

Development Strategy - Consideration of Judicial Review Proceedings

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Purpose of this report

- 1. This report relates to the Planning Inspectorate's decision that Central Bedfordshire Council have not met the legal Duty to Co-operate in respect of the Development Strategy. Council is asked to consider whether a Judicial Challenge should be lodged against the Secretary of State for Communities and Local Government in respect of this decision.**

RECOMMENDATIONS

That Council:

- 1. Notify the Planning Inspectorate that Central Bedfordshire Council does not intend to withdraw its Development Strategy and that the Planning Inspector should not issue his final report as the Council intends to challenge his decision.**
- 2. Instigates Judicial Review proceedings against the Secretary of State for Communities and Local Government against the Inspector's decision.**

Overview and Scrutiny Comments/Recommendations

- 1. N/A**

Issues

2. The Council submitted its Development Strategy for Examination by the Planning Inspectorate in October 2014. The appointed Planning Inspector wrote to the Council on the 3rd December 2014 describing significant issues with the submitted Plan. He subsequently notified the Council in January 2015 that he intended to hold the Examination Hearings into the Development Strategy in two parts.
3. It was agreed that he would examine only two issues at the first session of Hearings: whether the Duty to Co-operate had been met and matters relating to objectively assessed need, including the proper Housing Market Area. The Duty to Co-operate is set out in section 33A of the Planning and Compulsory Purchase Act 2004 (Appendix A) and is a legal requirement that Local Authorities need to comply with. It is distinct from the test of “soundness” i.e. whether the Plan is fit for purpose.
4. The first set of Hearings commenced on the 3rd February 2015 and lasted two days. The first day of the Hearings considered legal matters, including the Duty to Co-operate.
5. On the 16th February 2015 the Planning Inspector, Brian Cook wrote to the Council (Appendix B) explaining his view that the Council had not met the Duty to Co-operate and that the Council should withdraw the Plan or await his final Report, (the latter being somewhat academic as the final Report would essentially repeat the findings in the letter).

Options for consideration

6. The Council could agree with the Inspector’s request and withdraw the Plan or await his final Report.
7. The Council could challenge the Inspector’s findings. This would entail a Judicial challenge against the conclusions in the letter of 16th February 2015. Proceedings would need to be instigated against the Secretary of State as the Planning Inspectorate is an Agency of DCLG.

Reasons for decision

8. The Inspector’s letter of 16th February 2015 has been carefully examined and Counsel’s advice has been taken.
9. In the present case, the Inspector has emphasised that he is exercising his judgement on several occasions. However, the judgement must be exercised in a lawful manner. The Inspector sets out the tests he considers that the Council needs to meet in his decision letter. The Planning and Compulsory Purchase Act 2004 provides that the Duty is to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken.

10. The Inspector's approach to the matter is arguably flawed in law. Reading the decision letter as a whole he is clearly focussed on "outcomes" and gives little regard to the engagement and circumstances of the issues with Luton. He does mention it, but does not deal with how this needs to be fed into his assessment of compliance with the Duty.
11. Furthermore, he seems to believe that the desired outcome must be to meet all Luton's needs in the Council's area. That seems to be a soundness point rather than one that should have gone into the Duty considerations. The remainder of his letter is predicated on his conviction that this was the central point of any co-operation and his final comments in paragraph 56 of his letter confirm this.
12. He states the following: "The necessary steps to secure effective policy delivery on cross boundary strategic matters have not been taken in respect of housing. I acknowledge that in considering this issue the distinction between a failure to comply with the Duty and a failure to agree with others (and LBC in particular) is a matter of judgement that is not always clear. In making that judgement however I consider it reasonable to conclude on the evidence that the Council has failed to comply with the Duty in that regard."
13. Based on what goes earlier, it seems that he has decided that the failure to agree in this case proves the failure to meet the duty to cooperate. This is not the proper approach.
14. Furthermore, he seems unduly influenced by Luton's refusal to sign the MOU. He considers that it is "inevitable" that Luton's need will have to be met in the Council's area. It is difficult to see how he can conclude this given that other plans have not yet been examined and the capacity or growth study is yet to be completed. This is part of resolving where the need will in due course go. He has no regard or understanding of the role of the Allocations Plan in meeting further need. Significantly he seems to ignore that the Council has secured an outcome in that it is taking over 5000 dwellings of Luton's need and that this figure itself was a consequence of an increase during the process by over 1000.
15. Moreover, it appears that the Inspector may have taken into account a failure to meet the Duty to Co-operate before this duty was enacted.

Reason for urgency

16. A Judicial Review has to be lodged within six weeks of the relevant decision being taken.

Council Priorities

17. Enhancing your local community – creating jobs, managing growth, protecting our countryside and enabling businesses to grow.

18. Improved educational attainment, promote health and well being and protect the vulnerable.
19. Better infrastructure – improved roads, broadband reach and transport.

Corporate Implications

Legal Implications

20. As set out above.

Financial Implications

21. An Earmarked Reserve was created in 2013/14 and carried over in 2014/15 to cover any costs, including legal costs that might be associated with the Development Framework. The likely costs incurred will not therefore impact on current year or 2015/16 General Fund budgets.

Equalities Implications

22. No specific issues related to the Equality Duty have been identified.

Conclusion and next Steps

23. It is considered that the Inspector's conclusions following his initial Examination of the Development Strategy are flawed and capable of challenge. If the Council withdrew the Plan there would be a policy vacuum, hostile planning applications and investment uncertainty.
24. Should Council agree the recommendation, the Secretary of State could contest the challenge and legal proceedings commence, in which case the matter would go to a hearing in the High Court.

Appendices

The following Appendix is attached:

25. Appendix A - Section 33A of the Planning and Compulsory Purchase Act 2004
26. Appendix B - Inspector's letter of 16th February 2015