



Strategic Planning & Research Unit

For and on behalf of
Bayard Developments Ltd. and
Wattsdown Developments Ltd

Matter 1: Legal Soundness
Examination of the
Welwyn Hatfield Local Plan 2011 – 2033
Representor Numbers:
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Prepared by

**Strategic Planning Research Unit
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MATTER 1 – LEGAL SOUNDNESS

Has the DPD been prepared in accordance with the Local Development Scheme?

1.1 No Comment

Is the DPD in general accordance with the Statement of Community Involvement and its public consultation requirements?

1.2 No Comment

Has the DPD been subjected to Sustainability Appraisal? Are its conclusions sound and have they been taken into account in the DPD?

1.3 There are three aspects in which we consider that the submitted Substantiality Appraisal (SA 2016) does not conform to the Regulations, these are:

- a. The SA does not consider alternatives in terms of a range of potential housing requirements.
- b. The SA does not consider the impact of meeting the annual housing requirement against the “stepped approach” set out in SP2.
- c. The site selection process appears not to have been considered in the context of the need to deliver a higher level of housing throughout the plan period, and in general the reasoning behind site selection is unclear. In particular sites Wel1, Wel2 and Wel15 in Welwyn, WGr2 and WGr3 in Woolmer Green and OHM7 were all identified as reasonable alternatives in the north of the Borough (paragraph 6.333) with further reasonable alternatives in the southern part (SA Figs 5.2 and 5.3). Given their size and information submitted to the Council at the preparatory stages of the plan making process the justification for the exclusion of any or all of the abovementioned sites is wholly unclear.

1.4 Article 5.1 of the Directive is however very clear in this respect:

“an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives ... , are identified, described and evaluated.”

1.5 SA Reports are often very long and full of detail, and are also regularly scrutinised and sometimes challenged through Local Plan examinations on their contents and through legal challenge in the High Court on the process of their preparation. It is therefore essential that the legislation is followed very carefully and that the SA Report is examined fully to ensure compliance.

1.6 It should not be necessary to undertake a “paper chase” of the documents, including the SA Report itself, to find the necessary information required for to inform an SA Report, and this has been the subject of a successful legal challenge in the past. The judgement in *Save Historic Newmarket Ltd v Forest Heath District Council* was specifically in relation to the handling of alternatives, but the principle was related to the need for a paper chase.

Reasonable alternatives in terms of housing provision

1.7 While the SA highlights that a number of different levels of growth have been consulted upon it is unclear whether any of these have been subject to a SA/SEA that meets the EU Directive 2001/42/EC and consultation.

- 1.8 The Regulations are clear that an SA Report should present an appraisal of 'reasonable alternatives'.
- 1.9 It is clear from High Court judgements (Heard v Broadland District Council, South Norfolk District Council, Norwich City Council) that alternatives should be assessed to the same level as proposed sites and that all SA documentation should be consulted on together.
- 1.10 In paragraph 6.22 the SA states that in relation to housing (SA objective 5.1), the level of housing proposed in SP2 will make a significant positive contribution and a real step to delivering the required amount of housing to meet demand and need. It notes that the target is around 600 homes below the lower end of the OAN range, and that this results in a mixed significant positive and minor negative effect being identified. It goes on to highlight that there is also uncertainty attached to achieving the required build rates.
- 1.11 There is however no discussion of the alternative levels of provision including the impact of actually delivering the OAN, or a selection of sites that would mitigate the identified issue of potential under delivery of housing on the chosen sites.
- 1.12 It is unclear why the preferred level of housing and the particular selection of sites, which bring with them the uncertainty of achieving the required delivery rates, have been chosen.
- 1.13 It is noted that paragraph 6.5 states that where relevant, the reasonable alternatives considered in the SA are summarised by the SA, but that the detailed findings of the SA of reasonable alternatives can be found in the Core Strategy Issues & Options Report (2009), and the SA Reports for the Emerging Core Strategy (2012) and the Local Plan Consultation Document (2015).
- 1.14 The need to reference different documents to ascertain how decisions have been reached and options assessed is contrary to the Regulations which require the documents that the SA relies upon to be made available together.
- 1.15 In terms of the alternatives for the housing requirement only lower alternatives below the OAN have been considered despite the fact that the Council has known about under provision in London and planned under provision in St Albans. A reasonable alternative would have been a level of housing which sought to meet part of this undersupply.
- 1.16 Paragraph 6.18 of the SA states that further work on the alternative levels of growth within the Borough over the plan period was carried out in the separate consultation on 'How Many Homes' (June-July 2011), Policy CS2: Meeting the Needs for Growth in the Emerging Core Strategy (May 2012), and a revised Policy CS2: Meeting the Needs for Growth in the Local Plan Consultation Document (2015). These documents are not appraisals of the impacts of different levels of growth.
- 1.17 This progress requires a "paper chase" through historic documents and this is not acceptable.
- 1.18 The SA Report Addendum needs to be a full SA Report that is compliant with the SEA Directive and implementing Regulations (as required by Article 5.1) and not a partial SA Report.

