

RE: LONDON BOROUGH OF BARNET CORE STRATEGY

O P I N I O N

1. I am asked to advise the Brent Cross Cricklewood Development Partners with regard to an Opinion dated 5th December 2011 by Thomas Hill QC and Ms Jackson which was presented to the inquiry into the draft Barnet Core Strategy on the 6th December 2011.
2. I disagree with the conclusions reached in the Opinion.

Saved Policies

3. The Planning and Compulsory Purchase Act 2004 (P&CP Act 2004) provides for "saved" policies to be included within the Local Development Scheme (LDS) as development plan documents. Schedule 8 to the P&CP Act 2004 at paragraph 15 provides:

"(1) This paragraph applies to–

(a) the local development scheme which a local planning authority are required to prepare and maintain under section 15 of this Act;

...

(2) During the transitional period the local planning authority or county council (as the case may be) must include in the scheme as a development plan document–

(a) any plan or document which relates to an old policy (for the purposes of paragraph 1 above) which has not been replaced by a new policy"

4. During the transitional period there is thus a statutory duty upon a LPA to include in the LDS, as a development plan document, any plan or document which contains an old policy which has not been replaced by a new policy. I note that Mr Hill QC and Ms Jackson do not refer to this provision or its consequences in their Opinion. I view this as an important oversight for the reasons I set out below.
5. The transitional period is defined in Schedule 8 paragraph 1(2) to the P&CP Act 2004 as the period starting with the commencement of section 38 in that Act and ending on whichever is the earlier of:
 - a) the end of the period of three years;

- b) the day when in relation to an old policy, a new policy which expressly replaces it is published, adopted or approved.
6. The Secretary of State has the power under Paragraph 1(3) of Schedule 8 to the P&CP Act 2004 to direct that:
- “for the purposes of such policies as are specified in the direction sub-paragraph (2)(a) does not apply.”
7. Where such a direction has been made paragraph 1(2)(a) does not apply. Thus the transitional period runs until the day when a new policy which expressly replaces the saved policy is published.
8. In other words, the P&CP Act 2004 provides that if the Secretary of State makes a direction the transitional period lasts until the saved policy is replaced by a new policy. Thus, the scheme of the Act is that the document containing a saved policy must be specified in the LDS as a development plan document ("DPD") until replaced by a new policy.

The Local Development Scheme

9. Local planning authorities are of course obliged to prepare and maintain a LDS¹.
10. I note that Mr Hill QC and Ms Jackson's Opinion in paragraph 10 incorrectly sets out some parts of the statutory framework relating to LDSs. Unfortunately sections 15(2)(a) and (c) which are relied upon were repealed by the Planning Act 2008 with effect from the 6th April 2009.
11. The relevant parts of section 15(2) which are actually in force are:
- “(aa) the local development documents which are to be development plan documents;
- (f) the timetable for the preparation and revision of the development plan documents”
12. Thus, the timing of the replacement of saved policies is a matter for the local planning authority ("LPA") to determine at its discretion within the process of adopting its LDS.
13. The adoption of an LDS is subject to submission to the Secretary of State and in London also to the Mayor. The Secretary of State and the Mayor both have powers to direct amendment (see section 15(3) of P&CPA 2004).

¹ Section 15(1) of the P&CP Act 2004

14. Thus, if either the Secretary of State or the Mayor considered that the timetable for replacement of saved policies within an LDS was inappropriate they could direct amendment to provide an alternative timetable.
15. Further the adoption of an LDS could be made the subject of proceedings in Judicial Review if any third party considered that the timetable adopted in respect of saved policies was unlawful.
16. The P&CP Act 2004 therefore envisages that the timing of the replacement of saved policies is therefore a matter for the discretion of an LPA subject to scrutiny by both the Secretary of State and the Mayor.
17. I am not aware of any statutory provision, regulation or policy which identifies or imposes any particular timetable for the revision of DPDs. My understanding is that the intention of the legislation was to create a suite of planning documents (referred to collectively as the Local Development Framework (LDF)) each of which could be reviewed independently of the others on a timetable to be chosen by the LPA.
18. The reference at paragraph 21 of Mr Hill QC and Ms Jackson's Opinion to the Protocol does not assist in my view. "Step 2" is a requirement upon LPAs that applies when making an application for policies to be saved. It is not a matter which demonstrates that there is any particular time within which saved policies must be replaced.

