COUNCIL’S RESPONSE TO MAIN MATTER 7
Other Areas of Change
Sustainable Construction, Community Energy Networks and
Renewable Energy

1st June 2012
Main Matter 7: Other Areas of Change (Policy CS 8, Table 5.7),
Sustainable Construction, Community Energy Networks and
Renewable Energy (Policies CS 14-15)

1. Having regard to the scale of growth expected in the Other Areas of
Change, does Policy CS 8 give sufficient guidance about the planning
priorities for them?

Council Response

1.1 Paragraph 8.1 of the Core Strategy identifies four major areas where
significant development/change is expected to occur. These are:

i. The existing city grid squares that are not yet complete
ii. The Northern, Western and Eastern Expansion Areas on the edges of the city
which were allocated for development in the Local Plan adopted in 2005
iii. Bletchley town centre
iv. Wolverton town centre

1.2 Core Strategy Table 5.7 highlights the type of development and the scale of
change that is expected to occur at different locations around the Borough over
the plan period. It identifies the status of these sites; whether the site is being
allocated through the Core Strategy, for example the Strategic Land Allocation;
or if these sites are an existing commitment, such as the existing city grid
squares or the expansion areas.

1.3 Policy CS8, as published, states that at least 29,000 new dwellings will be
provided across the city on sites that already have planning permission, or that
are allocated in the Local Plan, including the existing expansion areas. The
Council flagged up in its list of minor changes, submitted alongside the Core
Strategy, that this figure should have been changed at the time the Core
Strategy was revised in 2010. The figure needs to be adjusted to take into account completions in the period 2006 to 2010. The figure should read 23,740, which is in line with the figures in Table 5.2 of the Revised Proposed Submission Core Strategy (page 23 – the total of lines on urban permissions, allocated and briefed sites and deliverable and developable SHLAA sites).

1.4 As paragraph 8.2 of the Core Strategy emphasises, most of the remaining city grid squares and expansion areas are committed for development. In the Council’s view, these sites have progressed to an extent where there is no need to give additional guidance on planning priorities. Bletchley and Wolverton town centres are discussed below.

1.5 As Table 5.7 (page 42 of the Revised Proposed Submission Core Strategy) illustrates, most of the remaining city grid squares (Tattenhoe Park, Oxley Park, Oakgrove and Kingsmead South) have had detailed development frameworks or development briefs prepared for them, and have outline or full planning permission. Development is already well advanced in grid squares such as Oxley Park. Similarly, in the case of the expansion areas, detailed development frameworks, development briefs and design codes have been prepared to guide development, and planning permission has been granted. New dwellings have been completed or are under way in the Northern Expansion Area, Eastern Expansion Area (EEA), and development in the Western Expansion Area (WEA) is expected to start in 2013.

1.6 In extremis, if circumstances did change radically and sites were incapable of being developed, then the Council would need to consider its position and investigate what options were available, in order to progress development. Policy CS8 acknowledges “where the need for major change is identified, new policy guidance to co-ordinate areas of change will be prepared through the Local Development Framework.”
1.7 In a recent example in CMK the original development scheme on Block B4.4 in CMK (Planning ref 08/00083/REM) for 650 dwellings and 2,480 sq m of commercial floorspace (including office, retail and café/bar uses) was not going to proceed. Recognising the need to encourage development and plan for a deliverable form of development, a Development Brief for the site was prepared by the Homes and Community Agency (HCA) with contributions from MKC officers to be proactive and re-market the site. The brief provided guidance to developers for the development of 400 dwellings, up to 6,000 sq m of B1 floorspace, up to 2,500 sq m of Use Classes A1-A3 and D1 uses, and a high quality hotel of up to 200 bedrooms. The site is now under the control of Barratt Homes and a new planning application is anticipated later this year, with development expected to commence during 2013 (see Appendix to the Council’s statement on Matter 3 for an overview by the developer). A wider review of the CMK Development Framework is also underway with the objective of stimulating and encouraging development in the central area of the city.

1.8 In conclusion, the Council believes that there is sufficient guidance in place to shape the planning priorities in ‘other areas of change’. To prepare new or amended guidance for the majority of sites would be unnecessary and inappropriate because these sites are at such an advanced stage in the development process.

