

## **COLONNADE LAND LLP**

### **IN THE MATTER OF THE ROCHFORD CORE STRATEGY**

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#### **OPINION**

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#### **INTRODUCTION**

1. I have been asked to advise Icení Projects Ltd (“Icení”) on behalf of Colonnade Land LLP (“CLLLP”) as to the soundness of the submission draft of the Rochford Core Strategy (“the CS”) which is shortly to be considered at an Examination.

#### **FACTUAL BACKGROUND**

2. In September 2009 the Council published for consultation its Pre-Submission CS. The consultation period ran for six weeks.
3. By written representations submitted to the Council on 14 October 2009 as part of the Pre-Submission process, CLLLP contended that the draft CS was unsound, primarily because it failed to provide a credible and transparent evidence base.<sup>1</sup> To summarise, the representations set out the following arguments:

- (1) The CS should assume an adoption date of 2011 rather than 2010, such that the provision of housing in the CS would run until 2026.

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<sup>1</sup> Box 3, tab 7

- (2) The CS fails to identify the sites which will contribute to the 'Extant Planning Permissions' provision, as set out in table appearing at paragraph 4.6 of the draft CS.
  - (3) By referring back to the 2007 Rochford Urban Capacity Study ("UCS"), it is said that the redevelopment for housing of the four sites which are currently allocated for employment - as identified at paragraph 4.14 of the draft CS - is unlikely within the plan period and potentially unsustainable.
  - (4) The Housing Trajectory figures in Appendix H2 includes sites from "other land allocated for residential purposes" but fails to recognise that these are unallocated greenfield sites which are not allocated for housing development in the adopted development plan. They ought to be discounted and the five-year housing supply should be recalculated.
  - (5) The representations go on to make a number of specific criticisms in relation to environmental issues, community infrastructure, leisure and tourism, transport and economic development.
4. The Council published on 2 November 2009 a Strategic Housing Land Availability Assessment ("SHLAA"). The Council has sought to argue that the SHLAA (in conjunction with a separate Annual Monitoring Report, published on 23 December 2009) demonstrates that it is able to identify a five year supply of specific deliverable sites, as required by paragraph 54 of PPS 3. Conversely, CLLLP contends that the Council is unable properly to identify a five year supply of deliverable sites.
  5. The draft CS was submitted to the Secretary of State on 14 January 2010. It is anticipated that examination hearings will take place during the summer of 2010, starting on 11 May.

6. By a letter dated 3 March 2010, Icení submitted written representations to the CS Inspector to the effect that the submission draft CS was unsound.<sup>2</sup> The representations build on and are intended to be read in conjunction with the October 2009 representations in relation to the draft CS. In summary, the submission draft CS is criticised on the following bases:

- (1) The CS fails to span a period of at least 15 years from the date of adoption.
- (2) During the consultation period on the Pre-Submission Core Strategy the SHLAA had not yet been published, and there were no opportunities to comment on it. In the circumstances, the Pre-Submission CS was not supported by a robust and transparent evidence base.
- (3) The CS identifies at Policy H1 a site at Stambridge Mills for high density residential development. There is, however, no evidence to show that the Sequential Test and Exception Test of PPS 25 have been applied in circumstances where this site lies wholly within Flood Zone 3. The identification of this site is accordingly said to be at variance with paragraphs 14 - 20 of PPS 25.
- (4) The submission draft CS is not supported by a compliant Strategic Flood Risk Assessment (“SFRA”). In the circumstances – and having regard to (3) above – the Stambridge Mills site should not be treated as a deliverable site within the meaning of paragraph 54 of PPS 3.

7. By a letter to the Council dated 3 March 2010, Icení drew attention to its (and the EA’s) criticisms of the soundness of the emerging CS and proposed that in the circumstances the examination of the submission draft CS be suspended for a period of six months in order to give the Council time to produce a complete evidence base.

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<sup>2</sup> Instructions 5 March 2010, tab 8

8. It is against this background that I have been asked to advise as to the soundness of submission draft CS, and in particular what the appropriate course would be for the examination Inspector.

## **ANALYSIS**

### ***Soundness: general principles***

9. By section 20(1) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”), local planning authorities must submit every development plan document (“DPD”) to the Secretary of State for independent examination. By section 20(5)(b) of the 2004 Act, one of the purposes of the independent examination of a DPD is “... to determine ... whether it is sound.” Since one of the DPDs will be the CS, any such CS must satisfy the test of “soundness”.

10. The requirement of soundness is explained in greater detail in PPS 12 (“Creating Strong Safe and Prosperous Communities through Local Spatial Planning”). Paragraph 4.52 of PPS 12 provides:

“To be “sound” a core strategy should be JUSTIFIED, EFFECTIVE and consistent with NATIONAL POLICY.”

