

Mr Mark Aplin
Planning Policy Manager
Dartford Borough Council
Civic Centre
Home Gardens
Dartford DA1 1DR

Planning
Ask for: Wendy Lane
Telephone: 01474 33 74 01
Fax:
My ref:
Your ref:
Date: 2 February 2017

Via email only to ldf@dartford.gov.uk

Dear Mark,

Proposed Modifications to Dartford's Development Policies Plan: Policy DP14

Thank you for consulting this authority on your proposed modifications to your Development Policies Plan. It will come as no surprise to you that, following post-examination correspondence, we remain in fundamental disagreement with Dartford BC over the status of Bluewater and the approach to it within your main retail policy DP14.

The main body of this response therefore relates to Main Modifications MM19, MM20, and MM22 which we consider to be **UN SOUND** due to lack of clarity and, therefore, effectiveness. We also have serious reservations about some of the statements made in both the supporting text and policies themselves introduced by the modifications and feel that they cannot be left unchallenged.

For the reasons set out in this letter, we also maintain significant objections to the proposed Bluewater boundary and the subsequent decision not to show a Primary Shopping Area for this centre. Our original concerns remain in relation to the Dartford Town Centre boundary and the way in which the Primary Shopping Area has been shown.

Whilst the point made by the Inspector is taken, that his main concern is the policies rather than what is shown on the Policies Map, centre boundaries that are inappropriately drawn have the potential to make the policies themselves unsound by making their application either ineffective or by inviting unintended consequences.

The remainder of this letter addresses the changes made through Main Modifications under the following headings.

- **Status of Bluewater as a centre and the implications**
- **Whether policy CS12 is in conformity with the National Planning Policy Framework (NPPF) and remains an appropriate basis to deal with planning applications at Bluewater**
- **Justification for not carrying out an early review of retail policy etc**
- **Conclusion**

Switchboard 01474 56 44 22
Minicom 01474 33 76 17
Website www.gravesham.gov.uk

Please note that the following comments should be understood in the context of our previous representations. Where previous objections have not been properly addressed, and no adequate explanation as to why has been given, these are re-stated because they continue to have the potential to make the policies unsound. Please note that given Dartford BC's position on the status of Bluewater, we now have no option but to repeat our objection on the basis of a failure under the duty to co-operate.

Finally, given what was said at the Examination regarding our offer to work with Dartford BC to attempt to resolve differences and agree an acceptable form of wording for draft policy DP14, we are disappointed that there has been no attempt by Dartford BC to enter into any meaningful engagement contrary to the spirit of the duty to co-operate.

Whilst there may be irreconcilable differences on some key points, sharing a draft of the Main Modifications with us in advance of their publication would not have been unreasonable under the circumstances and would at least have allowed a neighbouring authority to act as a critical friend. A similar situation occurred with the Kent Minerals and Waste Local Plan (MWLP) 2013-30 and Gravesham BC worked effectively with Kent County Council to develop modifications which enabled the plan to be found sound.

Status of Bluewater as a centre and the implications

MM19 includes the following statement:

As an identified centre in Dartford's existing Development Plan, **Bluewater is subject to the same NPPF provisions as traditional town centres** and development proposals for retail and leisure within the centre are not subject to a sequential test.

This goes to the heart of our concern that Dartford BC has unilaterally decided to treat Bluewater as a **town centre** within its network of centres, contrary to the approach that was taken when its Core Strategy was examined and adopted. Such a statement is, in our view, inconsistent with Dartford BC's own Core Strategy.

At the Examination, the Inspector sought to resolve the issue over the status of Bluewater by suggesting that Dartford BC continue to rely on the relevant parts of adopted policy CS12. Dartford BC in response said that the status of Bluewater would not be changed from the Core Strategy. An implication of this was that the duty to co-operate issue fell away – the Inspector's role not being to re-examine Dartford's Core Strategy, which in any event pre-dated the duty to co-operate.