1.9 The Core Strategy sets out sufficient detail to establish the planning priorities for the ‘other areas of change’. Detailed guidance should be provided in future documents at the appropriate time. This enables the Council and its development partners, to respond appropriately to challenges in particular areas, at particular times, as has happened with Block B4.4 in CMK.
2. Are the interrelationships between these areas and the proposals for Central Milton Keynes and the SLA properly considered?

Council Response

2.1 Interrelationships between the Strategic Land Allocation (SLA) and other areas of the city, including CMK, have been properly considered through the development of the Core Strategy, including the sustainability appraisal process which concluded that development to the south east of the city was the most appropriate location for growth. Policy CS 8 and the principles of CS 5 ensure that the development of the SLA will not be to the detriment of other areas of the city, including areas in need of regeneration.

2.2 With regards to the interrelationships between the SLA and the immediate adjoining areas, Policy CS 5 of the Core Strategy contains principles which demonstrate that these interrelationships have been properly considered:

i. Principle 3 states that the SLA should “maintain the character and integrity of existing settlements”.

ii. Principle 2 ensures that the SLA will not be a standalone development and that the principles that have shaped the existing city are carried forward into the new development, including grid roads and linear parks.

iii. Principle 5 ensures that there will be good access between the SLA and adjoining areas.

iv. Principles 7, 8 and 12 ensure that air quality, climate change and flooding impacts across the city will be minimised.

v. Principle 11 aims to reduce the impact of the development on the surrounding open countryside.

2.3 These principles are all being picked up through the preparation of the SLA Development Framework. Communities adjoining the SLA have had, and will
continue to have, significant input into the preparation of the Development Framework, which will help to ensure that all local interrelationships are addressed. More information is provided in the Council’s statement on Matter 6.

2.4 CMK’s role is as a sub-regional centre and is the focus for retail, office, hotel, leisure and cultural development in the city (see Core Strategy Policies CS 3 and CS 7). CMK is the focus of jobs and activity in the centre and is the hub of the public transport system, making it easily accessible.

2.5 For this reason the SLA would not be an appropriate location to focus non-residential development. Instead, principles 10, 14, 16 and 17 of Core Strategy Policy CS5 require non-residential development that is of an appropriate scale to the SLA. Development of social, employment, retail and commercial facilities, of an appropriate scale, will ensure that other areas of the city, including CMK, will not be undermined by the development of the SLA. The scale and form of this development will be addressed through the Development Framework production process, and will be informed by evidence, such as the retail capacity study (Submission Document B136). In addition, the lower density housing offer of the SLA (principle 15) will complement/ provide an alternative option to CMK’s higher density housing offer.

2.6 The interrelationship between the SLA and other town, district and local centres has been considered as part of the Sustainability Appraisal (SA) process. Objective 20 on page 90 of the SA Addendum (2) (Submission Document B138) states that the large part of the SLA is likely to support the Kingston and Eastern Expansion Area local centres. It also states that the Church Farm portion of the SLA may support Old Farm Park and Walnut Tree Local Centres. As set out above, these relationships have been recognised in Policy CS5 and will be addressed in more detail through the Development Framework production process.
2.7 The SA also recognises that support for other town and local centres will be limited. However, it is important to note that the SA scores are positive, “as it is not thought that the SLA will undermine other town or local centres in any way, and may provide an opportunity to enhance these areas. Again, consideration for this relationship has been incorporated into Policy CS5, with principle 10 stating that the development should “provide new social and commercial facilities and services, and where possible improve facilities in the existing settlements, to meet the day to day needs of new and existing residents”. Also, principle 16 states that the development should provide “retail and commercial development of an appropriate scale to ensure the weekly convenience shopping needs of new and existing residents in the development area are met”. This demonstrates that the interrelationships between the SLA and other areas of the city, in terms of town and local centres, have been properly considered.

