

Contact: Neil Carter  
Direct Tel: 03000 269722  
Fax:  
email: [neil.carter@durham.gov.uk](mailto:neil.carter@durham.gov.uk)  
Your ref:  
Our ref: NC/92617



Jayne Knight, Programme Officer  
*FAO Mr Harold Stephens*

By email: [jayne.knight@durham.gov.uk](mailto:jayne.knight@durham.gov.uk)

21 April 2015

Dear Mr Stephens,

**County Durham Plan; Inspector's Interim views on legal compliance and soundness**

1. For convenience I use numbered paragraphs.
2. I refer to your interim report, dated 18 February 2015, which was forwarded to the Council on the same date. At the outset, I am instructed to express the Council's considerable concern at its contents.
3. The Council's draft Plan was focussed on the need to improve the economic position of the county. It was not a theme introduced in the course of the examination but was clearly evident from the draft Plan as lodged for the examination process. At no time before or during that process was there any indication to Officers that there were such fundamental concerns about the Plan and the Council, aware of the good practice guidance contained in the PINS document entitled 'Examining Local Plans Procedural Practice' (December 2013, 3<sup>rd</sup> Edition v2, reasonably expected any concerns to have been raised in an early meeting or, at the latest, in the early stages of the examination.
4. The interim report indicates, without deciding at this stage, that the County Durham Plan in its current form is very likely to be unsound and presents three options (at paragraphs 111-114) to the Council. You invite the Council to inform you as soon as possible which option it wishes to choose (para 115). Having considered these three options in detail, alongside an independent review which the Council has commissioned (and which is referred to later in this letter) and the advice of Queen's Counsel, the Council is firmly of the view that none of the suggested options represent a reasonable or appropriate way forward.

5. Instead, the Council believes that it has identified a number of legal and fundamental errors in the interim report such that the hearing sessions ought now to be re-opened in order for these matters to be addressed.
6. In particular, the treatment of the issue of Objectively Assessed Need (OAN) at paragraphs 26-43 of the interim report is considered to be irrational and unreasonable. There was no evidence advanced to support a conclusion that the OAN should be otherwise than 1651 dpa. Furthermore, the interim report advances an alternative OAN figure when it is respectfully suggested that this is beyond the remit of an Inspector. Equally the treatment of the issue of the proposed Relief Roads at paragraphs 95-101 of the interim report is irrational. There also appears to be a misunderstanding with respect to key parts of the evidence, with conclusions being reached without an appropriate evidential basis.
7. In order to consider these issues, the Council commissioned an independent assessment of your interim report on the issues of OAN and the Relief Roads from Matthew Spry, a partner of NLP in London, and a highly respected expert in the consideration of the soundness of local plans. Mr Spry has had no previous dealings with the Plan, and appropriate "Chinese Walls" were put in place between him and other members of NLP who have had involvement in the Plan. A copy of Mr Spry's report is attached. We would invite you to consider it in detail but in summary only, it concludes that:

#### 8. OAN

- 8.1. The evidence available within the ambit of the Examination and for the Durham Housing Market Area (HMA) could reasonably have led to the conclusion that the OAN is 1651 dwellings per annum and was NPPF and PPG compliant.
- 8.2. Concerns expressed in the interim report appear largely unrelated to the proper approach to deriving OAN, with primary reasons given unrelated to factors of OAN but ones of policy and strategy making, including matters beyond the HMA's boundaries, such as the approach to commuting rates.
- 8.3. Whilst the interim report acknowledges that the Inspector's role is not to substitute his judgement for that of the Council but to assess whether it is soundly based, it appears that there was limited justification other than the adoption of an alternative judgement to dismiss the Council's conclusion that 1651 dwellings per annum represented a sound OAN for the Durham HMA.

#### 9. Relief Roads

- 9.1. There was no evidence before the examination in public to support the contention in the interim report that the Council has not demonstrated deliverability and viability of the roads.