However, the statement in MM19 adds credence and support to the alternative view that Dartford BC is entitled to treat Bluewater as a town centre when making development management decisions, when in our opinion the direct opposite is true.

Without wishing to repeat comments made previously in depth, the Courts have held that the starting point for determining planning applications under s.38 (6) of the Planning and Compulsory Purchase Act 2004 is the development plan, unless material considerations indicate otherwise. Policy as set out in the NPPF is a significant material consideration, capable of outweighing the development plan but it does not in itself change it. It is a matter for the decision maker to determine what weight to accord other material considerations and the Courts will not intervene unless the decision is clearly *Wednesbury* unreasonable.

It is important therefore that the status of Bluewater within the development plan is clearly understood as the starting point for decision making – albeit any interpretation of the NPPF (or PPS4 that preceded it) that allowed Bluewater to be treated as a town centre rather than an out-of-centre specialist regional comparison shopping centre would, in our view, be capable of legal challenge.

This is because it would be directly opposite to what the development plan intended and such a change in policy stance would be so extreme as to be unreasonable. The similarity between the terminology and definitions in PPS4 and the NPPF in this area also supports this view, as does Dartford BC's own claim that CS12 was in conformity with the South East Plan by seeking to ensure that town centres were not undermined by out-of-centre shopping centres (see below).

Dartford BC has argued through the Examination that because Bluewater is identified as a centre in its Core Strategy, it should now be treated as a town centre and references to the South East Plan were only citations and to place its policies in context.

However, we would contend that this was not the position put forward by Dartford BC at the time of Examination of its Core Strategy.

To place this in context, it should be remembered that Bluewater was not identified within the network of town centres within the South East Plan – it being specifically identified as an out-of-centre specialist regional comparison shopping centre (See SE Plan policies TC1, TC3, and KTG5). To treat it otherwise would have been a significant departure from the Regional Spatial Strategy that Dartford BC did not identify in either the text of the Core Strategy or any of its supporting documents.

For example, it is clearly stated in Dartford BC's Matter 1 Statement on Legal Process and Requirements (2011) that policy CS12 **only** diverged from the South East Plan in the following ways:¹

Policy CS12: Network of Shopping Centres

13 The Regional Spatial Strategy (RSS) Policies TC1, TC2 and KTG5 require the identification of a network/hierarchy of centres. A full hierarchy for new centres has not been defined in the conventional manner, given uncertainty with regard to phasing of build-out in the Ebbsfleet Valley and difficulties in predicting future retail patterns (see Retail Background Paper Update, Feb 2011: EB11). However, Table 3 of the Core Strategy, Role of Shopping Centres, serves to identify appropriate roles and functions of each of the centres. Additionally, CS12 proposes an early review of retail policies, to enable further guidance to be provided on retail issues, at an appropriate time.

14 The RSS require that extensions at Bluewater are considered through review of the RSS (South East Plan TC2, TC3, and KTG5). With the proposed abolition of regional strategies, this will not be possible. CS12 proposes a limited amount of new floorspace at Bluewater based on expenditure within the local catchment area. This is not in conflict with the RSS, since Policy TC3 states only that no need has been identified for 'major' extensions to regional centres CS12 recognises that floorspace beyond this limited amount would need to take into account regional considerations.

¹ See http://www.dartford.gov.uk/_data/assets/pdf_file/0009/74268/MATTER-1-2011-04-01-18.pdf

The fact that Dartford BC identified Bluewater as a 'centre' within its network of centres did not change its status from that set out in the South East Plan. Whilst PPS4 on Planning for Sustainable Economic Growth (2009) at EC1(b)(i) required both regional planning bodies and local planning authorities to define a network and hierarchy of centres at their respective levels, there appears to be no reason why it could not include centres that were not 'town centres'. Identifying Bluewater as a 'centre' within Dartford's Core Strategy was not therefore determinative as to its status.