2.8 The SLA is in a good location in terms of its wider transport links. It is a location where there has been significant recent investment in the highway network, ensuring that there will be good access by road to and from the site. The site is also extremely well positioned for the core public transport route (including the Platinum bus service) to be extended into the SLA (see Key Diagram – Urban Area). This will provide a fast and direct public transport link into CMK for good access to jobs, facilities and services. Journeys to other parts of the city can then be made from CMK, the city’s transport hub.

2.9 The need for good transport links / accessibility is incorporated into Policy CS 5. Principle 2 of CS 5 states that the development should be “well integrated with and accessible from the existing city”, principle 4 states that the development should “maximise opportunities for sustainable travel patterns”. Also, principle 13 states that financial contributions to on and off site strategic and local infrastructure must be made in “an effective and timely way”, “this must include financial contributions to the improvements and extension of
infrastructure and facilities in nearby existing settlements”. At the localised level, principle 5 states that the development should “link to the surrounding road, redway and grid road network”. On this basis it is deemed that interrelationships between the SLA and other areas of the city, in terms of access/travel, have been properly considered.

2.10 Overall, it is concluded that interrelationships between the SLA, CMK and other areas of the city have been properly and thoroughly considered; and Policy CS 5 contains principles to ensure that these interrelationships are respected in the development of the SLA.
3. Having regard to Policies CS 4 and CS 8, should the priorities for
Bletchley and Wolverton town centres be set out more clearly in the Core
Strategy? Is it appropriate that the development management policies
DPD should set out priorities for the key centres *(reference to Core
Strategy paragraph 8.8)*?

Council Response

3.1 Policy CS4 of the Core Strategy sets out the retail hierarchy for the whole of
the Borough. It includes Bletchley and Wolverton as older District Centres,
alongside the ‘new’ district centres of Kingston and Westcroft, created as part
of the new town.

3.2 The hierarchy recognises Bletchley and Wolverton as important second tier
service centres, which play a role in serving the weekly shopping needs of the
wider catchment areas in the north and south of the city, alongside Kingston
and Westcroft, which serve the east and west of the city respectively. The
policy also recognises the continued importance of maintaining this role for the
purpose of supporting regeneration in these areas, given the need to attract
new investment and activity in the centres.

3.3 The Council does not believe that any more detail is necessary in a strategic
policy. The delivery section of the policy makes it clear that issues such as the
specific primary shopping areas, which will ensure the delivery of overall policy
objective, will be included in a future Development Plan Document, now likely
to be a new style Local Plan. The Council maintains that this approach is
robust and will allow the specific requirements and circumstances of each
centre to be looked at in more detail, and non-strategic policies to be created to
guide future development.
3.4 Policy CS8 of the Core Strategy recognises where change in other areas is likely to happen over the plan period, and provides the context within which future DPD policies will be created and decisions on change will be made.

3.5 The Council already recognises that Bletchley and Wolverton are two of the main areas of change across the city and has put regeneration/development frameworks in place to guide development in these areas (Submission Documents SS2, SS4, SS14 and SS15). Whilst these are now several years old and may need to be updated in the future (which is acknowledged in paragraph 8.7 of the Core Strategy), they have helped shape several significant changes in both towns in recent years, such as the leisure centre redevelopment in Bletchley and the redevelopment of former railway works buildings in Wolverton.

3.6 As with the retail hierarchy, it is not felt necessary to set out the detailed priorities for these areas in a strategic Core Strategy policy. The issue of strategic importance for delivery of the Core Strategy, and for the future of Milton Keynes, is the recognition that Bletchley and Wolverton need support to help shape their future development, so that Milton Keynes does not become a “two-speed city”, with older areas left behind.

3.7 The specific detail of change in these areas is not of strategic importance to the overall delivery of the Core Strategy, and as such does not need to be included in the document. The detail of area specific policies should be shaped by local communities, as the regeneration/development frameworks were, and are best included in a lower level document which considers each area in more detail.

3.8 Since the policy was drafted, the Localism Act has brought forward the concept of Neighbourhood Plans. Such plans support the way the Council would see area specific priorities being set. Wolverton is a frontrunner Neighbourhood
Plan, which is progressing well, and has already started to establish local priorities for the town centre.