11. In order to be “justified”, PPS 12 explains that a CS document must be (*inter alia*) “... founded on a robust and credible evidence base.”<sup>3</sup> Paragraph 4.37 of PPS 12 explains in greater detail the need for a CS to be “... based on thorough evidence.” The evidence base should, according to paragraph 4.37, contain two elements. First, it should consist of “... evidence of the view of the local community and others who may have a stake in the future of the area”. Second, it should contain “... evidence that the choices made by the plan are backed up by the background facts”.

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<sup>3</sup> PPS 12, para. 4.52

12. In other words, CSs should be underpinned by an evidential base created through a process of research and public participation. Paragraph 4.37 further requires that the evidence gathered should be "... proportionate to the job being undertaken by the plan, relevant to the place in question and as up-to-date as practical having regard to what may have changed since the evidence was collected."
13. Paragraphs 4.44 and 4.52 of PPS 12 define "effective" to mean that core strategies must be "... deliverable, flexible and able to be monitored."

#### *The emerging Rochford Core Strategy*

14. The most useful approach in analysing the soundness of the Rochford CS is to address in turn the key criticisms of the CS advanced in Icení's submissions of 3 March 2010.
15. The primary criticism is that the CS is not supported by a credible and transparent evidence base within the meaning of PPS 12. It is worth recalling at the outset that this is a fundamental component of soundness: weaknesses in the Council's evidence base are therefore likely to render the Core Strategy unsound.

#### *The plan period*

16. Paragraph 53 of PPS 12 requires that LPAs should set out their policies and strategies for delivering the level of housing provision, including identifying broad locations and specific sites that will enable continuous delivery of housing "... for at least 15 years from the date of adoption", taking account of the level of housing provision set out in the Regional Spatial Strategy. In addition, paragraph 4.13 of PPS 12 provides that the time horizon of a CS should be "... at least 15 years from the date of adoption."

17. The Core Strategy makes provision for the supply of housing until 2025 (see the table at paragraph 4.6) which is, in turn, based upon an assumed adoption date of 2010. CLLLP makes the point that that assumption is flawed on the basis that it fails to take proper account of the likely delays to the adoption of the CS, including delays during the examination process (which is not anticipated to begin until 11 May 2010).
18. There is considerable force in this argument. Given the nature of the objections to the CS - including Environment Agency objections in relation to flooding and other matters<sup>4</sup> - it would be prudent to assume an adoption date of 2011. Paragraph 4.46 of PPS 12 makes it clear that a time frame of 15 years is usually required to render a core strategy effective, although the life of the strategy may be "... more if necessary." Plans should also be able to show "... how they will handle contingencies", given that "... it will not always be possible to have maximum certainty about the deliverability of the strategy." In the circumstances, it seems to me that the CS should look to a housing supply envelope extending to at least 2026. If the Strategy were to be found insufficiently flexible then it would almost certainly fail the test of flexibility and deliverability, which are in turn key components of the requirement of soundness in PPS 12.

### *Flood risk*

19. Two important arguments have been advanced under this heading. The first is that the CS is not supported by a compliant SFRA. The second, more specific, criticism focuses on the Stambridge Mills site. There is in my view significant force behind both lines of attack.
20. Paragraphs 10 - 12 of PPS 25 require local planning authorities to produce a Strategic Flood Risk Assessment. Paragraph 14 spells out the need for a sequential risk-based approach to determining the suitability of land for development in flood risk areas at all levels of the planning process. By paragraph 16, LPAs allocating

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<sup>4</sup> See below under the heading of "Flood risk"

land in LDDs should apply the Sequential Test to demonstrate that there are no reasonably available sites in areas with a lower probability of flooding that would be appropriate to the type of development or land use proposed. PPS 25 also sets out the need for an Exception Test in circumstances where the Sequential Test has been carried out and it is not possible, consistent with wider sustainability objectives, for the development to be located in zones of lower probability of flooding (see paragraphs 18 - 21). By paragraph 19, the Exception Test is only appropriate for use when there are large areas in Flood Zones 2 and 3, where the Sequential Test alone cannot deliver acceptable sites, but where some continuing development is necessary for wider sustainable development reasons.

21. In the present case, the CS appears to place reliance (at paragraph 8.22) on the Thames Gateway South Essex Strategic Flood Risk Assessment. However, as the Environment Agency has observed<sup>5</sup> this particular assessment was undertaken in 2006. It therefore pre-dated PPS 25 and will not have been informed by the up-to-date climate change scenarios which were introduced by that PPS, and which assume a significantly increased risk of flooding.<sup>6</sup> Nor did the 2006 SFRA cover the entire Rochford District. In the circumstances, it appears the Council is seeking to rely on a flawed evidence base. It should be recalled that paragraph 4.37 of PPS 12 provides that the evidence gathered to support a CS should be “as up-to-date as practical”, having regard to what may have changed since the evidence was collected. The Council have been on notice for some time that its evidence base is out of date.