More critically, PPS4 at EC1(b)(v) sets out that the need for any new, expanded or redeveloped out-of-centre regional or sub-regional shopping centre or any significant change in the role and function of centres should be considered through the regional spatial strategy and this was the case with the Lakeside regional shopping centre when a single issue review of the East of England Plan² was undertaken. As redefining Bluewater as a 'town centre' would clearly represent a significant change in its role and function, this could only have been done through the then South East Plan process and not at a local level by Dartford BC.

It was not therefore within Dartford BC's ability to change the status of Bluewater through its Core Strategy whilst PPS4 and the South East Plan were in place. Its status then and now remains as an 'out-of centre' regional shopping centre and the revocation of the South East Plan does not change this.

This also means that references in the supporting text to Dartford's Core Strategy cannot simply be dismissed as citations for the purposes of context – they are statements of fact on the status of Bluewater that carry through from the South East Plan into that document. If Dartford BC does want to treat Bluewater as a 'town centre', or even imply that it is entitled to do so, it can only do so by going through due process involving the duty to co-operate because of the wider implications of such a change to the Bluewater catchment which covers multiple local authorities.

Despite extensive re-reading of Dartford BC's Core Strategy documents, we have been unable to find any mention of the status of Bluewater being changed from that set out in the South East Plan. Based on this and the case set out above, it is reasonable for any reader to conclude that this is the basis upon which the Core Strategy was examined and found sound.

If Dartford BC has any evidence to the contrary (i.e. that a change to the status Bluewater from that from that in the South East Plan was intended and this was made explicit to stakeholders and the presiding Inspector at the Examination) we would be grateful if it could be produced.

In the absence of such evidence, it is our view that any statement in MM19 relating to Bluewater being subject to the same NPPF provisions as traditional town centres potentially places DP14 at odds with both adopted policy CS12 and national policy. This requires rectification by a clear statement that the status of Bluewater within the development plan remains as an out-of-centre specialist comparison goods shopping centre within Dartford's network and hierarchy of centres.

2

http://webarchive.nationalarchives.gov.uk/20100702154648/http://www.gos.gov.uk/goeast/planning/regional_planning/808661/

This is important for the purposes of clarity and to ensure that policy DP14 is **effective**, given all parties need to know precisely how the Sequential Test under paragraph 24 of the NPPF should be applied in the case of Bluewater. Currently we are of the view that this lack of clarity and potential conflict with the Core Strategy, as examined and adopted, makes policy DP14 ineffective and therefore unsound.

Whether policy CS12 is in conformity with the NPPF and an appropriate basis to deal with planning applications at Bluewater

Main Modification 19 includes the following statement:

As an identified centre in Dartford's existing Development Plan, Bluewater is subject to the same NPPF provisions as traditional town centres and **development proposals for retail and leisure within the centre are not subject to a sequential test.**

Main Modification 21 goes on to amend DP14 by stating:

Confirmation of CS12

2. Core Strategy policy CS12 identifies a network of shopping centres, including Dartford Town Centre and Bluewater, where shopping and leisure activity will be supported. **The policy is compliant with national policy, continues to be appropriate and will be applied in the determination of planning applications. Policy CS12:5d, in particular, will be applied in the determination of proposals at Bluewater.**

We have given considerable thought both to whether adopted policy CS12 is consistent with the NPPF and whether it remains an appropriate basis to deal with planning applications at Bluewater. We have concluded that it is not for a number of reasons.

Policy CS12 (1 – 3) sets out that a network of complementary shopping centres will be developed and supported - which includes Bluewater. These are intended to act as the main foci for shopping and leisure activity, based on the role of each centre identified in Table 3. The policy then goes on to say that the Council will work with developers and grant planning consent for development that supports these roles, with Table 4 acting as a guide to the amount of retail floorspace permissible at each of the centres.

Policy CS12 (4) relates to Dartford Town Centre and sets out criteria against which proposals 'within the town centre boundary' will be assessed.

Surprisingly, policy CS12(5 - 6) on Bluewater then only sets out what the assessment of proposals will take into account, without reference to any centre boundary – in other words it says that planning permission will be granted for development that 'supports' the role of Bluewater irrespective of where (or even what) it is.