- 9.2. Rejection of the relief road was in part dependent upon a rejection of overall growth levels but that rejection was in itself incorrectly made.
- 9.3. The policy in the LTP does not in fact undermine the case for the relief roads given that it does include a reference to them. The potential for congestion charging had been fully explored through the TIF process and the Council was justified in not pursuing it further.
- 9.4. There was no evidence to support expressed concerns over modelling assumptions – on modal shift targets, traffic levels and growth assumptions.
- 9.5. Findings that the low levels of traffic growth in Durham city do not justify the roads are based on merely a 24 hour snapshot of the figures across the whole study area and do not take account of peak hour and spatial concentrations and accordingly, contradict the evidence provided by the Council.
- 9.6. Views that the roads are not justified on technical and value for money grounds do not take account of the evidence that the roads are feasible.
- 9.7. The conclusion that the environmental and wider impacts are overwhelmingly adverse relies on the personal views of objectors and ignores the Council's evidence, some of which is not referenced in the interim report.
10. In addition to the above, the Council is also aware that there are some participants at the EIP hearing sessions who have already written about the conduct of the session: raising concern about the fairness of the process and refusal to accept part of their submissions/evidence. It is the Council's view that some of that evidence, had it been considered, would have been supportive of parts of the Plan submitted by the Council and may have supported a different conclusion to the one reached in the interim report.
11. The Council has also taken advice from Mr Peter Village QC who has confirmed that he is of the view that your treatment of OAN and the Relief Roads in your report is legally flawed. He considers that your conclusions would, if confirmed, be susceptible to legal challenge by way of Judicial Review. However, he has suggested a way forward.
12. The Council has given careful consideration to the most appropriate way forward. In particular it has had regard to paragraph 2 of your interim report in which you say:

"I am writing to set out my interim views on the legal compliance and soundness of the submitted plan below. For the avoidance of doubt, this note does not set out a final view on the soundness of the plan in respect of these

or any other matters and is issued without prejudice to the contents of any final conclusions when the examination is completed.”

13. The Council understands that statement to mean that the contents of your report are provisional and that they do not represent your final view. If so, it appears to the Council that there is still an opportunity to make further submissions to you in order to persuade you that the provisional conclusions which you have reached are incorrect and flawed. It may also be possible to remedy the breach of natural justice evident from your rejection of evidence which participants to the examination sought to adduce by allowing such evidence now to be submitted. In short, the Council considers that if you are able to consider all further evidence and submissions, with a genuinely open mind, then a way forward may be for the examination hearings to be re-opened to address these issues.
14. If, as a result of those re-opened hearing sessions, you came to a final conclusion on the issues of OAN and the relief roads and concluded that the Plan was in fact sound in those respects, then the Council would be able to properly consider its options in relation to your other provisional conclusions, and in particular whether it would request a suspension of the Plan to allow it to add to the evidence base in respect of those other matters.
15. Of course, this could only happen if you felt able to re-open the hearings and consider with an open mind, unfettered by your interim conclusions, further evidence and submissions.
16. If the Council's understanding of the status of your interim report is incorrect, and it in fact represents your final view, then obviously it would not be appropriate to re-open the hearing sessions and the Council would formally invite you to say so, in which case the Council will then further examine its options, one of which would be to seek a judicial review of your conclusions.
17. I should just refer to one further matter. The Council understands that you have returned your library of examination documents to the Council. I would be grateful if you could explain why you thought this was appropriate given the on-going examination.
18. Unfortunately the timescale for dealing with this is very short. If the Council had to resort to an application for judicial review, then such would have to be issued before 18 May 2015 at the latest. Accordingly, please could you let me know as a matter of urgency, and in any event within the next 14 days, whether you are prepared to re-open a hearing session along the lines of an exploratory meeting, into the issues of OAN and the Relief Roads, on the basis I have set out in paragraph 13 above. In particular I would also ask you to confirm that you are prepared to allow the representations to be made which you previously rejected. If you do so confirm, then I will then liaise with the Programme Officer to agree a suitable time and venue. It is further envisaged that following any re-

opened hearing session(s) on OAN and the Relief Roads, it is likely to be necessary to hold further hearing sessions into the matters directly affected by that. It appears to the Council that a timetable for that can be agreed at a future date as and when necessary.

19. If you feel unable to so confirm, then I would ask you to instead confirm that your interim report is now a final one, so that I may take the necessary steps in terms of Judicial Review challenge.

20. So that I may make an informed decision on our options without prejudicing Judicial Review as a potential option, I would stress the need for us to have your reply by close of business on Tuesday 5 May 2015.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Colette Longbottom', with a long horizontal flourish extending to the right.

Colette Longbottom  
Head of Legal and Democratic Services