Conclusion on the legal compliance of the SA

- 1.19 To this end, we have evaluated the SA Report Addendum and have identified a significant degree of legal non-compliance. If the SA Report were to be challenged in the Courts, in our view a challenge would be likely to succeed, with serious ramifications for the Local Plan itself. Ultimately this could strike out all or specific policies of an adopted Plan from use in decision-making and determining planning applications. The most significant areas of non-compliance are as follows:
- a. The objectives of the Local Plan are not described – reference is made to the SA objectives.
 - b. The SA does not identify links between the Local Plan and other plans, programmes and policies such as the councils housing strategy or LEP plans.
 - c. The alternatives considered at earlier stages of the SA process are not discussed or assessed.
 - d. The SA contains no information about the current state of the environment or its likely evolution without the Plan.
 - e. There is no reference to the inter-relationships between effects.
 - f. The description of the methodology does not enable the reader to understand how the assessment was undertaken.
 - g. The SA Report does not demonstrate how it has been taken into account in decision-making.
 - h. Monitoring measures are not proposed to enable adverse effects to be identified.
- 1.20 There are also several aspects where, while not an issue of legal compliance, do not follow standard good practice on SA. The implications for this may be not be as severe, however the appointed Local Plan Inspector may request the Council to provide further information to explain parts of the SA.
- 1.21 In order to prepare a legally compliant SA Report, the Council's consultants will need to update the SA Report (2016), ensuring that it contains all the information required by Annex I of the SEA Directive. The SA Report also needs to contain information about the alternatives considered in all previous stages of the SA, including why the alternatives were selected and why the preferred options were chosen. If this is not done, the SA will not be compliant with the Directive, the implementing Regulations and case law.

Has a Habitat Regulations Assessment been prepared? Are its conclusions sound and have they been taken into account in the DPD?

1.22 No Comment

Has the DPD been prepared in full accordance with the relevant parts of the Planning and Compulsory Purchase Act 2004 and the T&CP (Local Plan) (England) Regulations 2012 as amended?

1.23 No Comment

Has the DPD had regard to appropriate national policy?

1.24 No. The plan does not:

- a. Meet the OAN – Framework Paragraphs 17 and 47
- b. Provide justification with reference to the Framework as to why the OAN is not met
- c. Does not engage the DtC but seeks to manipulate the requirement to avoid the 5 year land supply assessment contrary to NPPG (Paragraph: 026 Reference ID: 3-026-20140306)

Framework Paragraphs 17 & 47

- 1.25 The plan is contrary to Framework paragraph 17 and fails to deliver the homes the country needs because it fails to meet the full, objectively assessed needs for market and affordable housing in the housing market area. In doing so the plan fails to explain why meeting the full OAN would be contrary to the policies of the Framework (Paragraph 47).
- 1.26 The OAN was not going to be met in the submitted Plan however the shortfall is now greater with the submitted plan delivering 12,000 compared to the latest SHMA 2017 of 15,200 (800 dpa Table 6.2) or the higher figure set out in SPRU's Reg19 submission of 20,520 (1,080 dpa).
- 1.27 The justification for not meeting the OAN is set out in paragraph 5.8 of the Plan which states in relation to the proposed level of housing that:
“This reflects infrastructure and other constraints identified for many of the sites which may affect lead-in times and completion rates in the early years of the plan period, and the fact that the large Strategic Sites are likely to take a number of years to develop alongside associated infrastructure.”
- 1.28 This is not the justification required by the Framework paragraph 47 and the plan should be considered unsound it has not been positively prepared (paragraph 182)
- 1.29 The plan explicitly states that it has been unable to engage the DtC to accommodate any shortfall (paragraph 5.11). While reference is made to the extension of Welwyn Garden City into East Hertfordshire this is to meet East Hertfordshire's OAN and should not be confused with meeting the OAN identified for WHBC.

