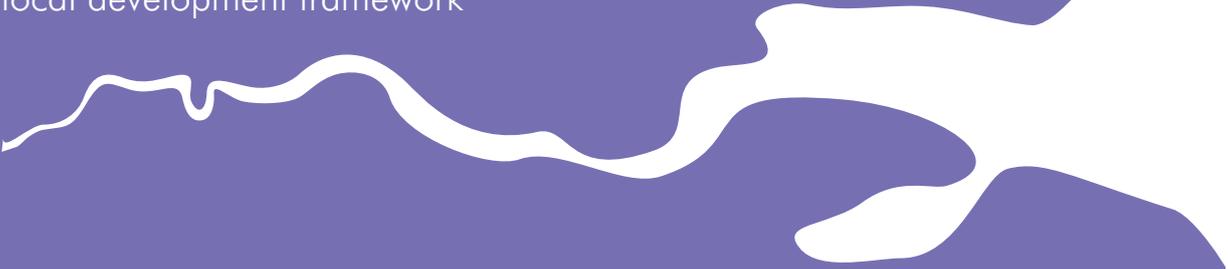


community infrastructure levy  
april 2015

southend on sea borough council  
local development framework





## Response to question raised by Terrence Kemmann-Lane, Examiner into the Southend Borough Council Community Infrastructure Levy Draft Charging Schedule

**Question:** The Council is invited to provide a more detailed response to the question of whether or not the Council's 2007 Core Strategy can be relied upon as an up-to-date local plan for the purposes of national policy and guidance on the preparation of CIL Charging Schedules.

---

### Oxted Residential Ltd v Tandridge District Council [2015] EWHC 793

At the outset, the Examiner has raised the matter of a Judicial Review made in early September 2014, which has been subject to a recently determined High Court challenge (The Queen on the application of Oxted Residential Ltd v Tandridge District Council [2015] EWHC 793). In this case it was claimed, *inter alia*, that the Council's adoption of its CIL Charging Schedule, on the Examiner's recommendation, was unlawful because its Local Plan (Core Strategy), which was adopted in October 2008, was deemed to be out of date. Hence, this case is pertinent to Southend Borough Council's CIL Examination.

To provide brief background to the case, the Tandridge Core Strategy was proposed to be in general accordance with the South East Plan, which has, in all respects relevant to the proceedings, now been revoked. The Core Strategy sought to make provision for the South East Plan housing requirement. In addition, in November 2013 Tandridge District Council consulted on a draft CIL Charging Schedule. Objections were made to the CIL Charging Schedule on the grounds that it was not based on an update to Core Strategy.

The Examiner for the Tandridge CIL examination concluded the following at paragraph 11 of his report, with which the Council concurs:

*"The Council has a Core Strategy adopted in October 2008, preceding the March 2012 publication of the NPPF by more than three years. It may be that some of its policies are capable of being considered out of date when judged against the policies of the NPPF, but until it is replaced it remains the principal document of the Development Plan for the district. The CIL charges proposed by the Council are based on infrastructure needs arising from the development required for the implementation of that plan. So long as there is a funding gap, and that funding is to provide for infrastructure needed to meet the costs of supporting development of the area, I see no legal basis to find that the submitted CIL Charging Schedule should not be approved just because it is based on a plan which, no doubt, will be reviewed in the near future."*

Further to this point, Mr Justice Dove stated at paragraph 12 of his judgement that *"Whilst it is a desirable objective, it would be unreasonable in the current circumstances, to expect all the planning documents of the Council to provide a seamless comprehensive and continuously up-to-date palette of planning policies and proposals."* And continued at paragraph 58 to state that *"The Inspector gave clear reasons (paragraph 10 and 12 of his report) which explain his approach in relation to this point as to the OAN and the Core Strategy being out of date. It was a conclusion which was...both logical and lawful."*

Mr Justice Dove considered that the Inspector for the Tandridge CIL Charging Schedule clearly addressed the concern of whether or not he was approving a Charging Schedule that related to an up to date plan. Similar to the circumstances of Southend Borough Council, in paragraph 70 the Judge states that the Inspector in considering Tandridge's CIL Charging Schedule "*was entitled to conclude, that although the Core Strategy was to be reviewed, nonetheless there was good reason to endorse the CIL Schedule so as to support provision of infrastructure for the existing levels of completed development.*"

Subsequently in paragraph 71 Mr Justice Dove summarises the position in relation to the status of the adopted plan and the legal entitlement of an Inspector to make his own considered conclusions. He states that:

*"...the following points in my view need to be noted. First, there is no requirement in the legislative framework - nor is one relied upon - which requires a recently adopted plan to be in place before a CIL Schedule can be adopted. Second, whilst the Guidance to which regard must be had in accordance with the requirements of Section 221 of the 2008 Act suggests charging schedules should be consistent with and supported by an up-to-date plan, the decision here was for the reasons which were given by the Inspector, a departure from that policy which the Inspector was legally entitled to make, provided he gave reasons for that departure. He provided clear and adequate reasons to justify the departure. Whilst it is no doubt the optimal position, there is no reason in law why a charging authority can only produce a CIL Schedule if it has a recently produced plan. If, like here, the plan relied upon requires review then no doubt revision of the CIL Schedule to align it with the reviewed plan would be a high priority, if not essential."*

For information, other examples of recent successful CIL Examinations for authorities with Local Plans that pre-date the NPPF have been included in Appendix 2.

### **Consistency with NPPF objectives (Objectively Assessed Housing Need and 5 year supply)**

The NPPF states the following in relation to OAHN and 5 year supply of housing:

Paragraph 14 states that "*local planning authorities should positively seek opportunities to meet the development needs of their area*" and "*should meet objectively assessed needs...*"

Paragraph 47 refers to the Government's aim to "*boost significantly the supply of housing*" which represents a general change of approach to that taken pre-NPPF.

Paragraph 49 states that "*...Relevant policies for the supply of land should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable sites*".

And paragraph 031 of the PPG expands on this stating the following (**emphasis added**):

*"The National Planning Policy Framework sets out that local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements. Therefore local planning authorities should have an identified five-year housing supply at all points*

*during the plan period. Housing requirement figures in up-to-date adopted Local Plans should be used as the starting point for calculating the five year supply. Considerable weight should be given to the housing requirement figures in adopted Local Plans, which have successfully passed through the examination process, unless significant new evidence comes to light. It should be borne in mind that evidence which dates back several years, such as that drawn from revoked regional strategies, may not adequately reflect current needs.*

The first point to note is that Southend's CIL Draft Charging Schedule does not seek to identify the full, objectively assessed needs for market and affordable housing for the purposes of paragraph 47(1) of the NPPF and that is not its function.

The meaning of NPPF paragraph 47 has been considered in detail in City of St Albans & R (OAO) Hunston Properties & SoS [2013] EWCA Civ 1610, a case to which the Examiner refers. The Council notes that the Court of Appeal has now clarified the operation of a key part of the NPPF in situations where a local authority has yet to produce a Local Plan and that it has now been established that it is an error in law to apply a 5 year housing land supply derived from a revoked Regional Strategy; however, the circumstances of this case are considered different to that of Southend Borough Council.

It is noteworthy in the St Albans case that the District Council did not have an up to date Local Plan in place (their Local Plan had been adopted in 1994) and therefore they were directly reliant on the East of England housing figures. At paragraph 25 of the judgement the Judge states "*I am not persuaded that the inspector was entitled to use a housing requirement figure derived from a revoked plan, even as a proxy for what the local plan process may produce eventually.*" The difference being in Southend that the evidence base for the East of England plan informed the adopted Core Strategy and its housing delivery strategy, which was tested at examination in 2007 against reasonable alternatives, but the Council is no longer relying on the housing figure as set out in the revoked East of England Plan.

The background to the Council's housing delivery strategy, as set out in its Core Strategy 2007, has been included in Appendix 1 of this document for information.

The Council is not currently able to specify an objectively assessed need for its area or the wider housing and economic market area – this is currently being carried out throughout a review of the TGSE SHMA so that it may be established. In the Council's opinion that does not mean the CIL Charging Schedule should be considered unsound. The recent decision in the Gladman Development case (Gladman Development Ltd and Wokingham Borough Council [2014] EWHC 2320), although it relates to a development plan document, is relevant to this issue. If a development plan document deals with the assessment of the need for housing, then paragraph 47 of the NPPF will generally require full, objectively assessed needs to be identified and then a distinct assessment to be made as to whether (and, if so, to what extent) other policies dictate or justify constraint (see Gallagher Homes Ltd v Solihull MBC [2014] EWHC 1283). The recent decision in Gladman Development confirms, however, that such an approach is not required where a particular development plan document is not seeking to deal with the assessment of the need for housing (see Lewis J in Gladman Development).

The Southend CIL Charging Schedule does not assess housing provision for the Council's area, but merely indicates the charges for different types of development in Southend on Sea, based on an infrastructure funding gap identified against the amount of development identified in the most up to date manifestation of the development objectives and wishes of the local community. In such circumstances, applying the Gladman Development principles, the soundness of the Southend CIL Charging Schedule is not contingent on identifying the full, objectively assessed needs for market and affordable housing for the purposes of paragraph 47(1) of the NPPF. In this context, it is considered that it is not within the scope of the CIL Examination to establish what the future objectively assessed housing need may be within Southend.