3.9 The Council is committed to working with all communities that want to produce Neighbourhood Plans. Where areas are not proactively looking to establish Neighbourhood Plans, as is currently the case in Bletchley town centre, it is the intention that the Council will initiate a Neighbourhood Plan style process with the local community to help shape area specific policies for inclusion in the new Local Plan.

3.10 Such policies and plans would be an integral part of the new Local Plan and would work alongside the existing development/regeneration frameworks, or inform their review as necessary. As such, the Council would suggest it may be appropriate to include an update to the wording of the delivery section (Core Strategy paragraphs 8.7-8.12) to reflect the role that Neighbourhood Plans will have in shaping the priorities in key centres (and across Milton Keynes in general).
4. With reference to policy CS14, are the standards for sustainable construction in the respective areas of the Borough and in conservation/alteration of existing buildings justified and deliverable and in keeping with national policy?

What would be required to demonstrate technical or financial non-viability?

Council’s Response

Introduction

4.1 The Council has had a sustainable construction policy in place since the Local Plan was adopted in 2005 (Submission Document LP1, page 34-35). Policy D4 of the Local Plan has been fully operational since April 2007 when a supporting Supplementary Planning Document was adopted (Submission Document LP9).

4.2 This policy has been successfully implemented over the last six years securing development of a standard over and above that required through the building regulations. The policy has helped to ensure that, despite the rapid growth of Milton Keynes, the environmental impacts of development have been minimised. The policy has also ensured that new development has helped to improve the standard of many existing dwellings across the Borough, through the innovative Carbon Offset Fund (see Issue 5 below). The Council wants to build on the success of the existing policy and continue to ensure development reaches the highest deliverable standards of construction.

Justification for the policy

4.3 Given the level of development that is planned for Milton Keynes, the Council wishes to ensure that development continues to reach the highest possible standard of construction to mitigate its environmental impacts. This is entirely consistent with the NPPF (paragraph 17, principle 6 and paragraphs 94-96).
4.4 Policy CS14 meets the NPPF requirements for standards of construction to be set against nationally described standards (the Code for Sustainable Homes) and seeks to encourage the use of renewable energy, again positively promoted in the NPPF.

4.5 The need to mitigate environmental impacts has been consistently recognised throughout the consideration of Milton Keynes’ growth over the last 10 years. The Milton Keynes South Midlands Sub Regional Strategy (Submission Document SR3, page 18, paragraph 50), the MK2031 Growth Strategy (Submission Document B18, page 93, paragraph 12.76) and the South East Plan (Submission Document R6, page 32, policy CC22) all provide the basis and justification for Milton Keynes requiring a policy that seeks development standards above those set out in building regulations.

4.6 The Sustainability Appraisal (SA) Report, which includes details of the SA work undertaken on the MK2031 Growth Strategy, also highlights the need for a sustainable construction policy (Submission Document B106, page 41, paragraph 10.3).

4.7 The Council would point to the success of the existing sustainable construction policy as part of the justification for the proposed Core Strategy approach. In all, bar a few isolated cases, the requirements of Local Plan Policy D4 have proved to be both financially and technically achievable. It has been six years since the original policy was drafted, as it stands today. During this time, national standards and policy have been updated and evolved, which make it entirely appropriate for the Council to take this opportunity to update its policy, in line with these changes.

4.8 The Council commissioned a report (Submission Documents B113 and B114) to look at the technical and financial viability of setting increased standards of sustainable construction and requiring renewable energy. This report shows
that the requirements of the policy are realistic both in terms of their technical and financial deliverability.

Consistency with national policy

4.9 A full review of national planning policies related to Policy CS14 in place at the time of writing was provided in Submission Document B113 (from page 10). Policy CS14 was prepared to ensure the principles and requirements of these polices were achieved. The NPPF does not fundamentally change the policy framework within which CS 14 was prepared. The Council’s position is that it is encouraged to have such a policy (NPPF, paragraph 95) and is justified in the approach it has taken. The key points from the NPPF are:

i. The policy supports the transition to a low carbon economy (paragraph 17, bullet 6)

ii. The NPPF requires pro-active approaches to mitigating and adapting to climate change (paragraph 94). Policy CS14 is proactive, building on advice from the SA work that such an approach is necessary given the scale of local growth.