NPPG (Paragraphs: 026 & 035)

- 1.30 This provides clear guidance that where insufficient sites have been identified against objectively assessed needs plan makers will need to revisit the assessment, for example changing the assumptions on the development potential on particular sites (including physical and policy constraints) including sites for possible new settlements.
- 1.31 It goes on to state that if, following this review, there are still insufficient sites it will be necessary to investigate how this shortfall should best be planned for. If there is clear evidence that the needs cannot be met locally, it will be necessary to consider how needs might be met in adjoining areas in accordance with the duty to cooperate.
- 1.32 It is not considered that there is clear evidence that the OAN cannot be met locally as shortfalls in the SA have been identified.
- 1.33 The NPPG (Paragraph: 035) is also specific that councils should aim to deal with any undersupply within the first 5 years of the plan period where possible and where this cannot be met in the first 5 years, local planning authorities will need to work with neighbouring authorities under the duty to cooperate in accordance with Framework paragraph 47.

- 1.34 If it is the Council's conclusion that the shortfall now cannot be met in the first five years then the Guidance is clear: the Council have to engage the DtC. Clearly this has not been done.

Has the Council fulfilled the requirements of the Duty to Cooperate?

- 1.35 No.
- 1.36 The Council's statement in paragraph 5.8 of the plan is explicit it that the DtC has been ineffective in securing agreement for other areas to meet Welwyn Hatfield's unmet need in terms of OAN.
- 1.37 This is a more acute problem now with the Council's new evidence base increasing the Council's position to 15,200 dwellings.
- 1.38 There is also a second issue. This is the fact that the Council are proposing a stepped approach to the housing requirement in an attempt to side step the five year land supply calculation. As highlighted above the NPPG is clear where the OAN cannot be met then the DtC must be engaged rather than a different approach taken to the definition of the housing requirement.
- 1.39 In response to the Inspector's questions WHBC now commit to early review. This is an unsatisfactory response as the Council do not have a track record of delivering timely reviews nor do they have a track record of securing DtC with other authorities to accommodate their unmet need as they have failed to do so with even with the smaller level of unmet need in the submitted plan. The Inspector can have no confidence in such assertions.
- 1.40 There is nothing in any of the DtC statements that can give any confidence that approving the plan as submitted will result in the housing need being met in the future. All the evidence is that the surrounding authorities will continue to resist any pressure to accommodate WHBC's future needs. If the DtC is to be an effective tool in securing the objective in the Framework of meeting the Country's housing need then the current plan must be rejected as unsound.

Has Engagement been Constructive from the Outset?

- 1.41 It is noted that the St Albans Inspector, when considering the question of cooperation between St Albans and WHBC, reviewed the evidence of the meetings and found it had not been demonstrated that cross boundary issues including housing and infrastructure had been fully addressed, given appropriate consideration or where necessary acted upon (IL paragraph 25).
- 1.42 There are no minutes which appear to identify any discussions in respect of the issue of unmet need in WHBC. The result in terms of the MoU appears to be an agreement to undersupply based upon constraints rather than the constructive approach envisaged by the Framework.
- 1.43 Welwyn Hatfield DtC presentation January 2015 identified a potential shortfall of housing to meet the OAN.
- 1.44 It is pertinent to note that WHBC in their response to the St Albans Local Plan claimed that plan was unsound because it was not effective and was not positively prepared (Ex04 page 313) on the basis that it had not resolved the issue of unmet need. There would seem to be little difference in real terms between the position of St Albans and that of WHBC now; except of course one would have expected WHBC to have learnt from the St Albans situation.

- 1.45 While there has been a potential for undersupply identified since 2015 it only appears in the minutes to the Duty To Cooperate meeting between Welwyn Hatfield and St Albans (dated: 23 March 2017) which highlights that WHBC would also be asking other districts during their plan preparation to accommodate this unmet need (Ex04 page 400).
- 1.46 This was then followed up with letters to other authorities to secure the MoU during the summer of 2017. These letters identified a shortfall of between 616 and 1,433 dwellings.

Has Engagement been Active?

- 1.47 The St Albans Inspector found engagement between WHBC and St Albans to be sufficiently active in seeking engagement on the cross boundary issues (IL paragraph 26).
- 1.48 The North Hertfordshire MoU states that both Councils agree that joint working will be required to investigate solutions to meeting the needs of both areas and that this includes the potential for new garden towns or sustainable settlements. What is unclear is why, in light of the present unmet need, this work to be delayed to the mid 2020's (paragraph 6.12).
- 1.49 This demonstrates a less than active approach to seeking to meet the unmet need in WHBC. There is a lack of evidence that WHBC actively raised the issue of unmet need with other Councils within the HMA and sought immediate solutions. It appears more effort has been spent in securing MoU justifying not to address this issue.

Has Engagement been On-going?

