

## **RE: ECO-TOWNS**

### **JOINT OPINION**

---

#### **Introduction**

1. We are asked to advise the Local Government Association (“LGA”) in relation to proposals by the Department for Communities and Local Government (“DCLG”) to create a number of new “eco-town” developments.
  
2. In particular, we are asked to advise:
  - (1) whether the proposed process for establishing eco-towns is consistent with the intention of Parliament as expressed through the planning legislation;
  
  - (2) whether the proposed process for establishing eco-towns complies with European Directive 2001/42/EC;
  
  - (3) whether an eco-town proposal can properly come back for consideration in the local planning process in circumstances where the site at which it was proposed to be located has already been rejected for housing development through the relevant Regional Spatial Strategy (“RSS”) process .

#### **Summary**

3. For the reasons set out in greater detail below, we are of the opinion that:
  - (1) The Government’s proposed promotion of eco-towns through a new Planning Policy Statement (“PPS”) is contrary to the basic principle – expressed through the planning legislation – of the plan-led system of development control.
  
  - (2) This conflict is all the more acute because the concept of an eco-town does not appear to be materially different from the concept of providing housing in new settlements in an environmentally sustainable way, something which is already

recognised in PPS3 on Housing. There therefore does not appear to be any compelling justification or rationale for seeking to promote eco-towns outside the existing statutory plan-led system, other than the government's wish to avoid the system due to the need for proper scrutiny, which takes time. It is to be noted that the government seeks to use the current planning legislation and is not to introduce any new legislation, such was the case with other forms of development which came forward under different statutory planning regimes.

- (3) The Government's stated intention is to rely on new PPS policy which is to be published later this year after consultation. The proposal is for the new PPS to support and promote designated eco-towns which have been selected after a form of competition and which appears to be designed to circumvent the normal plan-led process; it would do so by creating a new policy framework for site specific proposals, which the Government could then treat as a material consideration in determining planning applications for such eco-towns, notwithstanding that the eco-town proposal in question may otherwise conflict with the provisions of the development plan. This is clearly contrary to the legislative intention of development control through a plan-led system.
- (4) The conflicts identified above will be particularly serious in respect of attempts to promote eco-towns through the PPS where
  - i. such eco-towns have already been rejected through the RSS process, or
  - ii. when purporting dealing with consideration of alternative options, particularly alternatives which can properly invoke the term "eco-town" in all respects save for the fact that they are not included on the Government's final list of selected sites, or
  - iii. in dealing with the obvious point that an eco-town promoted in this way would be premature (within the meaning of PPS1 and the accompanying guidance) to the development plan process<sup>1</sup>.
- (5) Given the description and intent of the proposed PPS, the Government's aspiration to identify and promote specific eco-towns may well amount to a

---

<sup>1</sup> See the Government Policy Document "The Planning System - General Principles"

“plan or programme” within the meaning of Directive 2001/42/EC and the relevant implementing Regulations. If this is the case, the Government has a legal duty to carry out a proper Strategic Environmental Assessment (“SEA”). There is nothing to indicate that the Government has complied with that duty to date. Nor is it clear how it will be able to deal properly with that duty retrospectively, and in particular the obligation to consider alternatives as a necessary part of any SEA.

- (6) We consider the promotion of specified “eco-towns” in this way in conflict with the plan-led systems is an error of law in that it is inconsistent with the legislative framework, fails to address relevant considerations, is illogical or is otherwise irrational. While there would be potential grounds for challenging the Government’s expressed approach now, and we see a real problem for the Government in being able to advance any lawful policy, we consider it would be appropriate to await the publication of the PPS (or at least its draft) to see how the Government is proposing to take this forward.

### **Background**

4. In its response to Kate Barker’s *‘Review of Housing Supply’* (March 2004), in December 2005 the Government announced its intention to increase the rate of housing delivery in England from 160,000 homes in 2005 to 200,000 per year by 2016.
5. In October 2006, the Government announced that 29 Growth Points, covering 45 towns and cities, would form part of a New Growth Points Scheme. Under this initiative, local authorities were encouraged to bid for start-up funding from Central Government in order to support proposals for housing growth in their areas.
6. On 7 March 2007 the Housing Minister, then Yvette Cooper MP, announced that as part of the New Growth Points Scheme, the Government would be prepared to support plans submitted by local authorities for “exemplar green developments which meet the highest standards of sustainability in terms of the environment and climate change.”<sup>2</sup> The Minister stated that these new “eco-towns” (as they were labelled) should focus on zero

---

<sup>2</sup> Written Ministerial Statement, 7 March 2007, Hansard Col. 128WS

carbon, or low carbon, new developments of between 5,000 to 10,000 homes, and make use of brownfield and surplus public sector land. The Minister added:

“As with new growth points, any proposal of this type will need to be considered through the statutory planning system and be subject to consultation and testing by independent examination, and it is important that the RSS process gives a view on proposals of this type.”<sup>3</sup>

7. The Government’s interest in eco-town proposals was underscored in May 2007, when Gordon Brown MP (then Chancellor of the Exchequer, but to become Prime Minister the following month) announced that he wanted to see five new eco-towns built as part of a general increase in house-building.
8. On 23 July 2007 the DCLG launched an ‘*Eco-towns Prospectus*’ (“the Prospectus”) setting out, among other things, five “essential requirements” for an eco-town<sup>4</sup>:
  - (1) Eco-towns must be new settlements of between 5,000 – 10,000 homes, separate and distinct from existing towns but well linked to them.
  - (2) The development as a whole should reach zero carbon standards. Each town should be an exemplar in at least one area of environmental sustainability.
  - (3) Eco-town proposals should provide for a good range of facilities within the town: a secondary school, a medium-scale retail centre, good quality business space and leisure facilities.
  - (4) Between 30 - 50% of the total should be affordable housing. There should be a wide range and distribution of tenures, with a particular emphasis on larger family homes.

---

<sup>3</sup> As above.

