1. My advice is sought on whether it would be lawful for the Council within their Core Strategy to pursue an overall development strategy focused on Wymeswold Airfield.

Background

2. The East Midlands Regional Plan ("EMRP") was adopted in March 2009. Whilst it remains the Government’s intention to revoke regional strategies, any decision to revoke must be the subject of a strategic environmental assessment whether, when and to what extent any existing regional strategy is revoked remains uncertain.

3. The EMRP is based on a policy of urban concentration with the major proportion of new growth required in the region required to be concentrated in and adjoining the three conurbations of Derby, Leicester and Nottingham. To this end, Policy 3 provides for the distribution of new development in accordance with a settlement hierarchy. The Principal Urban Areas ("PUA’s") are to be where growth is primarily concentrated, with lesser scale of development at, for
example Loughborough. In terms of development in the rural area, away from a settlement the policy states:

“The development needs of other settlements and rural areas should also be provided for. New development in these areas should contribute to:

Maintaining the distinctive character and vitality of rural communities, shortening journeys and facilitating access to jobs and services; strengthening rural enterprise and linkages between settlements and their hinterlands; and respecting the quality of tranquillity, where that is recognised in planning documents”.

4. Within the Council’s area, the policy of urban concentration is reflected in the housing requirement policy. The 10,120 dwellings required in the non-PUA locations, are required by Policy Three Cities SRS3 “to be located mainly at Loughborough”. The Council’s Core Strategy seeks to meet this requirement. If this is not mainly located at Loughborough, there would be a conflict with the EMRP.

5. In the early stages of Core Strategy consultations, there was considerable support for development at Wymeswold Airfield to meet the strategic housing requirements. This led to it being considered and rejected as an option in the 2008 Core Strategy Further Consultation Report because it did not perform well against sustainability indicators, it was remote from Loughborough and therefore conflicted with EMRP strategy, it had delivery issues and the worst traffic impacts of any option.

6. In the light of support for development at the Airfield persisting, it was more recently made the subject of a comparative objective assessment of locations presented to Charnwood Borough Council Cabinet on 27th September 2012. The conclusions of this assessment were set out in the Cabinet Report as follows:
“The option still remains at odds with an urban concentration strategy that was agreed by Cabinet in December 2005 as part of the Regional Plan process and which was subsequently adopted by the Secretary of State in March 2009.

The transport and flooding concerns are still a major factor that would inhibit delivery of the option, (and appears to be the least able to be mitigated of all the options at reasonable cost); and

No promoter interest has emerged or approached the council to take the option forward, therefore it is unlikely that an inspector would be persuaded that this is a deliverable or viable solution.

The Wymeswold Airfield option appears to remain undeliverable and, in light of the current urban concentration strategy, the evidence and the guidance in the National Planning Policy Framework at least, would represent a significant risk were it to be selected for inclusion in the core strategy and subjected to examination against the tests of soundness.”

The General Conformity Requirement

7. In Cala Homes (South) Limited v SSCLG [2011] EWCA Civ 639 Sullivan LJ had to consider the materiality of the Secretary of State’s stated intention to revoke regional strategies to the plan making process. He compared the statutory regime relating to the determination of planning applications (which allows the development plan to be departed from if material considerations indicate otherwise) with the plan making general conformity requirement. He stated:

“The decision-maker must consider not only the development plan, but also other material considerations. Those considerations may include the fact that the policies in the development plan have become
outdated, or are no longer relevant because of a change of circumstances; and those considerations may indicate that the decision should not be in accord with the development plan.

This “valuable element of flexibility” (see Lord Clyde’s speech in the City of Edinburgh case cited in para.6 above), given to the local planning authority when determining planning applications, is to be contrasted with the lack of flexibility when the authority is preparing its development plan documents. It must have regard to the relevant regional strategy (among other specified matters), and whether or not it is precluded from having regard to other matters which are not listed in paragraphs (a) – (j) of the section 19(2) of the 2004 Act, the end product, the local development documents, “must be in general conformity” with the regional strategy: see section 24(1) of the 2004 Act. Development plan documents must be submitted for independent examination by a person (in practice a Planning Inspector) appointed by the Respondent, and one of the purposes of that examination is to determine whether the development plan document satisfied the requirement of general conformity in section 24(1). It would be unlawful for a local planning authority preparing, or a Planning Inspector examining, development plan documents, to have regard to the proposal to abolish regional strategies. For so long as the regional strategies continue to exist, any development plan documents must be in general conformity with the relevant regional strategy.”

8. The Cala case was not the last word on this issue. In R (on the application of Stevenage Borough Council v SSCLG [2011] EWHC 3136 (Admin), Stevenage challenged the finding of their Core Strategy Inspector that their Core Strategy was unsound because it relied on the cooperation of the adjoining authority North Hertfordshire District Council. That Council had ceased cross boundary working on housing provision in the light of the Government’s stated intention to revoke the regional strategy and were testing alternative housing provision options
(including but not limited to options which satisfied the regional strategy requirement). Stevenage argued that it was unlawful for the inspector to take into account the absence of cooperation because it flowed from the decision to revoke regional strategies which was immaterial in the light of the Cala case. Ouseley J rejected this contention and explained the proper context of Sullivan LJ’s words in that case:

“…The statutory obligation is quite clear. The DPD must be in general conformity with the Regional Strategy at the stage when it is submitted for examination; s.20(2)(b) requires the local authority to submit it when it is ready and when it thinks that the plan generally conforms to the Regional Strategy. There is no earlier obligation in relation to general conformity. S20(5) requires the DPD to be submitted for examination for such conformity, and for soundness. S24 does not bite at any earlier stage in the preparation of the DPD.