iii. Policies on sustainable construction should be set against nationally prescribed standards (paragraph 95). Policy CS14 uses the Code for Sustainable Homes (CSH) which is a prescribed national standard.

iv. Policies should seek to support the energy efficiency of existing buildings (paragraph 95). Carbon offsetting does this.

v. Viability and feasibility should be taken into account in determining whether a development should meet local standards of decentralised energy (paragraph 96). Policy CS14 states that these will be considerations in determining applications.

vi. The use of renewable energy is positively promoted (paragraph 97). Policy CS14 promotes the use of renewable energy.

vii. The longer term impacts of climate change should be taken into account in Local Plans to avoid increased vulnerability (paragraph 99). By setting
standards against the CSH, all aspect of the building, not just energy use, are considered ensuring buildings are resilient in all aspects for the long term.

4.10 On this basis the Council’s position is that the policy is entirely consistent with the approach to sustainable construction and renewable/low carbon energy set out in the NPPF. The main consideration would be the viability and feasibility of delivering the standards as clearly this will vary on a case by case basis. However, the work commissioned by the Council suggests these standards are realistic and deliverable. The policy also has a ‘get out clause’ regarding viability and feasibility, which is consistent with the approach of the NPPF.

4.10 The Council is also in the process of looking holistically at the impact of all planning policy requirements and planning obligations on the viability of development. The research carried out in relation to the implementation of Policy CS14 will be part of this assessment, with the extra costs involved being taken into account when setting s106 requirements and a Community Infrastructure Levy (CIL) charging schedule. This will ensure the overall burden to developers is not excessive and that the policy requirements are achievable.

Is the policy deliverable?

4.12 The Council’s position is that the requirements set out in Policy CS14 are deliverable over the plan period. There are a number of points to note in relation to the deliverability of the policy:

i. As set out in Submission Document B113, the targets are technically viable at a realistic cost. These requirements and costs will be taken into account in the upcoming review of s106/CIL contributions, to ensure that, overall, development remains viable.

ii. Much of the major development in Milton Keynes is already covered by existing planning permissions (see Statement 3, issue 3.1 i) and/or the Tariff
agreement. These extant permissions set out the standards of construction that will be required. As such, the new policy will not relate to these areas, unless any permissions lapse. The policy will, therefore, relate to a relatively limited number of new developments.

iii. The policy is likely to be caught up, at least in part, by national standards over the plan period\(^1\). This could mean local requirements are superseded by national requirements, which is acknowledged by paragraph 12.28 of the Core Strategy.

iv. The existing Policy D4, which is being successfully implemented, already contains the option to achieve Code for Sustainable Homes (CSH) level 4 as a route to achieve policy compliance\(^2\). There have been examples where CSH 4 has already been used as a route to meeting the policy, including Oakgrove (1,100 homes just starting construction) and Bracken Lodge in Beanhill (11 of 15 supported living homes).

v. The Policy CS14 standards take into account the constraints of developing in different parts of the Borough, which Local Plan policy D4 does not. The new standards for non-residential buildings in older centres, the rural area and for existing buildings are actually lower than previously sought, which will aid deliverability.

vi. The policy specifically highlights that, where it can be demonstrated the standards cannot be delivered for reasons of technical or financial viability, the Council will be flexible. This approach has been adopted successfully in relation to the existing Policy D4. A new guidance note will set out how this will

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\(^1\) The 44% reduction in Building Regulations, mandatory for CSH level 4 is expected to be introduced as a minimum standard through Building Regulations in 2013.

\(^2\) Meeting the minimum pass standards of construction set out in the Sustainable Construction Guide SPD is the main route to policy compliance. Achievement of Ecohomes excellent, BREEAM Excellent or CSH4 are accepted as alternatives to this approach.
be implemented. The guidance note will also include a map highlighting the different areas covered by the policy.

**Demonstrating development is technically or financially unviable**

4.13 The Council has an existing system in place for implementing Policy D4 that enables technical and financial viability to be taken into account where necessary. This approach will continue in the future.