<sup>4</sup> Paragraph 13(i) to (v). The Executive Summary of the Prospectus defines eco-towns as “...small new towns of at least 5 - 20,000 homes. They are intended to exploit the potential to create a complete new settlement to achieve zero carbon development and more sustainable living using the best new design and architecture.”

- (5) There should be a management body to help develop the town, support people and businesses moving to the new community, and to co-ordinate service delivery.
9. The Prospectus envisaged that a “dedicated delivery body” would plan, oversee and develop the major infrastructure needed to establish an individual eco-town. This could be a body led by the local authority, a cross-sectoral trust, English Partnerships, or a statutory new town development corporation established pursuant to the New Towns Act 1981. In relation to the implications of eco-towns for the planning system, the Government stated in the Prospectus:

“28. In some cases the planning content provided by the development plan as a whole is already sufficiently clear to enable a proposal for an eco-town to be handled directly by a planning application. The Government wants to minimise delay and enable proposals for eco-towns to be dealt with quickly through all aspects of the planning system ...

29. In particular:

- resources will be made available to facilitate the minor review of Regional Spatial Strategies (RSSs) where it is necessary to identify the broad locations of potential eco-towns;
- we will ensure sufficient resources are available to handle quickly those planning applications for eco-towns which can proceed within the existing development plan, or, where the planning framework is not sufficiently clear, are subject to call-in as a departure; and
- while some schemes would proceed via usual planning powers, there may be instances where the use of the powers in the New Towns Act 1981 would be appropriate. In these situations, there would still be a need for proposals to be included in a RSS or mini RSS review and to consult on the proposed designation and scheme proposals and to hold a public local inquiry.”

10. Also in July 2007, the Town and Country Planning Association (“TCPA”) and Professor David Lock published the ‘*Eco-towns: Scoping Report*’, commissioned by DCLG. The report stated that each eco-town proposal “may be subject to accelerated planning processes”, without specifying what form that acceleration might take.<sup>5</sup>

---

<sup>5</sup> Chapter 2, Page 7

11. On 24 September 2007 the Prime Minister told the annual Labour Party Conference that the Government would be aiming for ten rather than five new eco-towns.

12. In a speech to the Ecobuild 2008 Conference on 27 February 2008, the Housing Minister, Caroline Flint MP, stated:

“I will soon be publishing a short-list of locations which we think have the potential to be successful. This will be followed by full public consultation with communities and stakeholders. I want to make it clear that only the best proposals will survive - a majority will fall by the wayside. Weak bids where the greenest element is the recycling of failed proposals won't make it through ... And I also want to put on the record that, contrary to some reports, eco-towns *will be* subject to rigorous planning processes. Each proposal will have to submit a planning application and will be properly scrutinised before it can proceed.”<sup>6</sup>

13. In April 2008 DCLG published a consultation paper, ‘*Eco-towns: Living a greener future*’. This set out the Government’s shortlist of 15 locations for eco-towns. It opened a consultation period on the proposals which is due to close on 30 June 2008. Following the consultation process identified in that document, the Government’s intention is to undertake a more detailed evaluation of the particular locations under consideration<sup>7</sup> (to be known as the Sustainability Appraisal) and it intends to publish a draft Planning Policy Statement on Eco-Towns. The Sustainability Appraisal and draft PPS are expected to be published in July 2008. There will then be a further period of consultation, culminating with the publication of the final PPS and the announcement of a final list of 10 locations proposed in the autumn of 2008<sup>8</sup>.

14. Annex A of the April 2008 consultation paper sets out the way in which the Government expects the planning process to operate in relation to eco-towns.<sup>9</sup> In summary it suggests:

- (1) Eco-towns will proceed by way of planning applications, which will generally be determined by the local planning authority in the usual way. Developers will

---

<sup>6</sup> Original emphasis

<sup>7</sup> Including, where necessary, an Appropriate Assessment under the Conservation (Natural Habitats etc.) Regulations 1994

<sup>8</sup> It is not entirely clear from the relevant section of the April 2008 consultation paper (page 43, para 4) whether the final list of 10 will be incorporated into the PPS or not. Page 7 of the same document, however, suggests that the 10 sites will be listed within the PPS.

<sup>9</sup> Pages 42 - 43

need to provide full details of the impact of their proposals in an Environmental Statement.

- (2) Such applications will fall to be determined in accordance with the development plan and other material considerations. Material considerations will include Planning Policy Statements, and among these will be the new PPS on Eco-Towns. The Government envisages that this new PPS would be a particularly important material consideration where the development plan is silent on eco-towns, or is considered to be out of date.
- (3) In some regions, the Government considers the relevant RSS encourages the preparation of options for growth in the locations within which eco-towns are now being considered. Where, however, the RSS is silent on the issue, the Government expects that the new PPS will be of great importance. The Government expects the RSS partial reviews announced in the Housing Green Paper (July 2007), which seek to increase regional and local housing targets, "... to test the long term issues that rise from the eco-town proposals."
- (4) The Secretary of State may choose to exercise her powers to call-in eco-town applications for her determination, but her general policy will be to exercise this power selectively.

15. The Government has also announced that a panel of 12 experts has been appointed to provide advice and support to developers in each of the 15 short-listed locations. This is to be known as the Eco-Towns Challenge Panel.

16. The planning system in place in England and Wales requires a defined statutory process of decision making to be adopted by Central and Local Government. It is based on the plan-led system. To adopt a method by which the Government seeks to by-pass the current Development Plan system is as if the Government consciously wishes, in the case of a form of housing which it seeks to argue is different to all other forms of housing, to dispense with the planning system it has itself promoted through amendments to the planning statutes, most recently in 2004, in accordance with its own policies.