As in the Gladman case there is nothing to indicate that the intention of the examination into the CIL Charging Schedule is to review the figure for housing in the Core Strategy. In the Gladman case the Inspector confirmed that he did not consider that he was tasked with, or was in a position, to consider whether the Core Strategy housing figure now represented what was objectively assessed as necessary to meet the housing needs of Wokingham. As such there was no other better or credible basis for calculating the level of housing need. The inspector concluded that for *"these reasons"* – that in, the absence of any better, credible figure, and in this particular local context - *"it was appropriate to continue to rely on"* the number of dwellings identified in the Core Strategy.

In the Grand Union case (Grand Union Investments Ltd v Dacorum Borough Council [2014] EWHC 1894), Lindblom J upheld the decision of Dacorum Borough Council to adopt its Core Strategy, despite the fact that it had been required to identify its full, objectively assessed needs but had failed to do so. The Inspector had recognised this defect, but had nonetheless decided that the Core Strategy (as modified by a main modification) was sound because of the Council's intention to adopt an early review by 2017/18. This was a view that the High Court considered to be *"pragmatic, rational and justified"*.

It is worth considering that, although a different language may have been used prior to the publication of the NPPF, the process was nonetheless addressing *the substance of the issue* of paragraph 14, and ensured to the satisfaction of a Panel of Inspectors in the case of the East of England Plan, and a single Planning Inspector for the Core Strategy that a 'sound' and robust approach had been taken that complied with the three elements of sustainable development as outlined in the NPPF.

Paragraph 49 of the NPPF clearly states that policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites. In the case of Southend Borough Council, evidence of a 5 year supply is readily available and reviewed each year in the Annual Monitoring Report and this is further discussed in Section 3 of the Council's Overview Report.

As set out above in the context of the St Albans case, Southend Borough Council is not relying on the housing figure as set out in the revoked East of England Plan, rather it relies on its housing delivery strategy in the adopted Core Strategy and it is this that the CIL Charging Schedule is based upon. Of course the Council intends to review the Core Strategy. The Core Strategy Review is due to commence late 2015, in accordance with the Southend Local Development Scheme: [https://www.southend.gov.uk/downloads/file/2910/local\\_development\\_scheme\\_update\\_june\\_01](https://www.southend.gov.uk/downloads/file/2910/local_development_scheme_update_june_01)

In addition, the on-going TGSE SHMA review demonstrates the proactive approach of all local authorities within the TGSE area to identify an objectively assessed need within the housing and economic market area. The SHMA will not seek to address the extent to which, or the location in which, the objectively assessed housing need it identifies should be met. Those undertakings will be carried out during a review of the Core Strategy and through the duty to cooperate process with neighbouring authorities (for which the SHMA will, of course, be a key part of the evidence base).

Even so the commissioning of this key evidence base further highlights the good intention of Southend Borough Council and other TGSE authorities to ensure that they will have an updated evidence base to inform plan preparation and to deliver sustainable regeneration and growth in the long term in line with national policy. Again this evidence base will also assist greatly with any future review of the CIL Charging Schedule alongside local plan review. Nevertheless as has been highlighted herein and in the CIL evidence base, there is already a pressing need to secure infrastructure to support current and proposed development, and there is an identified funding gap, which validates the implementation of CIL, with an option to re-examine once new delivery targets are adopted.

Consistent with the circumstances of Tandridge judgement as outlined above, in its CIL Charging Schedule Southend Borough Council is seeking funding towards the infrastructure required to support existing defined levels of growth as set out in the Core Strategy 2007. Although the Council has acknowledged in paragraph 3.6 of the Overview Report (February 2015) that it intends to review the Core Strategy, this comment is not intended to imply that the document is out of date or non-NPPF compliant; it is simply stating that in accordance with good practice it is intended for the Local Plan to be reviewed to ascertain whether its policies require updating. The Infrastructure Delivery Plan and the CIL Charging Schedule will be reviewed alongside any review of the Core Strategy to ensure that the infrastructure needs of any additional growth are correctly identified and met, and that the identified infrastructure funding gap is accurate and up to date.

## **Appendix 1: Background to Southend Borough Council Core Strategy (December 2007)**

The Southend Core Strategy adopted in December 2007 is the most up to date manifestation of the development objectives and wishes of the local community. It was prepared in accordance with the necessary statutory framework and regulations, which included a number of stages of statutory public consultation on issues and options, preferred options and a proposed submission version which were subject to an iterative process of sustainability appraisal, including strategic environment assessment, which required the Plan to consider robust and reasonable alternatives to the spatial strategy. The consultation process involved extensive consultation with the community and interested parties, local authorities and agencies and other statutory bodies. When it was found sound by the planning inspector it had been subject to significant public scrutiny and examination, and was deemed to be the most appropriate strategy for Southend for the period from 2001 and 2021.