The important point here though is that, whilst a locally determined threshold for retail impact assessment is applied to proposals at Bluewater up to 2016, the policy is completely silent on whether or not the Sequential Test is required or under what circumstances.

There is therefore no policy basis for the claim in MM19 that 'development proposals for retail and leisure within the centre are not subject to a sequential test'. Such silence cannot be considered

determinative and it may be necessary to defer to national policy, whereby the Sequential Test may be required given Bluewater's status as an 'out of centre' regional shopping centre.

We also object to the wording included in MM21 that Policy CS12 'is compliant with national policy' when it clearly isn't. This is because CS12 (and DP14) do not differentiate between 'centres' and the 'Primary Shopping Area' when it comes to the application of the Sequential Test for retail proposals.

This issue has recently been rehearsed in the context of a called-in planning application for retail development at Meols Cop Retail Park, Southport (decision dated 7 December 2016) whereby the Secretary of State concurred with his Inspector that 'in centre' for retail means the Primary Shopping Area. In this case, policies in the Unitary Development Plan (2006) pre-dated the NPPF and were considered to be out-of-date. This was because the Primary Shopping Area was not identified and the Sequential Test was wrongly applied in policy. The following extract from the decision letter sets this out clearly³:

305. The UDP includes a number of retail policies. The Framework indicates that in drawing up local plans the extent of the town centre and the PSA should be defined for each designated centre. This is important because the PSA is the area where retail development is concentrated. It is not necessarily equivalent to the Primary Retail Frontages but can include adjoining and closely related secondary frontages too. It is unsurprising of course that the UDP does not define or refer to a PSA in Southport town centre because it preceded the publication of the Framework by some years. However, it does have implications for the treatment of the retail policies in the UDP.

306. Saved Policy R1 sets out the retail strategy. However, the sequential approach gives edge-of-town centre sites priority over district and local centre sites. The Framework does not make such a distinction. Furthermore, the UDP does not define edge and out-of-centre sites with reference to a PSA. In the circumstances it seems to me that saved Policy R1 is out-of-date in the terms of Paragraph 215 of the Framework.

307. Saved Policy R2 is directed specifically to Southport town centre and refers to its boundaries on the Proposals Map. It is here that is the preferred location for new retail development. However, as already discussed above, the Framework indicates that for retail uses it is the PSA that is the preferred location and not the wider town centre. The latter has been drawn considerably more widely than the defined Primary Retail Frontages and has no equivalence with what could reasonably be considered as a PSA. In the circumstances saved Policy R2 is out-of-date.

308. Saved Policy R9 deals with retail proposals on edge and out-of-centre sites. Again, the definition of such sites cannot accord with the Framework in the absence of a defined PSA. That aside, the first policy requirement is that there should be a demonstrable need for the proposal. A requirement of this kind is not included in the Framework and whether or not

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575180/16-12-07_DL_IR_Sainsburys_Meol_Cop_Retail_3002637.pdf

there is retail capacity in the catchment is no longer a relevant policy test. The policy also refers back to saved Policy R1 and for these reasons it also is out-of-date.⁴

This clearly has implications for Dartford BC's Development Policies Plan, in that policy CS12 pre-dates the NPPF and is also based on 'centres' rather than identified Primary Shopping Areas when it comes to retail. This must therefore be considered inconsistent with national policy and therefore out-of-date.

Similarly, policy DP14(1) and (2) also fails to distinguish between 'centres' and Primary Shopping Areas, whilst the decision has been taken to delete the Primary Shopping Area at Bluewater in its entirety. For the same reasons, it must also be considered as inconsistent with national policy.

Given the centrality of the Primary Shopping Area to the correct application of retail policy and the NPPF Sequential Test, we are also somewhat surprised that the decision to remove the Bluewater Primary Shopping Area notation from the Policies Map is only being treated as an additional modification (under AM34) rather than a main modification.

Please note that our concerns, expressed in previous correspondence, remain over the proposed boundaries at Bluewater and Dartford Town Centre.

