

Re: North East Derbyshire Local Plan

NOTE

INTRODUCTION

1. I have been asked to summarise the key risks which might arise if Full Council were to decide not to adopt the recently examined North East Derbyshire Local Plan.
2. I deal first with the key implications for decision taking and then the key implications for plan making.

DECISION TAKING

3. Perhaps the single most important step a local planning authority can take to guard against unplanned and speculative development is to ensure that it has an up-to-date development plan.
4. The planning system is designed to be plan led. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that where regard is to be had to the development plan for the purpose of a planning decision, the decision must be made in accordance with the development plan unless material considerations indicate otherwise. Where a planning application conflicts with an up-to-date development plan, permission will not usually be granted. As such, an up-to-date development plan is a powerful means by which a local planning authority can resist development which does not accord with that plan.
5. The plan making process is an opportunity for a local planning authority to set out a positive vision for the future of the area and to address the priorities for

development and use of land as well as to establish a more detailed policy framework for decision taking.

6. The adopted local plan is the North East Derbyshire Local Plan 2001 – 2011. It was formally adopted on 28th November 2005. It is therefore chronologically old.
7. Without descending into detail, the adopted plan is unlikely to continue to provide a framework which sets a positive vision for the future of the area by addressing housing needs and other economic, social, and environmental priorities.
8. Whilst a chronologically old plan is not necessarily out of date, it makes it more likely that the policies contained in it will have been overtaken by things that have happened since it was adopted, either on the ground or in some change in national policy, or for some other reason, so that they are now “out-of-date”.
9. Indeed, the preparation of an evidence base for a new plan is likely to serve to highlight elements of the existing development plan which have been overtaken by events.
10. The consequences of this are explained in paragraph 11 of the National Planning Policy Framework. Paragraph 11 contains a presumption in favour of sustainable development, part of this presumption is commonly referred to as the ‘tilted balance’. In certain circumstances, this directs a decision maker to grant planning permission unless the adverse impacts of doing so would significantly and demonstrably outweighs the benefits.
11. One way in which the tilted balance may be engaged is if the policies which are most important for determining the application are out-of-date. Whilst each case will turn on its own facts, given the passage of time since the current local plan was adopted, it is likely that events (not least the preparation of a new plan) will mean that the extant development plan policies which are most

important for determining an application are likely to be considered out-of-date.

12. Put simply, a decision not to adopt the new Local Plan would make it more likely that the 'tilted balance' would be engaged in decision making which would set a higher bar for decision makers to refuse planning permission.
13. A caveat to this is where a policy referred to in footnote 7 of the NPPF, such as policies relating to Green Belt or AONB, is engaged. In those circumstances, the relevant test (such as the very special circumstances test for Green Belt) would continue to apply. However, the absence of an up-to-date local plan would undoubtedly be relied upon by an applicant seeking to satisfy the very special circumstances test.
14. Delays in the plan making system are very commonly relied upon by applicants seeking permission for unplanned development. Therefore, even where the tilted balance is not engaged, for example, because a site is in the Green Belt, the absence of an up-to-date local plan and the lack of progress towards or a clear timetable for the adoption of a new local plan would be likely to be relied upon by applicants for planning permission as relevant factors in seeking to demonstrate that there were very special circumstances which justified the grant of planning permission.
15. In the context of applications for housing development, another factor which will render the most important policies for determining an application as out-of-date is the absence of a five year supply of deliverable housing sites. My understanding is that the authority can currently demonstrate a 5YHLS. But, as is clear from the above, this does not save the policies from being rendered out-of-date for other reasons.
16. Further to this, from discussions with officers I am informed that without an up-to-date Local Plan that identifies sites to be built over the period to 2034, the 5YHLS may soon have a deficit. The Council will be reliant on sites that

developers want to bring forward to give the council a 5YHLS rather than that supply being underpinned by the strategic work of the local planning authority. It may be that developers choose to promote sites that would have been allocated in the new Local Plan but they may choose to promote other sites that have not yet come forward for allocation or application.

17. Separately from the issue of the most important policies being out-of-date, but not wholly unrelated, paragraph 219 of the NPPF gives direction to decision makers as to the weight to be given to policies which pre-date the latest NPPF. This provides that due weight should be given to them according to their degree of consistency with the policies in the NPPF. If the policies are inconsistent with the NPPF or are otherwise considered to be out-of-date they will normally be given less weight in the decision making process.

