reflect this.

Government policy as expressed in the letter of the 31 March 2011 from the Government's Chief Planner¹⁰ makes it clear that local authorities should continue to pursue development plans in the interests of promoting economic growth.

On the other hand the Localism Bill will undertake a number of radical changes to the planning system, not least of which will be the revocation, later than the Government originally planned, of Regional Strategies. It may be argued that there is little point in a Core Strategy that has 15 year timeframe seeking "general conformity" with a Regional Strategy that will no longer exist in a matter of a few months.

It is therefore important for the Joint Committee to take a view on **Option 2** in the light of the fact that the relevant Government Department has indicated that the Regional Strategy will be revoked by the end of November 2011. This would suggest that by the time the Inspector convenes the Hearing it may no longer be necessary for the Core Strategy to be in general conformity with the Regional Strategy.

Until that moment arrives, it is reasonable to assume that seeking a deferral of the Examination carries a significant risk that the Plan will be found by the Inspector to be unlawful. On that basis, **Option 3**, seeking withdrawal of the Core Strategy, is the appropriate action.

⁹ Appendix 1: JTU Letter – Appendix C – Letter from Adrian Cannard

¹⁰ Appendix 1: JTU Letter – Appendix B – Planning for Growth Letter 31/03/11

Should the Joint Committee seek a deferral of the Examination, it will be necessary to consider the timeline that it envisages will be practical. This arises from the Inspector's note of the Exploratory meeting (Appendix 2) where he records:

"If the Joint Committee decided to ask for a suspension, the Inspector asked the JTU to provide, with the Joint Committee's views, a Timeline or Table for the proposed further work, and any necessary Sustainability Appraisal and public consultation that had to be carried out. This should set out each discrete work stage, its start and completion dates, and the total length of time requested for the suspension. The further work should include any further or revised evidence, additional or revised Background Papers or appendices, and individual CS policy amendments, deletions or additions."

However, it will not be possible to produce this level of detailed timeline until the Joint Committee or its sub-Committee have made a determination on all of the points raised as set out in paragraph 2.2 of the Report within the previous agenda item. These matters will be placed before the 29 July Joint Committee meeting or as may be delegated to the Sub-Committee, including that detailed timeline.

4. FINANCIAL IMPLICATIONS

4.1 There are financial implications arising directly from this Report.

4.2 Should the Joint Committee wish to defer the Core Strategy and is successfully progressed towards adoption, there will be additional work involved. However the costs can be contained within the existing budget for the JTU. Additional costs will be incurred in:

- additional consultancy and legal fees;
- consultation and publication costs; and
- opportunity costs due to existing staff being retained.

4.3 Should the Joint Committee wish to withdraw the Core Strategy, there will be limited direct costs involved, though there will be substantial but unknown costs to the constituent local planning authorities arising from the lack of a Core Strategy Development Plan Document for their areas.

5. LEGAL IMPLICATIONS

- 5.1 There are legal implications arising directly from this Report. All options given will have legal implications on the lawful status of the Core Strategy, its ability to be found “sound” and the consequential position of the participating Councils when dealing with Development Planning and Development Management decisions in the future.

6. EQUALITIES IMPLICATIONS

- 6.1 There are no equalities implications as all processes will still be subject to normal equalities impacts assessments.