Importantly, s19 by contrast does not contain a requirement for general conformity. The statute requires the DPD to be prepared in accordance with the Local Development Scheme. The statutory duty at that stage in relation to the Regional Strategy is “to have regard” to it. This is the flexible language with which, in Cala Homes, Sullivan LJ contrasted the inflexible requirement under s24 that the DPD conform generally to the Regional Strategy. In my judgment, and consistently with Cala Homes in the Court of Appeal, the local authority in developing its DPD is entitled to take a view on the ways in which a Regional Strategy may be evolving away from the immediately current version, and by the same reasoning is entitled to take a view on its prospective revocation, in deciding to have regard to it.

The statutory scheme gives flexibility at earlier stages in the plan-making process, which it removes at the stage of submission for examination. I can see no justification for importing that lack of flexibility into the earlier stage, as a matter of statutory construction. Indeed it would conflict with the clear contract between the language of
s38(6) of the 2004 Act (with s70(2) TCPS 1990), and that if s24, so important to the reasoning of the Court of Appeal in Cala Homes.

No doubt it would be possible to imagine an authority purblindly preparing a plan which was bound to fail at the stage of submission for examination, for want of general conformity, But that is an unlikely picture.”

9. The settled legal position is therefore that a local planning authority may have regard in preparing its DPDs to the proposed revocation of regional strategies but, in doing so, must act rationally. It can prepare a DPD which is not in general conformity with the relevant regional strategy but in doing so must first consider (a) the prospects that revocation will occur; (b) the timescale within which that is likely to occur; (c) the policy framework which will apply even if the regional strategy is revoked and (d) the planning consequences of any delay which an inability to submit a non-conforming plan would give rise to. It would, for example, not be lawful to prepare a plan which is in general conformity with the regional strategy but which the planning authority considers would, in any event, fail to satisfy the NPPF tests of soundness.

Wymeswold

10. Placing substantial reliance on a site with the locational disadvantages of Wymeswold Airfield in order to meet the non-PUA housing requirement would not be consistent with the EMRP and, dependent on the scale of development proposed, could lead to a conclusion that the Core Strategy as a whole was not in general conformity with the EMRP.

11. In the light of the Stevenage case it would be open to the Council to consider whether or not at the point of likely submission for examination, the EMRP is likely to have been revoked. Provided that it
properly weighs up the factors I have identified in paragraph 9, it could consult on a Core Strategy which is not in general conformity with the EMRP.

12. However, the difficulty here is more one of soundness than of general conformity. The Council has, no doubt for perfectly sound planning reasons, accepted the housing provision requirement of the EMRP. That is the objectively assessed need which it is required by the NPPF to meet. The Council will be required at examination, irrespective of whether or not the EMRP has been revoked, to demonstrate that the Core Strategy is sound i.e. positively prepared, justified, effective and consistent with national policy (see the NPPF para.182). “Justified” means that the plan should be the most appropriate strategy when considered against the reasonable alternatives. “Effective” means that the plan is deliverable.

13. In the light of the appraisals which the Council has undertaken, I can see no basis upon which it could rationally conclude that the inclusion of Wymeswold Airfield in the Core Strategy would be likely to be found sound. The evidence is that it is significantly constrained, that the location is unsustainable, that the site has no active promoter and there is no evidence that it would be either viable or deliverable. There appears to be no evidence upon which it could be contended that a strategy which placed significant reliance on the Airfield for its success would be “the most appropriate” judged in the light of the NPPF as a whole.

14. A decision to favour Wymeswold Airfield over other options in the plan making process where there is no rational basis for that decision would be unlawful. Just as Ouseley J warned against planning authorities “purblindly” pursuing non-conforming plans in the face of the general conformity requirement, it is equally unlawful for a planning authority to pursue a location for development which the evidence shows would be bound to fail at independent examination. That is bad plan making.
15. Whilst prior to the Planning and Compulsory Purchase Act 2004 local planning authorities were never successfully challenged in their plan making decisions until after adoption (by which time local plan inspectors had usually resolved the results of aberrant decisions), under section 113 of the Planning and Compulsory Purchase Act 2004, there is no restriction on challenges to decisions on what to include in submission draft plans (see Manydown Company Limited v Basingstoke and Deane Borough Council [2012] JPL 1188). It would therefore be open to the owner or developer of a rival site which might be rejected in favour of Wymeswold Airfield, to challenge any decision to include it. On the basis of the material that I have seen, that would appear to be a significant risk.

Simon Bird QC
24 October 2012

Cornerstone Barristers
2-3 Gray's Inn Square
London WC1R 5JH
IN THE MATTER OF
CHARNWOOD BOROUGH COUNCIL'S
EMERGING CORE STRATEGY

ADVICE