22. These conclusions are bolstered by the guidance accompanying PPS 25 set out in the PPS 25 Practice Guide (December 2009 update). Paragraph 2.20 of the Practice Guide provides that site allocations in core strategies “... should reflect the application of the Sequential Test ...”. The Practice Guide repeatedly emphasises the centrality of SFRAs, which should be “... a key part of the evidence base to help

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<sup>5</sup> See below, starting at paragraph 22

<sup>6</sup> The 2006 SFRA would have been completed while PPG 25, (2001) was still extant. PPG 25 has now been replaced by PPS 25.

inform the allocation of development in a local plan area through the preparation of LDDs” (paragraph 3.40). Paragraph 3.40 makes it clear that an LDD that was not supported by an adequate evidence base on flood risk is “... unlikely [to] be found to be sound.” Paragraph 3.46 notes the importance of LPAs developing SFRA in partnership with the Environment Agency (“EA”), with whom the LPA “... should discuss the scope of the SFRA at an early stage” and which, as a statutory consultee, must be satisfied that all flood risk issues are adequately covered in LDDs.

23. It is significant that the EA has put forward a series of objections to the soundness of the Pre-Submission Core Strategy, primarily in relation to the absence of a compliant flood assessment and the inclusion of the Stambridge Mills site in Policy H1. The EA’s representations<sup>7</sup> make it very clear that the Agency does not consider Policy ENV3 (Flood Risk) to be compatible with PPS 25. One of the fundamental components of soundness is, of course, that the document in question is “consistent with national policy” (PPS 12, paragraph 12). The key problem identified by the EA in this regard is essentially the same as that identified in Icen’s own submissions on soundness – namely the absence of a Sequential Test (compliant with PPS 25) in order to support the Core Strategy.

24. The EA also draws attention to the fact that Policy ENV3 suggests that any residential development on brownfield land in the areas of Flood Zone 3 would be permitted regardless of the outcome of a properly conducted Sequential Test. The wording of the Policy is as follows:

“The Council will direct development away from areas at risk of flooding by applying the sequential test and, where necessary, the exceptions test, as per PPS25. The vast majority of development will be accommodated within Flood Zone 1. However, considering the very limited supply of previously developed land in the District, proposed development on previously developed land within Flood Zone 3 will be permitted if it enables a contribution towards the District’s housing requirement that would otherwise require the reallocation of Green Belt

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<sup>7</sup> Box 3, tab 8



land, providing that it passes the exceptions tests and is able to accommodate the necessary flood defence infrastructure.”

25. The EA criticises the assumption apparently underpinning Policy ENV3 to the effect that the protection of greenbelt land should take precedence over the avoidance of high density development within Flood Zone 3 (which would, as the EA rightly points out, pose a risk to life and property).

26. It appears to me that, although the Policy does make reference to the necessity of applying the Exception Test, the EA is correct in its characterisation of the assumption underpinning the Policy. The EA correctly points out the while paragraphs 38 and 41 of PPS 25 provide support for prioritising development on previously developed land, physical and environmental constraints and risks need to be taken into account, including flood risk. The EA is also right, in my view, to argue that there is no apparent justification supporting the assumption that developing outside the greenbelt in the high flood risk zone is the most appropriate approach for the Core Strategy given what is (in the EA’s words) “... the reasonable alternative of accommodating those housing figures in areas at lesser flood risk – either by releasing a minimal additional amount of greenbelt, or by slightly increasing density elsewhere.” With this in mind, it should be remembered that paragraph 4.38 of PPS 12 provides that the local planning authority should seek out and evaluate reasonable alternatives promoted by them and others. Paragraph 4.38 makes the point that the ability to demonstrate that the plan is the most appropriate when considered against reasonable alternatives “... delivers confidence in the strategy.”

27. The EA’s conclusions have a particular bearing on the appropriateness of identifying the Stambridge Mills site as a site for very high density housing development. Policy H1 of the Core Strategy confirms that the Council will seek the redevelopment of the Stambridge Mills site for appropriate alternative uses, including residential development. The EA makes the point that the Council has failed to put forward any evidence to show that the Sequential Test and Exception

Test have been applied in circumstances where this particular site lies wholly within Flood Zone 3 (the high risk flood zone as defined in Table D1 of Annex D to PPS 25). The EA notes that the 2006 SFRA did not encompass the flood risk at this particular site or its general location, and that there is no evidence that, should the Sequential Test be passed, the proposed residential development at this site would be capable of passing criterion D9(c) of the Exception Test (as set out in PPS 25), which requires that a site-specific Flood Risk Assessment “... **must demonstrate that the development will be safe, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.**” In the circumstances, the EA – rightly, it seems to me – expressly doubts whether the Stambridge Mills site can be said to be “deliverable” within the meaning of PPS 3.