17. It would not be lawful to do so for example if the type of development being promoted is not materially different to that which it requires be promoted through the Development Plan route, but which has not won a competition or selection process, albeit in accordance with a PPS and overseen by the Secretary of State. It would not be lawful to do so if it deprives a Local Planning Authority, land owner, stakeholder or the public from being able to be properly consulted to the extent that they would if the proposals were required to be promoted through the Development Plan route, or if the short-circuit method failed adequately to allow them to know why their objections had been rejected.
18. It would not be lawful to do so if the short-circuit method (not backed by statute but only ostensibly by policy) failed properly to compare alternative or different ways of meeting the local need for the development being promoted, here for housing. It would also not be lawful to do so if the consultation procedure and proposals were insufficiently explained or were presented with insufficient detail so that those consulted were unable adequately to know what they were being consulted upon, what their responses should be directed towards, whether the decision maker was properly taking into account the responses, and whether he did so with an open mind.
19. The current statutory system adopts a spatial approach whereby planning to meet a specific need (such as housing) is not to be an end in itself, not to be an isolated process, but is to consider and take into account in the decision making process many other matters including social, educational, transportation, and environmental matters. In particular, it must have regard to the requirement of achieving sustainable development.
20. A comparative process is necessarily required to be undertaken, whereby different ways of meeting the defined need are considered and widely consulted upon, debated and considered at public inquiry, as well as consideration of the extent of the need. This would include different ways of developing areas of land to meet the need. These are all options to be considered on an area by area basis through the Development Plan process. It is the way Parliament (and the Secretary of State) has deemed it to be required to ensure that a proper and adequate comparison of options is made.
21. Options to meet the need may include increasing the density of development within towns on brownfield sites, developing adjacent extensions to towns as opposed to use of land

elsewhere which might include the need to commute, and adopting a sequential approach to development. Less favoured options include development of greenfield land away from settlements. The method of formulating housing need at a regional and local level, together with its distribution at a more local level are through under the Town and Country Planning Act 1990, the 2004 Act and the Government's/Secretary of State's policy through the statutory Development Plan.

22. This comparative exercise governed by Statutory Regulations and statutory consultation processes is of long standing and cannot be avoided. The translation and distribution of housing need is considered through the Development Plan (RSS to LDF) which has been carefully considered at each stage.
23. The eco-towns concept, without any statutory support, seeks to avoid the whole of this carefully formulated Development Plan system and statutory process of long standing. It would be illogical for one form of large housing proposal to be able to be promoted by means of a planning application albeit with the support of the Secretary of State and policy in the form of a PPS, when the more rigorous and thorough Development Plan system is required to be utilised for all other large housing proposals, even those of the same form (here eco-towns), but which have not been short listed by the Secretary of State following consultation and what is in effect a competition. It will be interesting to see how eco-towns not shortlisted are to be treated by the Secretary of State if promoted by developers.

#### **Issue (1) Eco-towns and the planning system**

24. As the Chairman of the LGA has made clear in a letter to the Leaders of its members, the LGA is not opposed to the eco-town concept as a form of meeting the country's housing needs with lower carbon emissions and other environmental benefits. The LGA is, however, very concerned about how such eco-towns should be delivered through the planning process. The LGA is concerned that the Government's proposal will use the tool of a new PPS devoted specifically to identified eco-towns to circumvent the normal development plan system. This circumvention will be particularly acute in circumstances where, for example, an existing development plan such as an RSS has already considered, but rejected, a site for a proposed eco-town, or is silent about eco-towns, or is otherwise considered to be out of date. In such circumstances, the Government is plainly

contemplating that the new PPS will constitute a particularly important material consideration in the determination of an eco-town application.

### **What is an Eco-Town?**

25. Before attempting to deal with the overall legitimacy of this proposed policy approach, in our view the Government's proposal begs a prior, and even more fundamental, question: what is an eco-town? And why is it either a special, or novel, form of development that can be differentiated from all other forms of housing development (including those with eco credentials and other eco-towns which fall outside the Secretary of State's current selection process) should be catered for outside the normal development plan system through the production of a PPS dealing with specific locations?
26. From the material produced to date, it appears the Government considers a number of factors to be relevant to the character and concept of an eco-town. We here and above in this Opinion consider the key ones in turn, and analyse in what respects these factors make eco-towns materially different from existing concepts or proposals to provide new housing.

#### *New Settlement*

27. First, the Government's draft criteria reveal that the Government considers an eco-town must be a new settlement, separate and distinct from existing towns but well linked to them<sup>10</sup>.
28. In our opinion there is nothing in this quality that makes it fundamentally different to one well-established method of delivery of new housing, namely provision through the creation of new settlements. It has long been recognised that new housing may be delivered within existing urban areas, or on the edge of existing urban areas by way of urban extensions, or in the form of new settlements. The requirement that an eco-town be a separate and distinct new town simply places it into the last of these categories. It is therefore difficult to see any way in which this characteristic justifies the creation of a

---

<sup>10</sup> The Government does not appear to have gone so far as to say *when* this judgment is to be made: are eco-towns to be well linked when assessed against the situation at the present time or at some point in the future? It remains to be seen whether this issue is addressed in the draft PPS.

new policy identifying specific eco-towns which would enable site selection to operate outside the existing plan-led system.

29. Proposals for new settlements have in the past always been proposals which would normally expect to be considered and progressed through the development plan process. Indeed, given the potential controversial nature of creating new settlements, they are quintessentially proposals which warrant careful scrutiny and consultation, and testing through the rigour of the independent examination process that is represented in the development plan process. Therefore far from being a characteristic which would justify the creation of a new policy that tended to operate outside that framework, in our opinion this is a characteristic which can only support the promotion of eco-towns through the plan-led system.

30. The legislative framework set out in the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004 is based upon that plan-led system. That system is based upon a process of formulation of plans at a local and regional level, through a detailed and extensive development framework process. This is intended to ensure public participation, consultation and independent scrutiny. This generally secures consistency, certainty and fairness for all those involved by enabling those affected an opportunity to have a say in what is proposed for their area. The plan-led system, and the importance that the Government has historically attached to it, are reflected in both PPS1 and PPS12.

31. More specifically in relation to housing, the Government's national policy on the provision and planning for housing needs is articulated in PPS3 (in conjunction with other policy statements of relevance such as, for example PPG13 on transport). Consistent with the legislative framework, PPS3 gives effect to the plan-led system by identifying a hierarchy of planning policy intended to identify, and then provide for, housing needs. At a regional level, it is intended that the Regional Planning Bodies will articulate a vision and spatial strategy for their area. Housing figures for the region will be identified and these will then be broken down to housing targets for the different parts of the region. It is then the task of local planning authorities to give effect to these strategic targets and aspirations in local development documents.

