

Forest Heath Core Strategy Assessment Challenged

– The implications for other Assessments?

Sean Nicholson
Technical Director



This recent High Court Judgementⁱ, relates to a challenge under Section 113 of the Planning and Compulsory Purchase Act 2004. The challenge focused on policies in the Core Strategy which allocated a 1,200 dwelling urban extension in north-east Newmarket. Earlier versions of the draft Core Strategy allowed for development in the area but not at that scale. The SA report did not comment on reasonable alternatives to the proposed development or the implications of increasing development in this area.

The primary ground of the challenge was that the Core Strategy had been adopted in breach of the requirements of Directive 2001/42/EC on the assessments of the effects of certain plans and programmes on the environment (“the SEA Directive”), in particular the duty for the ‘environmental report’ accompanying a draft plan or programme to explain what reasonable alternatives to the proposed policies have been considered and why they have been rejected.

The Judge referred to Article 5 of the SEA Directive and associated regulations (our emphasis):

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated.

He also referred to the Guidance on implementing the Directiveⁱⁱ:

If certain aspects of a plan or programme have been assessed at one stage of the planning process and the assessment of a plan or programme at a later stage of the process uses the findings of the earlier assessment, those findings must be up to date and accurate for them to be used in the new assessment. They will also have to be placed in the context of the assessment.

He concluded:

...the final report accompanying the proposed Core Strategy to be put to the inspector was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report.

The policies in the Core Strategy relating to the urban extension were quashed.

What are the Implications of the Judgement?

The judgement demonstrates that assessment is a key part of the plan making process and compliance with the SEA Directive is essential if challenges are to be avoided. The judgement centres around the consideration of reasonable alternatives (options) and the need for each stage of the assessment to provide a clear audit trail in terms of the alternatives considered, their effects and why they were rejected. Assessments must provide a commentary on this - one client described this as ‘telling the story.’ It is not sufficient to provide the reasons for rejection in, for example, the Core Strategy itself. The principles apply equally to assessments of other documents in the Local Development Framework and assessments in other sectors (like water, energy and transport) that are also caught by the Directive.

What this decision must not lead to is the generation of reasonable alternatives for fear of plans being challenged in the courts. The identification of alternatives should be led by the plan-making team (consulting with the development industry, landowners and the public) with the assessment team acting as a critical friend in that process.

Sometimes policy makers and other stakeholders have an expectation that the assessment process should generate its own alternatives. This is something we resist. Having alternatives in the assessment that are not included in the plan itself could just confuse the public and other consultees – what status would such alternatives have relative to those included in a draft plan?

Those promoting sites should engage with the plan making process as early as possible and seek to understand whether or not their site(s) are considered a reasonable alternative by the policy team and if not why that is the case.

With the demise of Regional Spatial Strategies and uncertainties around the effectiveness of the duty to co-operate included in the Localism Bill the identification of reasonable alternatives is likely to become more difficult. This judgement demonstrates it is a key part of the assessment (and hence) plan making process.

More generally, the case highlights the complexities of the Directive and the need for vigilance to ensure compliance.

Who We Are

WSP has a dedicated SA/SEA team that works for both public and private sector clients. We can undertake all elements of the assessment process; advise on specific elements, provide training or undertake a critique of assessments using a framework that we have developed for that purpose.

FURTHER INFORMATION

Please contact Sean Nicholson on +44 (0) 7713 985 902
or email him at sean.nicholson@wspgroup.com.

Or Russell Buckley on +44 (0) 7825 843 565
or email him at russell.buckley@wspgroup.com

ⁱ Save Historic Newmarket Ltd v. Forest Heath District Council [2011] EWHC 606)

ⁱⁱ European Commission (2003) Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment. Commission of the European Communities, Brussels