It is illogical that the Bluewater boundary includes significant areas of car parking etc. when, as an 'out of centre' regional shopping centre, it has a completely different character from a traditional town centre. The area of Bluewater shown as currently lying within the proposed centre boundary is 47.7 hectares, of which the actual malls themselves only account for 11.8 hectares (25%). The inclusion of the car parks etc. would therefore place Bluewater at a strategic advantage to traditional town centres when the Sequential Test is applied because proposals are more likely to be considered 'in centre'. This would be perverse and completely contrary to the principle of 'town centre' first enshrined in national policy.

Notwithstanding this, justified and evidenced Primary Shopping Areas still need to be shown, following due consultation, for both Dartford Town Centre and Bluewater so that the Sequential Test for retail uses can be applied as per national policy. The Primary Shopping Areas also need to be clearly shown as complete areas and not just lines on a map (i.e. just the frontages) for the sake of clarity and effectiveness given the need to determine what is 'in centre' or not.

Incidentally, it is noted that the only modification proposed to DP14 (1) under MM20 is as set out below:

- (1) Ensuring investment is directed as planned towards centres, ~~notably Dartford Town Centre~~, main town centre uses should be located sequentially and in accordance with policy CS12, considering sites within the Borough's network of centres (~~key shopping areas~~) first. Proposals should demonstrate flexibility in the design and form of the proposal in order to respond to the needs of centres and available sites. Planning applications for shops (A-Class use) outside development plan centres will not be permitted where the sequential test is not met.

As nothing within policy DP14(2) as modified by MM21 or CS12 appears to caveat DP14(1) in terms of the need to apply the Sequential Test, our assumption is that any edge-of-centre or out-of-

centre proposals (in terms of the Primary Shopping Area in terms of retail) would require sequential testing anyway – including at Bluewater. This should be made explicit in DP14 to add clarity and for the policy to be effective.

We also note that there is inconsistency in DP14(1) whereby it refers to all main town centre uses being located sequentially but then only goes on to say that shops will not be permitted where the test is not met – what about the other main town centre uses?

Both DP14 and CS12 are also inconsistent with national policy in that they do not mention the need for impact testing of leisure (or office) proposals outside of the named centres. This needs to be rectified for the policy to be sound and a clear indication given of the required threshold – presumably the default 2,500 sqm in national policy?

Given DP14 (1) directs main town centre uses to the network of centres first and these include not only those set out in policy CS12/Table 3 but also the district and neighbourhood centres identified in the Development Policies Plan, it is suggested that there should be something in the policy that requires proposals to be of a scale and function commensurate with the position of the lower order centres within the hierarchy.

This is necessary because policies DP17 and DP18 appear to be primarily concerned with changes of use and not new development – presumably Dartford BC is not suggesting that any main town centre uses can be directed to the lower order centres anyway. This may require a further Main Modification to clarify and make DP14 effective.

Finally, we note that policy CS12 is inconsistent with the NPPF in that it requires impact testing of retail proposals in Dartford Town Centre when the guideline figure is exceeded. Provided that retail development is in the Primary Shopping Area (and not the wider centre boundary) paragraph 26 of the NPPF doesn't actually require this and Dartford BC have not provided any evidence to explain this additional requirement.

Justification for not carrying out an early review of retail policy etc

We note that MM19 amends paragraph 12.7 to include a rationale for not having carried out an early review of retail policy and stating that Dartford BC will undertake it as part of their proposed full local plan review.

Whilst we understand that development has not proceeded as originally intended in Dartford, a key driver of this review was the need to resolve the outstanding issue of Bluewater and to provide a mechanism for its future planned development in the absence of the South East Plan.

We welcome Dartford BC's very recent attempts to engage through the establishment of the Strategic Retail Group, albeit under the duty to co-operate, whilst recognising that there will be a need to go much further when it comes to dealing with Bluewater. Because of the cross-boundary issues raised, a commitment to joint working in this area and an agreement to the Strategic Retail Group having a steering role in terms of any retail study commissioned that looks at Bluewater would be helpful.