18. The absence of an up-to-date local plan therefore makes it more difficult for the local planning authority to resist unplanned and speculative development. It also makes it much more difficult for the local planning authority to shape the future growth of its area. If the decision were taken not to adopt the emerging plan, the local planning authority would be left without an up-to-date strategic policy framework to guide future development across the district.

The Evidence Base for the emerging plan

19. The emerging plan has reached an advanced stage. It has been examined by Inspector Housden and found to be sound. In particular, the Inspector's Report identifies that the plan's vision and objectives are appropriate in the context of the North East Derbyshire District and that the spatial strategy and distribution of development is justified and will be effective. The Inspector also found that there was a compelling case in principle to release land from the Green Belt to meet the objectively assessed need for housing and to promote a sustainable pattern of development.

20. As with the preparation of many development plans, the allocation of sites within that plan is usually a difficult and contentious issue. Here a detailed process of site selection has been undertaken and has now been subject to examination by a planning Inspector. Section 5 of the report considers the issue of site selection.
21. The Inspector sets out that the site selection process for the housing allocations has been comprehensive and has taken place over several stages of plan preparation. The approach is described as robust and appropriate. The report sets out that each allocation which is not subject to further discussion is soundly based.
22. Certain sites are then subject to further discussion and, where necessary, main modifications are proposed in respect of them to ensure that their allocation is sound.
23. Site DR2 – Land north of Eckington Road, Coal Aston, Dronfield and Site EC1 – Eckington South are green belt sites which have been deleted as allocations because the Inspector was not satisfied that the exceptional circumstances necessary to justify their removal from the Green Belt had been demonstrated. These conclusions are likely to provide a reasonably robust basis for resisting the development of these sites if the emerging plan is adopted. However, if the emerging plan is not adopted, it should not be thought that these sites would be protected from speculative applications for development. Promoters of such sites would, no doubt, seek to rely on circumstances such as the failure to adopt the emerging plan, as well as site specific evidence addressing the issues identified in the Inspector’s Report, to seek to establish a very special circumstances case. Again, whilst each case will turn on its own merits, it should not be thought that the conclusions in the Inspector’s Report will protect the sites which were removed from the emerging plan, in the event that that plan is not adopted.

24. Other Green Belt sites such as sites KL1 – Land at Westhorpe, Killamarsh and KL2 – Land off Rotherham Road, Killamarsh, are considered and the Inspector sets out that exceptional circumstances have been demonstrated to justify the alternation of the Green Belt boundary to remove the parcels of land from the Green Belt and to allocate them for housing.
25. Others, such as, DR2 – Land off Shakespeare Crescent and Chesterfield Road, Dronfield are considered for removal from the Green Belt and whilst exceptional circumstances were not found to remove the whole of the site (as initially proposed for allocation) from the Green Belt, a main modification is set out with the Inspector having found that exceptional circumstances to exist to justify the removal of 6.52 hectares of the site from the Green Belt for housing. This would reduce the size of the allocation by 3.35 hectares and the overall capacity of the site from approximately 235 dwellings to 160 dwellings resulting in, what the Inspector describes as, a strong and defensible Green Belt boundary and a gap between Dronfield and Unstone that would be sufficient to maintain the separate identities of both settlements.
26. Even were the decision to be taken not to adopt the local plan, it is likely that promoters of the sites which have been identified for allocation (and where those allocations have been found sound) would nonetheless make an application for planning permission. The evidence base for the emerging plan and the Inspector’s conclusions in respect of those sites would undoubtedly be relied upon by an applicant as potentially powerful material considerations in any such application.
27. In respect of the allocated Green Belt sites, the work which unpins these allocations serves to demonstrate that development in the Green Belt is necessary to achieve a sustainable pattern of development and that the sites which are subject to allocation are the most appropriate sites to release from the Green Belt. Even were the plan not to be adopted, again, these factors are likely to be relied upon by applicants for planning permission in respect of

these emerging allocations in seeking to demonstrate that the “*very special circumstances*” test is met.