32. Thus PPS3 explains at paragraph 34:

“Regional Spatial Strategies should set out the level of overall housing provision for the region, broadly illustrated in a housing delivery trajectory, for a sufficient period to enable Local Planning Authorities to plan for housing over a period of at least 15 years. This should be distributed amongst constituent housing market and Local Planning Authority areas.”

33. The same general approach is reflected in relation to identification of the appropriate mix of housing, appropriate high quality provision and, significantly, providing housing in suitable locations. Thus paragraph 37 of PPS3 provides (in respect of the Government’s objective of creating mixed and sustainable communities and the provision of housing in the right place):

“At the regional level, the Regional Spatial Strategy should identify broad strategic locations for new housing developments so that the need and demand for housing can be addressed in a way that reflects sustainable development principles. Regional Planning Bodies should, working with stakeholders, set out the criteria to be used for selecting suitable broad locations for new housing, taking into account:

- Evidence of current and future levels of need and demand for housing, at the local, sub-regional, regional and national level, as well as the availability of suitable land.
- The contribution to be made to cutting carbon emissions from focusing new development in locations with good public transport accessibility and/or by means other than the private car and where it can readily and viably draw its energy supply from decentralised energy supply systems based on renewable and low-carbon forms of energy supply, or where there is clear potential for this to be realised.
- The objectives of relevant national policies and programmes that seek to support the provision of new housing developments for example, Growth Areas.
- Particular circumstances across the regional or sub-regional housing market that may influence the distribution of housing development [With examples given] ...
- The availability and capacity of, and accessibility to, existing major strategic infrastructure, including public and other transport services, and/or feasibility of delivering the required level of new infrastructure to support the proposed distribution of development.
- The need to create and maintain sustainable, mixed and inclusive communities in all areas, both urban and rural.”

34. The role of local planning authorities in reflecting the regional strategy is identified in paragraph 38 of PPS3. Similar but more specific requirements in setting out a spatial vision for the local area within Local Development Documents, is identified.
35. It is clear from PPS3 itself that the plan-led system is well-placed to provide for the necessary spatial planning to meet housing needs. It is specifically designed to ensure proper consideration and scrutiny of spatial planning, including fundamental matters such as identifying the correct location for new settlements in a region's area to ensure that new development is delivered in a sustainable way.
36. Therefore in our opinion there is nothing in the first characteristic of an eco-town which requires it to be dealt with outside that spatial planning process. Spatial planning is an inherent part of the current planning process. Indeed, PPS3 makes clear that the selection of locations of new housing is a central part of that process.
37. There is some uncertainty in the Government's idea that while an eco-town should be separate and distinct from existing towns, it should have good links to them. If this is no more than a general requirement that all new settlements should be well-linked to existing settlements, then it is unremarkable. If, however, it is intended to impose an additional accessibility requirement on eco-towns which would not apply to a new settlement in any event, then it is difficult to understand the nature of any such requirement or its purpose. For example, if the intention is that an eco-town should depend in part upon some of the existing facilities, services and infrastructure in existing settlements, then it is unclear how that relationship will be addressed in terms of identifying and mitigating the extra strain placed upon the existing settlement. But again if this is a factor, it only tends to emphasise the importance of the locations of eco-towns (like any other form of major housing development) being properly considered in the spatial planning process to ensure that they are well-integrated with all other proposed development and truly sustainable.

### Eco-Credentials

38. The second characteristic we have been able to discern from the Government's statements is the requirement that each eco-town should, as a whole, reach zero carbon standards.<sup>11</sup> In addition, each town should be an exemplar in at least one other area of environmental sustainability.
39. Again, we can find nothing in this requirement or aspiration which makes an eco-town exceptional or unusual as compared with the requirements now imposed on housing development generally in the current environmental climate. In fact there are already strict requirements being imposed on new housing to ensure that it is sustainable. This includes the imposition of standards in terms of emissions and zero-carbon achievements. Any new settlement proposed for housing would undoubtedly be expected to meet exacting standards in demonstrating sustainability. There is a whole range of sustainability considerations that apply, whether it be in reducing reliance upon the private car, increasing use of public transport, conserving energy, generating energy, ensuring that flood risk is properly assessed or using sustainable drainage strategies.
40. The DCLG clearly believes that eco-towns are "uniquely" placed to allow for an entire community to be planned from scratch on environmental and sustainable principles<sup>12</sup>. But as a policy objective, this is clearly something that the Government and local planning authorities would presumably seek to apply to any new housing proposals of any scale. As already noted, paragraph 37 of PPS 3 provides that Regional Spatial Strategies should identify broad strategic locations for housing development, taking into account, among other matters:
- "The contribution to be made to cutting carbon emissions from focusing new development in locations with good public transport accessibility and/or by means other than the private car and where it can readily and viably draw its energy supply from decentralised energy supply systems based on renewable and low-carbon forms of energy supply, or where there is clear potential for this to be realised."
41. These principles are further reflected in the recent supplement to PPS 1, '*Planning and Climate Change*'. Therefore we do not consider this characteristic as one which makes

---

<sup>11</sup> Meaning that, over the course of a year the net carbon emissions from all the energy use within the buildings on the development amount to zero.

<sup>12</sup> April consultation paper, page 8, para 2

an eco-town exceptional, let alone a characteristic which would justify creating a policy framework in favour of identifying specific eco-towns which could potentially circumvent the plan-led system.