4.14 In cases where there are financial viability issues, the Planning Department seeks advice from the Council’s Valuer and the Estates team. The onus is on the developer to demonstrate the requirements are not viable and they are expected to follow an open book approach disclosing their costs and assumptions on costs and value to the Valuer, to enable him to make a judgement about development viability.

4.15 This process needs to include details of the costs of meeting all of the Council’s policy requirements, not just the sustainability standards, to enable a holistic view to be taken on the whether the development is unviable and how the scheme can/should progress. On the back of this process, negotiation can take place on all requirements, including the potential to lower the standards of sustainable construction sought and/or a reduction in the level of renewable energy to be provided.

4.16 In terms of technical viability, applicants need to have demonstrated, at the planning application stage, that all approaches to meeting the policy requirements have been explored. In cases where technical issues mean that existing policy requirements cannot be achieved, which is very rarely the case, a report needs to be provided explaining why this is the case.
4.17 Possible limitations could be design requirements imposed by other regulations (such as health and safety), or restrictions imposed as a result of heritage conservation concerns.

4.18 The Council will expect to see that reasonable efforts have been made to achieve the required standards, within the constraints of the specific development site and the nature of the building.
5. Can financial contributions be expected to the carbon offset fund, given the statutory tests that apply to planning obligations?

Council's Response

5.1 In response to the introduction of the Community Infrastructure Levy Regulations 2010, the Council sought a legal opinion as to whether seeking contributions into the Carbon Offset Fund could continue to be a legitimate s106 requirement, particularly given the tests in Regulation 122.

5.2 The legal opinion (Appendix A to this statement) clarifies that contributions into the Carbon Offset Fund meet regulation 122. The opinion concludes that (Appendix A, paragraph 11) the obligation is:

i. necessary in planning terms as without it a policy (Local Plan Policy D4) would be breached, (or Policy CS14 when adopted)
ii. directly related to the development as it relates to offsetting the actual carbon emissions from new buildings
iii. fairly and reasonably related in scale and kind to the development as it (the contribution) is based on the size of the development, and is based on the calculated cost of offsetting the carbon dioxide emissions created by that specific development.

5.3 On this basis, the Council believes the Carbon Offset Fund is able to legitimately continue to operate, as it has done successfully for the last six years.

5.4 The Council is currently in the early stages of reviewing its s106 contributions and preparing a Community Infrastructure Levy (CIL) charging schedule. The legal opinion suggests that the Carbon Offset Fund can continue to run alongside a charging schedule under the CIL 2010 regulations (Appendix A to this statement, paragraphs 22-25).
5.5 The Council would point to the success of the scheme in collecting over £1.49m to date towards offsetting carbon dioxide emissions across the Borough over this period, with a significant amount more secured through s106 agreements and the Tariff. This money is still being spent, but, to date it has enabled annual carbon dioxide savings of 3,939 tonnes to be made; mainly through retrofitting existing properties with cavity wall and loft insulation (equivalent to the total emissions for around 1,500 average sized homes built to current standards). As well as the environmental improvements this has made, the Fund has also helped address issues of fuel poverty in some of the older areas of Milton Keynes, raised awareness of the impacts of climate change and helped support the local green economy.
6. Are the requirements of Policy CS15 justified by substantive evidence of technical and financial viability?

Council’s Response

6.1 The Council evidence (Submission Document B113, page 89) shows that decentralised energy and district wide systems are the most efficient way of cutting carbon emissions through low carbon/renewable energy in larger developments. The Council is, therefore, justified in including such a policy in the Core Strategy to ensure that this efficient approach is considered when looking at how larger developments could meet the policy requirements of CS14. This has not previously been the case across the city, with ad hoc, parcel by parcel approaches being preferred by developers.

6.2 The Council is seeking to take a positive approach to promoting and encouraging low carbon and renewable sources of energy, in line with the principles of the NPPF, already set out above.

6.3 The NPPF specifically sets out that new development should comply with local requirements for decentralised energy unless it can be demonstrated that it is not viable or feasible to do so. This implies that the Council is justified in having a policy of the nature of CS15, but that clearly any policy should recognise that there will be circumstances where standards will not be achievable, which Policy CS15 does.