28. On any view, the EA’s objections strengthen significantly the argument that the Core Strategy is unsound.

#### *Housing*

29. CLLLP’s representations of October 2009 identified several discrete flaws in relation to the quantification of housing land supply in the draft CS.

30. It seems to me that a strong argument here is the one appearing at paragraph (c)(iii) of the October 2009 representations, which focuses on the redevelopment of employment sites for housing. Paragraph 4.14 of the Core Strategy confirms that the SHLAA examines four sites that are currently allocated for employment, and sets out the Council’s belief that “... their redevelopment to include housing represents a more appropriate use of the land.” CLLLP note that the 2007 Rochford Urban Capacity Study (“UCS”) refers under the heading “Redevelopment of Established Employment Land” to the four sites in question, with a collective capacity of 486 units (pp. 22-23). CLLLP then draw attention to the following section of the UCS:

“There are considerable areas of land in the district that are currently allocated for, and in use as, employment land. The redevelopment of such sites for residential use would reduce demand for residential development on greenfield sites, but would at the same time create a need for alternative sites to be found for employment. Such an approach, which would be likely to require the decontamination of existing employment land to make it fit for residential use, together with development of a greenfield site and implementation of additional infrastructure to serve the new employment area, may well be unsustainable.”

31. The key argument here – which, to my mind, carries very considerable force - is that the CS ought not to place any reliance on such sites coming forward for housing in circumstances where the redevelopment of the four sites is either unlikely within the plan period; or where their redevelopment would be unsustainable.

*The SHLAA*

32. The Council relies on the SHLAA as part of the evidence base underpinning the CS in circumstances where this assessment was not published during the currency of the consultation period. The SHLAA was in existence during the consultation period but was not published until 2 November 2009, by which point consultation on the Pre-Submission Core Strategy had come to an end.
33. It is noteworthy that paragraph 4.37 of PPS 12 stipulates that the evidence base is comprised of two elements, one of which is *participation* (defined to mean that “... evidence of the views of the local community and others who have a stake in the future of the area”). This is bolstered by paragraph 4.28 of PPS 12 which (*inter alia*) provides that stakeholders need to be engaged “... earlier to avoid late and unexpected representations emerging at the end of the process which might render the plan unsound and lead to lengthy delays in the delivery of a robust planning framework for the area.” Moreover, paragraph 4.20 of PPS 12 spells out the expectation that the production of CSs should follow the Government’s principles

for community engagement in planning, one of which is that involvement should be “transparent and accessible”.

34. Having regard to the broad principles set out in PPS 12, it is in clear that there cannot have been proper consultation in relation to the housing element of the Pre-Submission Core Strategy in circumstances where at least part of the evidence base purportedly underpinning that element of the Strategy was unavailable to those who submitted representations.

## **CONCLUSION**

35. In conclusion, and in light of at least the foregoing matters, I am firmly of the opinion that the Core Strategy is unsound when tested against the relevant guidance in PPS 12.

36. The issue arises as to how properly to remedy the present position. If the deficiencies in the CS evidence base are to be overcome and the CS rendered sound, then the Council will need further time to prepare and take full account of further evidence – not least an updated SFRA, Sequential Test and Exception Test (particularly in relation to the Stambridge Mills site) as proposed by both Icení and the EA.

37. Icení’s letter of 3 March 2010 puts forward a solution: the Examination should be adjourned. It seems to me that this is entirely the right approach. As the letter correctly points out, there can hardly be sufficient time for the necessary evidence to come forward in advance of the Examination in May, still less the Pre-Examination Meeting in March. Furthermore, such evidence would, in the interests of fairness and natural justice, have to be the subject of consultation.

38. Icení’s letter refers to the Isle of Wight decision on the examination of the Island Plan CS. It is clear from the minutes of the Isle of Wight Exploratory Meeting on 6 August 2009 that the Inspector was persuaded to suspend the examination of the

Island Plan for six months.<sup>8</sup> Significantly, he did so not because he had at that stage reached a finding that the CS was unsound, but because he had concerns that it *might* be so. He recognised, however, that if the cumulative effect of changes to the CS was too extensive then it might be necessary to withdraw the CS altogether and resubmit.

39. In the light of the Isle of Wight decision and the unsoundness of the Rochford CS, I am firmly of the view that what is necessary now is for the CS examination to be adjourned in order that the necessary work to make the CS sound is undertaken by the Council.

**PETER VILLAGE QC**

**16<sup>th</sup> March 2010**

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<sup>8</sup> Instructions 5 March 2010, tab 9