42. Moreover, in so far as eco-towns are proposed to be unusual or exceptional in terms of carbon emissions (which appears contrary to the overall thrust of securing sustainable development generally), then this is something which could be reflected by the promotion of such settlements in the development plan process. There is no need or logical reason for exempting such settlements from that process where their environmental credentials could be properly examined and tested and, crucially, potentially compared against alternative proposals. Again, by way of an example, in what respects would an eco-town that used predominantly greenfield land, but achieved zero carbon emissions, necessarily be better than a planned extension to an existing urban area using brownfield land but which achieved (for example) very low carbon emissions? These sorts of judgments on sustainability are just the sort of judgments that one would ordinarily expect to be made in the development plan process, with the full consultative processes and independent scrutiny built into that process.

43. There is also a lack of clarity in this aspect of the Government's strategy. In many respects, the virtues of an eco-town will presumably be related to the quality of the design of the settlement. But in this respect, any new settlement is capable of being a type of eco-town, if that really means a settlement which is environmentally friendly. Conditions as to the type of housing, energy efficiency, or layout in terms of accessibility, are all conditions that could be imposed on any form of new settlement. They are not unique or inherently unusual. It is clear that an eco-town in this sense is nothing more than a new settlement which meets high standards of environmental design. But the location of such settlements remains an issue which is best explored and established through the development plan process by reference to a full consideration and testing of alternatives.

#### *Range of Facilities and Affordable Housing*

44. The third and fourth criteria we have been able to extrapolate is the DCLG's requirement that eco-town proposals should (a) provide for a good range of facilities within the town: a secondary school, medium scale retail centre, business space and leisure facilities; and

(b) make provision for affordable housing at 30 to 50% of the total, with an emphasis on larger family homes.

45. Once again, we do not see how these requirements differ materially from those that apply to new housing proposals generally, and in particular a new settlement proposal. Any new settlement would be expected to be sustainable in this way, generating employment and providing services which can be accessed by the residents to minimise the need to travel further afield. Any new housing proposal would normally be expected to provide affordable housing, and the percentages set would normally be imposed by the local planning authority by reference to a proper Strategic Housing Market Assessment and assessment of housing need. Again, PPS3 specifically articulates this process. Therefore there is nothing in these qualities of an eco-town which are unusual or unique (save, perhaps, that the arbitrary setting of an affordable housing target in this way is contrary to the general thrust of PPS3 which makes provision for affordable housing targets to be set by reference to need (see eg paragraph 29 of PPS3)).

46. Again if, contrary to our views, an eco-town is in fact unusual in any of these respects, there is still no obvious or logical reason why such characteristics require the location of eco-towns to be identified in a PPS rather than through the development plan process. There is no reason why the Government should be identifying the location of such settlements through a bid-process outside the development plan, particularly where it lacks the degree of public involvement, consultation, testing against alternatives, and the independent examination and testing that comes with the development plan process.

#### *Housing Supply*

47. Finally, the Government may intend that a further characteristic of an eco-town be the extent of the contribution it makes to housing supply. The April 2008 consultation paper described eco-towns as “additional to existing plans, with a minimum target of 5,000 homes” - indeed, this is stated as being part of the key criteria for an eco-town.<sup>13</sup> Later on, the April 2008 consultation paper appears to describe a process whereby eco-towns will be developed in tandem with a series of partial RSS reviews by 2011, with the aim of

---

<sup>13</sup> Page 8, para 3(i)

revising targets upwards to meet the national aim of 240,000 homes per year by 2016.<sup>14</sup> The paper assures local authorities that, if they include an eco-town within their future housing plans, the housing to be provided within the eco-town will count towards future housing targets.

48. In a “myth-busting” interview with *The Times* on 27 June 2008, the Housing Minister stated, however:

“Local governments were concerned that eco-towns would be added to existing housing targets. This is not the case: eco-towns will be part of the overall target.”

49. This issue is of some significance for the whole concept of eco-towns. If eco-towns were intended to be additional to existing targets, then there would be a very significant question-mark over the whole environmental rationale for such a project. It is difficult to see in what sense would it environmentally-friendly or sustainable to build new settlements where there was no identified housing requirement for such housing, and the regional and local plans are already providing sites to meet the identified housing requirements.

50. If, however, the intention is now that eco-towns are intended to be part of the supply to meet the targets that will be set out in the RSS, then it is very difficult to understand why the locations for such eco-towns should be dealt outside the development plan process. Indeed, the requirement to consider the most sustainable locations to meet housing needs would strongly suggest that an eco-town should be considered and scrutinised in the development plan process alongside any other alternative sites or options to meet the area’s needs.

51. For the reasons outline above, we are not able to discern any intrinsic characteristics of the Government’s notion of an eco-town which would justify promoting them outside the development plan processes in the way being suggested by the Government. The definition of an eco-town is problematic if it is intended to represent some new or novel concept. The characteristics the Government has identified of an eco-town do not logically or reasonably support the idea that the location of such towns should be

---

<sup>14</sup> Page 43, para 6

identified outside the normal development plan process. Indeed, those characteristics tend to confirm the importance of the development plan process in ensuring that any eco-town that is promoted is truly sustainable.

52. While the term ‘eco-town’ clearly has the connotation of something different, in reality the characteristics are ones of any new settlement (by another name) where they are required to meet standards of design that could be imposed on any new housing.

53. This impression is reinforced by comments made in the recent report (June 2008) of the Government-appointed Eco-Towns Challenge Panel. In relation to the proposed eco-town of 5,000 dwellings at Curborough, Staffordshire, the Panel commented:

“The proposal needs to be more ambitious, as it may be a good development by normal standards but it is not yet an eco-town. The bid is based on a current planning application where housing is wrapped around an existing business park. **This means at the moment the ‘eco’ element feels like an ‘add on’ to an existing application** rather than embedded in the concept.”<sup>15</sup>

#### *Other Factors*

54. Having failed to identify anything in the Government’s own factors which would make eco-towns unique or clearly distinguishable from housing proposals promoted through the Development Plan system, we consider other factors which are not identified by the Government, but which appear to be the real defining characteristics.

55. The first is the potential size of an eco-town. While the Government has indicated settlements of 5-10,000 homes, it is clear that they are relying upon the overall potential size of eco-towns as being an intrinsic quality of them. But in so far as this is a factor, it is not one which is capable of justifying circumvention of the plan-led process and the use of a PPS to promote specific sites. In our view, if size is an important factor, it is one which confirms the need for such proposals to be promoted through the plan-led process, by reason of prejudice to the Development Plan process.