### **Inspector's Report (October 2007)**

The Inspector's Report for the Core Strategy accepted that the spatial strategy, based mainly on the main built up area, (i.e. the focus for growth and regeneration as being in the Southend Town Centre and Central Area, the Seafront, Shoeburyness and the Priority Urban Areas) was the most appropriate to deliver much needed regeneration and growth. The Inspector considered that the Spatial Strategy rightly accorded this area high priority for both jobs and housing, and that the

Core Strategy should emphasise its prime status in regeneration and growth, and acknowledged that the central area would have no difficulty physically accommodating additional dwellings.

The Inspector also discussed the alternative to the spatial strategy, which would have involved peripheral "master planned" development on much of the Green Belt land to the north east of the Borough or a more modest release of Green Belt land in the north. Proposers of the "Green Belt release" strategy did not submit sustainability appraisals of their proposals. The Inspector stated that that strategy would, in the absence of clearly demonstrable other considerations amounting to very special circumstances, be unjustified. It would be contrary to the aim and purposes of Green Belt policy, lose high grade agricultural land and mineral deposits and prejudice the aim of creating a country park in the general location of the north east of the Borough. The Inspector stated that it was unclear how it would assist in reducing dependence on car travel and it would severely prejudice regeneration of the Town Centre, Seafront and Priority Urban Areas. The inspector concluded that within the limited scope provided in this densely built up area surrounded largely by Green Belt and the sea, that she was satisfied that there was sufficient flexibility allowed for in the policies to achieve the regeneration and growth and meet the objective of the plan period.

The Inspector also pointed out that the need for Green Belt releases to help meet requirements was considered at the East of England Plan Examination. The Secretary of State's Proposed Changes to the Draft East of England Plan delete the reference to a review of the Green Belt in the Thames Gateway South Essex that was contained in the submitted Draft Revision and there is no reference to a more limited local review being needed in Southend. This Secretary of State's Proposed Change was in response to the Panel's findings that in the Thames Gateway South Essex, there should be concentration in the short to medium term on recycling brownfield land and on regeneration and renaissance of the urban area.

#### **East of England Plan Panel Report (June 2006)**

The Panel Report for the East of England Plan highlighted that the latest population and household projections were considered, recognising as is the case now that projected household numbers are highly sensitive to assumptions about future migration. The Panel understood that the household projections were not statements of housing requirement but statistical exercises showing what would happen if demographic trends continue. Nevertheless they did acknowledge at the time that household projections represented the best available statistical basis for considering how many additional households might require homes in the region in the future. Given the number of variables and the uncertainties of forecasting over a 20 year period, the Panel considered that it was important not to try to be over-precise in interpreting projections for planning purposes; the limits of 'sound science' in this area needed to be understood – no one projection provides a "correct" figure of household formation or growth.

The figure the Panel settled on, after taking account of 2001 to 2006 housing completions, represented an annual rate of over 26,000 homes per annum from 2006 onwards. Indeed the Panel highlighted that this figure was over 30% above previous levels of around 20,000 per annum, and considered it to be a "step-change". They also pointed out that this figure was above the annual rate of household increase implied by all but the 2006 ODPM household projections. Furthermore the Panel acknowledged that the housing growth within Thames Gateway South Essex sub-region, which Southend is one of five authorities that the housing growth rate was about 35% higher than previous Structure Plan/Unitary Development Plan requirements, and also recognised that there had been an increase in all five districts, although Southend and Thurrock has the greatest proportional annual increase.

The Panel Report also acknowledges that the Thames Gateway South Essex was already a highly developed area where the open spaces between settlements were often narrow; as such they

considered that there was particular importance in maintaining such stretches of open countryside. Even so, it was recognised that a time may come when a strategic review of the Green Belt may be justified to address longer-term growth requirements.

## Appendix 2:

### Examples of recent successful CIL Examinations for authorities with Local Plans that pre-date the NPPF (March 2012)

- Tandridge: Core Strategy adopted October 2008
- Kensington & Chelsea: Core Strategy adopted December 2010
- Peterborough: Core Strategy adopted February 2011
- Sheffield: Core Strategy adopted 2009
- Southwark: Core Strategy adopted 2011
- Bexley: Core Strategy adopted February 2012
- Hackney: Core Strategy adopted November 2010
- Sevenoaks: Core Strategy adopted February 2011
- Camden: Core Strategy adopted November 2010
- Waveney: Core Strategy adopted January 2009
- Bedford: Core Strategy adopted 2008
- Epsom and Ewell: Core Strategy adopted 2007
- Reading: Core Strategy adopted 2008