6.4 The evidence in Submission Document B113 recognises that ‘the costs for implementing this type of technology will be site specific and require a detailed assessment of the proposed development and its electrical and heat demands’ (page 90, 7th paragraph). It does, however, refer to cost estimates of between £1,349 and £2,622 per unit\(^3\), based on previous research\(^4\), which is

\(^3\) The cost of achieving the mandatory energy reduction requirements of Code Level 4 through the use of a community energy network.
significantly lower than the costs of adopting a unit by unit approach to reducing energy loss (see Submission Document B113, Table 37, page 106). The policy, therefore, ensures that the most cost effective method for delivering the requirements of Policy CS14 is considered, in all relevant developments.

6.5 The policy sets out that, where it is not technically or financially viable to meet the policy requirement, a development will not be expected to connect to a community energy network. The policy, therefore, ensures that the requirement is, at the very least, investigated through the development process, which should lead to an increase in the instances of efficient community energy networks across the city.
LIST OF APPENDICES TO THE COUNCIL’S RESPONSE TO MAIN MATTER 7

APPENDIX 1 – LEGAL OPINION ON POLICY D4 AND THE CARBON OFFSET FUND
Appendix A - Legal Opinion on Policy D4 and the Carbon Offset Fund

MILTON KEYNES

POLICY D4

OPINION

1. Part 11 of the Planning Act 2008 provided for the imposition of a charge known as the Community Infrastructure Levy. It specifies who may charge the levy (that is to say charging authorities). The Act also involves provision for other aspects of the charge, including the way liability is incurred, how the levy is to be charged and collected together with its application to infrastructure and enforcement.

2. The Community Infrastructure Levy Regulations 2010 (S1 2010/948) provide the supporting detail using powers provided in the 2008 Act.

3. Part 11 of the Regulations is concerned with planning obligations and regulation 122 applies where a relevant determination (i.e., generally, the grant of planning permission after 6 April 2010) is made which results in planning permission being granted for development.

4. Regulation 122(2) provides that a planning obligation may only constitute a reason for granting planning permission if the obligation is necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development.

5. Such regulatory approach is, of course, familiar in the context of town and country planning. The language is similar to that used as the test for the appropriateness of conditions.

6. As is well known an application for planning permission is determined having regard to the development plan, so far as material, and to other material considerations. The development plan consists of a number of documents, which have to go through a statutory process before they become part of the development plan.

5 Section 70 of the Town and Country Planning Act 1990.
7. In 2007 a supplementary planning document, namely, the Sustainable Construction Guide, referred to policy D4 of the Milton Keynes Local Plan, which it set out and described.

8. Policy D4 is within the Milton Keynes Local Plan, which is part of the development plan. It is to the effect that all new development exceeding certain quantitative limits will be required to include those matters which appear on the list which then follows. The Local Plan was formally adopted in December 2005.

9. On the face of it the policy is clear in that new development beyond a certain size is, without exception, required to include a range of matters set out from (i) to (viii) and ranging from energy efficiency to carbon neutrality or financial contributions to a carbon offset fund to enable carbon emissions to be offset elsewhere.

10. The effect of regulation 122 of the 2010 Regulations is that one cannot, by way of a reason for planning permission\(^6\), rely on an obligation unless the obligation meets the tests in regulation 122. There will inevitably be circumstances when carbon neutrality, as sought under D4, cannot be achieved. In that event the policy, which has been adopted and forms part of the development plan calls for a financial contribution.

11. In those circumstances I consider an obligation which provided for financial contributions to a carbon offset fund meets regulation 122. This is because one can properly reason that a planning policy is being met by the obligation which, consequently, is necessary to make the development acceptable as otherwise the policy would be breached. Further, the obligation is directly related to the development as it relates to its carbon footprint and is fairly and reasonably related in scale and kind to the development as it (the contribution) is geared to the size of the development. Further, the arguments put forward in my instructions as to the relevance of the policy to planning generally are sound.

12. An argument has been advanced to the effect in respect of new development that the requirement to include carbon neutrality or to make a financial contribution should take account of that which is displaced by the new development. In other words if I knock down an old inefficient building and replace it with a better building account should be taken of the carbon contrast between the two buildings.