---

<sup>15</sup> ‘Notes and recommendations from session 1 of the Eco-town Challenge’, page 7. My emphasis.

56. The next potential factor is ownership. Many of the eco-town sites being considered or favoured by the Government involve Government or publicly-owned land. But in so far as this is being used as a factor, it is clearly not a material planning consideration which would be capable of justifying the proposed policy. Ownership of land should normally be irrelevant to the general application of planning control and policy. There is no good reason why that should not also be so in the case of eco-towns.
57. The next possible factor could be one of location. There is no indication that the location of an eco-town singles it out as being able to circumvent the normal planning system. It is not an extension of a town but is expressly to be separated from any nearby town. This would normally be the least preferred option in sequential terms for new housing, as stated in PPS3.
58. Having considered what an eco-town is or is not, we turn to consider the conflict between the proposal to promote specific eco-towns in a PPS and the development plan process which would normally apply to spatial planning.
59. The Government's express intention is to locate eco-towns in places with no history of housing or large-scale development.<sup>16</sup> While DCLG has confirmed that there will be no building within the Green Belt, the proposed locations do include greenfield land.<sup>17</sup> There is certainly likely to be significant scope for controversy. Some of the proposed locations may be suitable. Others may be inherently unsuitable for a whole host of valid planning reasons.
60. Against this backdrop, we consider there is a very clear tension between the promotion of a new PPS intended to promote and support specifically identified and selected eco-town locations, and the basic principle and good sense (expressed through the planning legislation) of a plan-led system.
61. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides:

---

<sup>16</sup> April consultation paper, page 10, para 1

<sup>17</sup> See: interview with the Housing Minister, Caroline Flint MP, in *The Times*, 27 June 2008

“(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

62. By section 38(3) of the same Act, “the development plan” is defined in England (other than Greater London) as constituting (a) the relevant RSS and (b) the adopted or approved development plan documents.

63. The April 2008 consultation paper acknowledges that “any planning application must be determined in the context of the planning policy framework, including the development plan”<sup>18</sup> and that “the statutory development plan remains the starting point for considering all planning applications”.<sup>19</sup> The Government are therefore not taking ‘eco-towns’ out of the conventional planning system altogether. But the process of identifying specific eco-town sites which will then enjoy the support of a specific PPS does represent a significant departure from established practice and, in our view, the clear potential for circumvention of the plan-led system.

64. It is clear that the Government is in a hurry and expects its new PPS to help deliver its plans as quickly as possible<sup>20</sup>. In this regard, it is well-established that Central government policy is a material consideration in the determination of planning applications (where relevant). A PPS addressed exclusively to eco-towns would therefore be a material factor when any eco-town planning application was considered. Accordingly, the Government’s intention is that the PPS is likely to be important on any eco-town planning application. The Government no doubt intends that it should carry significant weight, particularly where the development plan itself does not deal with eco-towns or is considered to be out of date in that sense. Moreover, it seems to us that an eco-town developer would seek to pray in aid the PPS to outweigh a development plan, even in circumstances where the site of the eco-town had previously been considered and rejected in the formulation of the development plan (whether at RSS or local development document level).

---

<sup>18</sup> Page 42, para 2

<sup>19</sup> Page 43, para 5

<sup>20</sup> The April consultation paper states that: “If eco-towns are to fulfil their demonstrator role we need to get these projects underway quickly to help guide other types of development, with the first schemes underway by 2010” (page 8, para 2).

In our opinion the formulation of a PPS in the way proposed by the Government, to identify specific eco-towns and provide policy support for them, is contrary to the plan-led system. We consider that a PPS of this kind would be contrary to established practice, and contrary to the Government's own policies on the importance of the plan-led system.

### *Prematurity*

65. The Government has published planning policy advice on how a proposal may be premature to a DPD. In the Government publication "The Planning System: General Principles", a daughter document to PPS1, the following is stated:

#### **PREMATURITY**

17. In some circumstances, it may be justifiable to refuse planning permission on grounds of prematurity where a DPD is being prepared or is under review, but it has not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by predetermining decisions about the scale, location or phasing of new development which are being addressed in the policy in the DPD. A proposal for development which has an impact on only a small area would rarely come into this category. Where there is a phasing policy, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have effect.

18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications should continue to be considered in the light of current policies. However, account can also be taken of policies in emerging DPDs. The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example:

- Where a DPD is at the consultation stage, with no early prospect of submission for examination, then refusal on prematurity grounds would seldom be justified because of the delay which this would impose in determining the future use of the land in question.
- Where a DPD has been submitted for examination but no representations have been made in respect of relevant policies, then considerable weight may be attached to those policies because of the strong possibility that they will be adopted. The converse may apply if there have been representations which oppose the policy. However, much will depend on the nature of those representations and whether there are representations in support of particular policies.

19. Where planning permission is refused on grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process.

### *Viability*

66. The viability of a proposed scheme can be of crucial importance and in the case of eco-towns is likely to be so. This is particularly if the proposed development is required to bear the costs of additional factors such as those required in the case of an eco-town. It is assumed that such requirements are necessary from the outset, and that it is not possible for them to be introduced at a later phase, else this would cause the development to be devoid of eco credentials. There is no statement that the viability of eco-town proposals

has been a factor considered by the government, nor that the eco credentials are required to be in place from the outset. This would be of particular relevance if new transport links are required, in order to make the proposed eco-town sufficiently sustainable. Compliance with Circular 05/05 is of relevance too in this regard.