28. Whilst each case will turn on its on facts, in the absence of a material change in circumstances, a proposal which accorded with the terms of an emerging allocation may be more difficult to resist. Thus, a decision not to adopt the plan would not necessarily serve to protect the emerging allocations sites from development.
29. Finally, without an up-to-date Local Plan, there is an increased risk that developers would appeal any refusal by the local planning authority of an application for planning permission to the Secretary of State. Such appeals can be costly and a local planning authority may also be ordered to pay an Appellant’s costs where it is found to have behaved unreasonably and that behaviour has caused the Appellant to incur unnecessary or wasted expense.
30. Where a local planning authority loses too many major planning appeals, there is a risk that special measures might be invoked by DLUHC. This would potentially allow applications for major development to be made straight to the Planning Inspectorate for a decision thus bypassing the local planning authority.¹
31. In respect of decision making there are therefore two main risks:
 - a. there will not be an up-to-date strategic policy framework, or any progress towards one, to guide development across the district. This would increase the prospects of unplanned and speculative development including of sites which are not allocated in the emerging plan or those sites which were initially allocated and subsequently removed from the emerging local plan;

¹ The criteria for designation under s.62A-62C of the Town and Country Planning Act 1990 is set out in the “Improving planning performance: criteria for designation document”.

- b. those sites identified for allocation in the emerging plan would be prime targets for speculative applications for planning permission. Applicants would point to the conclusions of the extensive plan making process to date to justify the grant of permission; and
- c. the local planning authority may see more appeals against any decision it makes to refuse planning permission. Whilst each will turn on its own merits, the absence of an up-to-date Local Plan may make such appeals harder to successfully defend.

PLAN MAKING

- 32. If the Council decides not to adopt the recently examined North East Derbyshire Local Plan this would also have significant implications for plan making in the district. It would essentially mean starting again.
- 33. First, because of transitional provisions in the NPPF, the emerging local plan is being examined against the 2012 NPPF. Any future emerging plan would not benefit from those transitional provisions and would therefore need to be examined against the latest national policy. This may have wide ranging implications, for example, in respect of the number of houses which would need to be planned for.
- 34. Secondly, the evidence base would require a comprehensive review and updating work. This would take time and have significant resource and cost implications. Further, from discussion with officers, I note that by resetting the base date, which would be a consequence of updating the evidence base, it would inevitably mean that more housings allocations would be required in any new plan as there would be fewer completions to offset against any housing requirement.
- 35. Thirdly, there is no certainty that further work towards another plan would come up with a sound alternative spatial strategy. Whilst this would be a matter for policy makers to consider in more detail, given that the emerging

plan has considered and rejected alternative strategies it may be that the preferred approach of any revised emerging plan is not dissimilar to the currently emerging plan. Even if further work is done, it may well be that the sites which are currently emerging allocations remain the most sustainable sites for development in the district.

36. Fourthly, the government has powers of intervention to ensure that progress on plan making is maintained. The government has indicated that all local authorities should continue to work to advance local plans through to adoption by the end of 2023. I would imagine that if this emerging plan were not adopted, it would be very difficult to meet that deadline.
37. Section 27 of the Planning and Compulsory Purchase Act 2004 applies if the Secretary of State thinks that a local planning authority are failing or omitting to do anything it is necessary for them to do in connection with the preparation, revision or adoption of a development plan document. These powers enable the Secretary of State to intervene or to invite Derbyshire County Council to intervene and take over the task of plan-making, at the expense of the authority. The powers also enable the Secretary of State to direct a local authority in relation to the preparation or revision of a document.
38. The well-publicised intervention by the Secretary of State in South Oxfordshire is a recent example of such a measure. In that case, the cabinet of South Oxfordshire recommended withdrawing the emerging local plan. The Secretary of State initially issued a holding direction and subsequently directed the council to progress the plan through to examination and adoption within 9 months. The plan was eventually adopted. The intervention is widely considered to have been reputationally damaging to those involved.
39. Finally, pursuant to section 22(1) of the Planning and Compulsory Purchase Act 2004, a local planning authority may withdraw a local development plan document at any time before it is adopted. However, any such decision could be the subject of challenge by way of judicial review. A challenge of this nature

would proceed on normal public law principles. This means that the decision to withdraw the plan would need to be a rational one. Adequate and intelligible reasons for the decision would likely be required and other public law principles would need to have been followed in the decision making process.

CONCLUSION

40. For the reasons set out above, there are several key risks which might arise if Full Council decides not to adopt the recently examined North East Derbyshire Local Plan.
41. This note summarises what I consider to be the key risks, but it may not address every possible risk.

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