That aside, we do wonder whether references as to why work has not been done to date are actually necessary.

Incidentally, we also note that the proposed main modifications do not include the amendment or deletion of paragraphs 12.11 and 12.12, which state:

12.11 A planning permission remains extant for major redevelopment of the West Village, predominantly for comparison retail and other A-class shop uses. In excess of 5,000 sqm (A1 net), the proposal was justified with a retail impact assessment produced consistent with Core Strategy requirements.

12.12 In line with Core Strategy policy CS12:5b and Table 3, small retail developments have occurred in the plan period without full retail assessment at Bluewater totalling less than 5,000 sqm. Development permitted following retail impact assessment in consultation with adjoining authorities is not counted within the 5,000 sqm Core Strategy requirement. Accordingly this cumulative threshold for retail assessment remains in place. This is reiterated through policy DP14:2 below.

On the above, it is incorrect to say that there is an extant permission for the redevelopment of West Village – it is now time expired. In any event, we would question the need to insert references into the supporting text referring to planning permissions anyway given such statements are likely to become quickly dated and add nothing in terms of explaining how policy should be applied.

In addition, all references to the 5,000 sqm are irrelevant as this allowance is now time-expired (post-2016). Given this was only intended to apply up to 2016, we do not see how it can remain a cumulative threshold for retail assessment beyond that date unless it is refreshed by an updated evidence base. This is particularly the case as Dartford BC has already admitted that the assumptions used in its retail study and which formed the basis of the 5,000 sqm figure have not proved to be robust.

We also note that there is a lack of clarity in MM19 in that there are references to retail and leisure development 'within the centre' at Bluewater not being subject to the Sequential Test and later to such development being simply 'at Bluewater'.

Given 'at Bluewater' could be construed as meaning not just 'in centre' but within the wider Western Quarry site, this needs to be properly explained in the text to ensure that policy is effective.

Please note that this also relates to comments we have made previously regarding the 'unsaved' policy R4 (and R5) notation still being shown on the Policies Map.

Whilst we would disagree with Dartford BC that the Policy R4 notation has any status given the policy was not 'saved' in 2007, it does not appear to be listed to be removed. We would appreciate a response on this given Dartford BC has previously claimed the notation can be assigned weight in decision making – even though the decision not to remove it was made in the context of the Core Strategy in 2011, some 4 years after the policy it referred to actually ceased to have any effect.

Conclusion

We remain of the view that the status of Bluewater within Dartford's Core Strategy remains as per the South East Plan (i.e. as an out-of-centre regional shopping centre) and that it cannot be treated as a town centre without going through due process.

This is important because of the way the NPPF Sequential Test is supposed to be applied, so that priority is given to sustainable town centre locations first. A clear statement is therefore required within the Development Management Policy document confirming this.

It is not sufficient to argue that, because Bluewater already exists, applying national policy properly now would have little or no effect. The NPPF does not allow for the 'town centre first' approach to be abandoned under such circumstances. To do so would perpetuate and reinforce unsustainable forms of development.

Irrespective of this, it is clear that neither policy CS12 and DP14 are consistent with national policy in a number of important ways. In particular, CS12 cannot be relied on to underpin those parts of DP14 relating to Bluewater. We also maintain our objection to the boundary shown for Bluewater because it would place this centre at an advantage when compared to traditional town centres. This must in itself make any policy ineffective in terms of achieving the aims of the NPPF.

It is also clear that the intent of the NPPF is that the Primary Shopping Area should represent 'in-centre' when the Sequential Test is applied to retail proposals. Neither CS12 nor DP14 reflect this and both are therefore inconsistent with national policy.

Confirmation that the redundant policy R4 (and R5) notations are to be removed from the Policies Map is also required.

For the reasons set out above, we consider that policy DP14 remains unsound and that further modifications will be required before the plan can be adopted.

Regards

Wendy Lane

Wendy Lane

Assistant Director (Planning)