### *Alternatives*

67. It is stated in the DCLG Press Notice issued on 30<sup>th</sup> June 2008<sup>21</sup>, which has announced the result of a consultation process on the generality of the eco-towns concept. Details of the consultation process are lacking, but it seems to have been a limited response poll of public reaction as to whether eco credentials could be applied to housing proposals generally. It states that consultation will be in three phases prior to a decision being made on which eco-town or towns will be finally shortlisted by the Secretary of State.
68. It is in effect a competition for new towns based largely upon referendum not independent scrutiny, a novel concept hitherto in planning, and patently not scrutiny by an independent expert body comparable to that in the DPD process. The proposed Eco-Towns Challenge Panel would perform a wholly different role and not be independent advisers to the Secretary of State; further, they would not publish a reasoned report with recommendations, it seems. The need for independent scrutiny of proposals on a like for like basis by a panel or tribunal which would publish reasons is a fundamental basis of planning law and the selection of development to meet identified need, including alternative housing proposals. This would be totally absent in the case of the eco-towns concept and in fact would be by-passed, it seems. This would be wrong in law.
69. The result of this process will be one where one or more large free-standing housing developments of 5,000-10,000 houses will be chosen largely by referendum or poll and not by comparison of alternatives through independent scrutiny, inquiry or examination; it will be able with the government's support to by-pass the statutory development plans planning system where careful scrutiny of all forms of alternative housing proposals is required by both policy and law; and it will not be possible for any other form of housing proposal, even ones with eco-town credentials, to be promoted by a developer or even by

---

<sup>21</sup> <http://www.communities.gov.uk/news/corporate/866462>

a local planning authority so as to by-pass the development plans system. This would be inherently illogical, unfair and wrong in law.

70. The Press Notice states the following and gives an insight into the process:

“The Government has been inviting preliminary views and comments on eco-towns since 3 April 2008 when it published its consultation paper [\*Eco-towns: Living a greener future\*](#) which set out plans to take forward the eco-towns programme and named the shortlisted locations.

The second phase of the consultation will involve a series of roadshows taking place around the short listed sites to provide further information to the public and listen to their views; and a further three months of public consultation on top of the detailed sustainability assessment on the potential locations; and a draft planning policy statement on eco-towns.

The sustainability appraisal will provide greater detail on environmental sustainability and other issues around the locations, and test them against reasonable alternatives. The planning policy statement will create the right framework for consideration of eco-town planning applications, to ensure they meet the highest standards, with the best public transport links and strong employment opportunities. Both documents will be published next month.

The third stage (in the autumn of 2008) will see the publication of the final shortlist of locations with potential to be an eco-town. The final stage involves the consideration of planning applications for the individual schemes by local authorities.”

71. Nowhere is any indication given as to what the criteria are for preference and for rejection. Nor is it clear how the consultation process is to influence the decision. The decision making process should be carefully scrutinised to ensure that it is legally acceptable, in particular as to how alternatives are rejected.

72. The Government is to publish a new PPS on the process and in relation to eco-towns generally. Inevitably the overall legality of any such PPS will depend on its final content. A draft version is intended for publication by the end of July this year. The LGA will no doubt wish to comment during the consultation stage if DCLG were to produce a draft PPS of the kind proposed. But currently we consider that the proposed PPS is likely to be unlawful as on all the information before us we conclude that it will be seeking to propose a policy and process which is inherently flawed.

## **Issue (2) Eco-towns and Regional Spatial Strategies**

73. We have already touched on the potential for a PPS on eco-towns to conflict with the development plan process. This will be particularly acute in circumstances where a RSS has been formulated which does not make provision for an eco-town, but where the location of a Government favoured eco-town in the PPS is a location that has already been considered for housing and rejected in the RSS process.
74. It seems to us that there is a real issue here as to whether it is appropriate in these circumstances for the Government to attempt to bypass the established development plan through the vehicle of a PPS listing selected eco-town sites. In the circumstances of a site having been rejected in the development plan process, it seems to us there would be a clear tension between national policy (expressed in the PPS) and the statutory development plan (of which the RSS would be a part).
75. The Government has contemplated that one way of addressing a situation in which an RSS is silent on eco-towns would be a partial revision of the relevant RSS.<sup>22</sup> However, it should not be assumed that this would be a straightforward process. The draft revision could only be prepared if it appeared to the relevant Regional Planning Body (RPB) to be necessary or expedient to prepare the draft revision, unless it was directed to do so by the Secretary of State: sections 5(1) and 10(1) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”). By section 4(1) of the 2004 Act, the RPB would be obliged to seek the advice of specified authorities within their region, including the county council.<sup>23</sup> The revision would itself need to be subject to strategic environmental assessment under Directive 2001/42/EC and the Environmental Assessment of Plans and Programmes Regulations 2004.
76. Given, among other matters, the likely level of controversy generated by a proposed revision of an RSS to identify the location for an eco-town, it is likely that the Secretary of State would have to exercise her discretion under section 7 of the 2004 Act to arrange for an examination in public of the draft.

---

<sup>22</sup> April consultation paper, page 43, para 5

<sup>23</sup> The list of authorities is set out in section 4(4) of the 2004 Act

77. Moreover, the Government's contemplated partial review fails to address the situation in which an eco-town site that has been specifically rejected in an RSS, yet nonetheless appears as one of the ten favoured locations in the PPS on Eco-Towns. Any partial revision of an RSS in those circumstances would be highly controversial and it is difficult to conceive why a review in those circumstances would be justified.

**Issue (3) Eco-towns and the need for strategic environmental assessment**

78. The Council Directive on Strategic Environmental Assessment 2001/42/EC ("the Directive") requires a strategic environmental assessment (SEA) to be undertaken of certain plans and programmes that are likely to have a significant effect on the environment. By Articles 3(1) and 3(2)(a), SEAs shall be carried out for all plans and programmes which are prepared for town and country planning or land use, and which are likely to have significant environmental effects.

79. Various duties under the Directive become engaged if a plan or project falls within the scope of Article 3. These are set out in Articles 4 to 9, and include the following:

- (1) The SEA must be carried out during the preparation of a plan or programme and before its adoption: Art. 4(1).
- (2) An environmental report shall be prepared evaluating the likely significant environmental effects: Art. 5(1). Annex I sets out ten pieces or categories of information that must be given in the report. These include the likely significant effects on issues such as biodiversity, population, human health, fauna, flora, soil, water, air and landscape: Annex I (f).
- (3) The draft plan or project and environmental report must be made available to the public and certain authorities for consultation: Art. 6(1).
- (4) The environmental report and opinions expressed during consultations must be taken into account during the preparation of the plan or programme before its adoption: Art. 8.