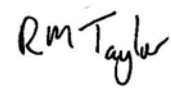
The Barnet LDS

19. The London Borough of Barnet's (LBB) revised LDS 2011 was approved by the Secretary of State for Communities and Local Government on the 23 June 2011 and the Mayor of London on 6 July 2011. It was formally adopted and published by the LBB on Monday 18 July 2011. It has not been the subject of Judicial Review.
20. The LDS explains at paragraph 2.17:

"We expect that in 2012 the Local Development Framework will have replaced most of the 'saved' policies in the Unitary Development Plan with the exception of the suite of 'saved' policies that are specific to Brent Cross – Cricklewood (as listed in Appendix 6)."
21. Thus, the LDS which has been adopted expressly provides for the saved policies relating to Brent Cross-Cricklewood to continue. The LDS thus makes it clear that the Core Strategy is not intended to replace this suite of policies. It follows that, consistent with its discretion as to when to replace saved policies, Barnet has chosen not to do so yet within its LDS.

22. If Bestway considered that the failure to replace the UDP policies as determined by the LDS was unlawful, it should have commenced proceedings in Judicial Review to challenge the adoption of the LDS because it is that document which determines whether or not those UDP policies are to be replaced at the present stage or not. Bestway's complaint goes to the adoption of the LDS and not to the soundness of the Core Strategy.
23. The time limit for Judicial Review proceedings to challenge the adoption of the LDS has expired. The LDS is therefore lawful.
24. Section 19(1) of the P&CP Act 2004 requires DPDs to be prepared in accordance with the LDS. Thus, once the LDS was adopted LBB is required by law to prepare, *inter alia*, its Core Strategy in accordance with the LDS. Consequently, the Core Strategy must therefore proceed on a basis which is consistent with the LDS namely that the saved policies are not to be replaced by policies in the Core Strategy.
25. The matters set out in paragraphs 22 and 23 of Mr Hill QC and Ms Jackson's Opinion are all contingent upon the assertion in the first sentence of paragraph 23 that "the Council is seeking to incorporate" the UDP policies within the Core Strategy.
26. This interpretation is incorrect in my view.
27. The contention put forward in the Opinion is at odds with the LDS that has been adopted. As I have set out above, the LDS makes it clear that the saved UDP policies are not to be replaced by the LDF. If the Core Strategy did incorporate the saved UDP policies within it as suggested, the Core Strategy would contain those policies as policies of the Core Strategy. The effect of this would be that the new Core Strategy policies would replace the UDP policies and the saved UDP policies (see above). This interpretation is thus wholly inconsistent with the adopted LDS and would be contrary to section 19(1) of the P&CP Act 2004 (see above).
28. My view is that the Core Strategy simply cross refers to the saved UDP policies but it does not incorporate them. What CS2 adds is a process for monitoring the progress of development within the Brent Cross Cricklewood Area and matters to have regard to in determining whether it is appropriate to review the saved UDP policies in the future. The Core Strategy thus recognises the reality flowing from the adopted LDS that the saved UDP policies are not to be replaced but to continue to have effect. After adoption of the Core Strategy the saved UDP policies are to continue to be part the development plan documents in their own right. This interpretation is wholly consistent with the LBB's LDS and is not contrary to section 19(1) of the P&CP Act 2004.

29. The decision not to replace the saved UDP policies at this stage is thus not a matter that has to be justified within the Core Strategy process or at the examination in public. That justification properly fell to be considered in the context of the LDS process. It was. The justification for the approach in the LDS has been approved by the Secretary of State and the Mayor and has not been challenged by Bestway in Judicial Review proceedings. It cannot be challenged now by way of a side wind.
30. The result of this is that the matters set out in paragraphs 23 and 24 of Mr Hill QC and Ms Jackson's Opinion do not have to be addressed by the Inspector. This is because the UDP policies already form part of a DPD within the LDF. Consequently, they do not have to be justified within the Core Strategy or examined within the Core Strategy adoption procedures; rather they are to be taken as a given.
31. I am aware of an email sent by GOL to LBB which appears to suggest a contrary to this view. However, I have not seen any document that suggests that the views provided in that email are provided on the basis of legal advice or with an appreciation of the LBB's LDS. In those circumstances it seems to me that little weight can be given to the views expressed in that email.



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