13. However, this is not what the policy asks one to do. The policy demands that new development should include carbon neutrality or a financial contribution

\(^6\) It will be remembered that reasons (now) have to be given for the grant of planning permission.
to a carbon offset fund. It does not say that new development should be an improvement on what is present; it simply demands that the new development should include something. Something is not included in x if it is not actually contained within x but only derivable from a contrast between x and y. The policy does not ask for such a contrast, it simply says that something (carbon neutrality or a financial contribution) should be included with the new development.

14. It appears to me that the policy is designed to look at the new development on its own terms. In other words, one asks what is the new development, which might of course, be change of use or operational, and then demands that the identified new development should include that which is listed in the policy.

15. It follows that I consider D4 as properly construed refers to the new development and does not require account to be taken of that which went before. It also follows that I consider regulation 122 is satisfied.

16. Further, the following should be noted about the supplementary planning document. First, it supplements D4; it is not intended to replace it. Second, the supplementary planning document refers to carbon and proposes zero carbon growth. Carbon neutral is said to mean no net increase in carbon dioxide emissions resulting from the energy used in occupation of the building. In other words, a contrast is being made between, on the one hand, the use of the building and, the other hand, what happens when the building is not used.

17. When the building is used the spaces within it are heated, water is heated, cooking occurs, the building is illuminated and appliances are used. All such activities contribute to or can contribute to carbon dioxide emissions. They can be contrasted with a state of inactivity and it is that contrast which is sought to be made. This is exemplified by the use of the expression “no net increase ... resulting from.” The words “resulting from” indicate the character of the contrast to be made.

18. Third, the paragraph referring to carbon offset is not, it can be noted, as specific. However, it refers to “increased carbon dioxide emissions from a new development” and if one was seeking to look back in time to a building which once occupied the site one might have expected different language. Further, such an approach would be inconsistent with what is said under the heading ‘carbon’.

19. Further, the calculation method is inconsistent if one is being asked to reflect on the building which previously occupied the site. Indeed if one introduced such a contrast, various questions would need to be asked and answered. For example, it would be necessary to know the state of the old building, which might, of course, have varied over time.
20. Milton Keynes Council may well introduce for Milton Keynes a scheme under the Community Infrastructure Levy Regulations. It is clear that prior to such scheme being introduced Policy D4 will continue to apply so that contributions may come to be made to a carbon offset fund.

21. I consider that such a course is clearly lawful and is unaffected by the possible future introduction of a scheme under the Regulations. This is because unless and until a scheme becomes effective the operable provisions cannot and do not include any such scheme.

22. It is next asked what the situation would be once a sale was introduced. The answer to this question must, of course, be subject to future events in the sense that it is not yet known precisely how the scheme promoted by Milton Keynes under the Regulations will be funded. However, the analysis appears to proceed as follows in respect of D4.

23. First, D4 will continue to operate as long as it is part of the development plan. Second, in certain circumstances, it (the policy) calls for a contribution to a carbon offset fund. Third, that carbon offset fund is used to provide (in effect) improvement grants for existing buildings to reduce their carbon footprint. Fourth, the contribution will be secured by a planning obligation. By regulation 123(2) after the charging schedule takes effect a planning obligation may not constitute a reason for granting planning permission to the extent that the obligation provides for the funding a provision of relevant infrastructure. Fifth, relevant infrastructure means that infrastructure published on the Milton Keynes website as being funded through the scheme under the Regulations or if there is no list any infrastructure.

24. Accordingly, in the creation of the scheme and the identification of infrastructure it would be prudent to ensure, if the carbon offset fund is to be operated separately, that the use of carbon offset is not listed as infrastructure. In any event I consider that a grant to improve an existing building is not, ordinarily, infrastructure.

25. Accordingly, subject to the precise terms of the scheme, Policy D4 can work alongside a scheme under the Regulations.

CONCLUSION

26. D4 refers to the carbon effects of the new development. It does not seek a contrast with an earlier building or use. Carbon offset payments pursuant to D4 meet regulation 122 of the 2010 Community Infrastructure Levy Regulations.
Milton Keynes Council
Main Matter 7
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MILTON KEYNES

POLICY D4

OPINION

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