80. Article 5(1) is of particular importance given the genesis of the eco-towns proposals:

“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 ...**”<sup>24</sup>

81. Under Annex I (h), the information to be provided under Article 5(1) includes:

“(h) an outline of the reasons for selecting the alternatives dealt with ...”

82. There is therefore under Article 5 a duty not only to produce an environmental report in relation to the particular plan or project in question, but to identify, describe and evaluate reasonable alternatives to that project.

83. The Directive has been transposed in England by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) (“the Regulations”). The Regulations closely follow the structure and terminology of the Directive. Regulation 12(2)(b) similarly requires an evaluation of reasonable alternatives “taking into account the objectives and the geographical scope of the plan or programme”. The UK Guidance on the Directive (A Practical Guide to the Strategic Environmental Assessment Directive) (September 2005) provides at Appendix 6 (page 68):

“Only reasonable, realistic and relevant alternatives need to be put forward. It is helpful if they are sufficiently distinct to enable meaningful comparisons to be made of the environmental implications of each.”

84. Turning to the eco-towns proposals, there is no doubt that each of the eco-town planning applications would require an environmental statement under the environmental impact assessment requirements pursuant to the EIA Directive and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

85. The more significant question at this stage is whether the Government’s proposals to identify eco-towns in a PPS is (or will be) a “plan or programme” upon which the 2001 Directive and 2004 Regulations will bite. It is not enough that the eco-towns are likely to

---

<sup>24</sup> Emphasis added

have significant environmental effects within the meaning of the Directive and Regulations.<sup>25</sup> For the SEA requirements to apply, there must also be a plan or programme within the meaning of Article 2(a) and Regulation 2(1).

86. Regulation 2(1) provides, so far as material:

“2.(1) In these Regulations –

...

“plans and programmes” means plans and programmes ... which –

- (a) are subject to preparation or adoption by an authority at national, regional or local level;
- (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and in either case,
- (c) are required by legislative, regulatory or administrative provisions ...”

87. The preparation of the elements of a development plan (including a RSS) will fall within the scope of SEA, since these are (a) prepared or adopted by an authority at regional or local level and (c) required by legislation. The concept of a plan or programme under the Directive would appear to be an expansive one.<sup>26</sup>

88. In our opinion it is at the very least strongly arguable that the Government’s proposals for a new PPS on Eco-Towns result from an “administrative provision” and constitute a plan or programme which falls within the scope of the Directive and Regulations. These are documents that are or will be publicly available, prepared in a formal way and subject to consultation and involve planning or programming a series of national housing projects of significant environmental effect (whether perceived to be positive or negative in effect).

89. If the Directive and Regulations do apply to the eco-towns proposals in this way, then the question arises as to whether the Government has done enough to discharge its duty to identify, describe and evaluate reasonable alternatives to the 15 short-listed eco-town sites, or the 10 final sites to be announced later this year.

---

<sup>25</sup> The criteria that must, pursuant to Article 3(5), be taken into account in determining whether the test of “likely significant effects” is satisfied are spelled out in Annex II. The criteria are broadly-drawn, and include at Annex II(2) the magnitude and spatial extent of the effects, the value and vulnerability of the area likely to be affected, and the probability, duration, frequency and reversibility of the effects.

<sup>26</sup> The relevant Commission Guidance suggests that this is the case.

90. It appears that during the consultation period between the publication of the April 2008 consultation paper and July 2008, consultants are to be commissioned by DCLG to undertake a Sustainability Appraisal. It is stated that this Appraisal will:

“... provide greater detail on environmental sustainability and other issues and test them against reasonable alternatives.”<sup>27</sup>

91. Until it is published, it is difficult to say whether such an Appraisal will fulfil the requirements of the Directive. But certainly there is nothing that exists yet which appears to satisfy the requirements. The way that it is suggested that the Appraisal will consider “reasonable alternatives” indicates that the intention is to undertake it in accordance with the Directive and Regulations in mind and it is likely, in effect, to represent the Government’s *purported* fulfilment of the need for a SEA. If that is the case, then the timescale for assessment (around 3 to 4 months) appears to be very short for a series of projects of this magnitude and impact.

92. But the Government’s proposal may already be vulnerable. The original list of locations for eco-towns came into existence as a result of bids submitted to DCLG. It is not clear what process of assessment led to those original bids being reduced to 15. But in these circumstances we share the concern expressed by those instructing us that there is no way of being satisfied that the necessary environmental assessment of the final 10 sites will have been conducted taking all reasonable alternatives into account.

### **Conclusion**

93. For the reasons we have set out above, we consider that there is a conflict between the Government’s proposals to identify and promote specific eco-towns in a PPS, and the plan-led process. We are not able to discern any reasonable or logical basis for the proposed departure from the plan-led process. It is not clear how eco-towns can properly be distinguished from housing proposals or new town development.

94. We also consider that any such PPS would be likely to engage the requirements of SEA. There has been no compliance with the SEA requirements to date. The process that has

---

<sup>27</sup> April consultation paper, page 42, para 4

already started of selecting eco-towns through a bid process without any SEA may render the policy legally vulnerable.

95. We consider that the proposed eco-town PPS is likely to be unlawful, as on all the information before us we conclude that it will be promoting a policy and process which would be inherently flawed. It is our advice that even though there are sound grounds for seeking judicial review of the eco-towns concept on the evidence before us, it would be more prudent to await the publication of the proposed PPS (at least in draft) and to await more details as to how the process is to be effected. These conclusions and our advice should be kept under review in the light of publication by the Secretary of State of further details of the proposed eco-town policy and process.

**4-5 Gray's Inn Square  
Gray's Inn  
London WC1R 5AH**

**JOHN STEEL QC**

**JAMES STRACHAN**

**2<sup>nd</sup> July2008**