- 1.50 While there has been engagement this has been relatively patchy, the only reference that is made by WHDC with regard to their inability to meet their OAN is in a letter to Broxbourne BC on the 16 September 2016 in which, in response to the Reg 18 consultation, WHBC identified that they are 500 dwellings short of the lower end of their OAN and asked:

“In common with other surrounding authorities, we would therefore like to ask you to consider prior to your Regulation 19 consultation whether Broxbourne is able to accommodate any of the unmet housing needs of Welwyn Hatfield.” (Ex04 page 725).

- 1.51 This appears to be the single incident in which WHBC have actually identified the shortfall to one of its surrounding authorities and specifically requested assistance.
- 1.52 There appears to have been no discussion of WHBC's unmet need at any of the meetings minuted in the evidence base prior to the submission of the plan.

Has Engagement been Collaborative?

- 1.53 The St Albans Inspector considered that the evidence of cooperation with WHBC demonstrated a lack of meaningful collaboration (paragraph 32).
- 1.54 Despite the number of pages of evidence submitted there appears to have been little actual collaboration the exception being what appears to be considerable effort put in since March 2017 to produce MoU's which simply agree that there are capacity constraints across the HMA.

Has Every Effort been made to Secure the Necessary Co-operation?

- 1.55 No.

- 1.56 A review of the evidence base highlights that at no time did WHBC request the other constituent authorities in the HMA to meet some of their unmet needs, even though they were aware of these at the time of submission.
- 1.57 Dacorum Council in response to the updated SHMA (17th May 2017 Ex04 page 392) stated:
- “Thank you for your comprehensive update on your housing needs position and highlighting the fact that the 19% uplift to OAN as a result of new projections indicates a higher level of need than you are currently planning for.*
- We are happy to maintain the dialogue through our respective plan-making processes through liaison on a SW Herts basis as you suggest. However, should you be in position where you will need to ask authorities such as Dacorum that fall outside of your HMA to help accommodate any unmet needs, then this request needs to be made as early as possible to enable us to appropriately respond.”*
- 1.58 WHBC (Ex04 page 396 3rd August 2017) responded:
- “In response to your request for early notice that Dacorum will be required to meet some of Welwyn Hatfield’s shortfall, I should advise you that at the current time as no other authority has indicated an ability to make provision for this shortfall, Welwyn Hatfield is now requesting that Dacorum consider the need to do so as part of its plan preparation (within the context of the south-west Herts HMA).”*
- 1.59 WHBC had previously contacted Dacorum Council to request possible assistance in meeting their OAN and it would appear this was simply not followed up.

Has Engagement been Diligent?

- 1.60 No.
- 1.61 In the 326 pages of evidence on DtC the Council has not once highlighted to its neighbours that it is incapable of meeting its OAN and requested their assistance. The only time it expressed this was in its Regulation 18 response to Dacorum BC.

Is the Evidence Robust?

- 1.62 No.
- 1.63 The production of mutually supportive MoU’s significantly after the submission of the plan that simply assert a capacity limit on the ability to provide for the shortfall either as identified at the time of submission or as identified by the later SHMA 2017 update is unsupported by evidence.
- 1.64 Neither the SA for the submitted Plan nor the SA’s or the other work associated with the emerging plans in the surrounding areas actually positively considered how the shortfall might be accommodated or indeed the consequences both social (increased overcrowding, lower birth rates etc), economic (lower rates of growth due to labour inflexibility and higher costs of labour), and environmental (increased commuting distances) of not making this provision.
- 1.65 The evidence on this issue is exceedingly scarce.

Has Engagement been of Mutual Benefit (the broad outcomes)?

- 1.66 Yes and No.

- 1.67 The outcome is beneficial for the authorities in a political sense but is not beneficial for those households which are going to be excluded from the housing market in this wider area for the next 20 years.
- 1.68 The Councils have mutually supported each other on a capacity based approach which has failed to look seriously at how the housing need in the wider HMA may be met. The broad outcome is a negative one for the population and is clearly contrary to the objective of the Framework regarding meeting the housing needs of the nation.

Conclusion

- 1.69 In light of these considerations there are significant flaws in the Council's approach. The remedy may be to note that, in any respect, the capacity of reasonable alternative sites exceeds the potential shortfall in supply when compared to the higher figure of 15200 dwellings identified by the Inspector. Inclusion of a proportion of these additional sites would potentially resolve the flaws in that approach that the Council has created for itself.
- A1.1 This is without prejudice to our argument set out in other submissions to this Plan that the figure of 800 dwellings per annum is an inadequate reflection of housing need in the Borough.

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