IN THE MATTER OF THE NORTH ESSEX AUTHORITIES
Joint Strategic (Section 1) Plan Examination

AND IN THE MATTER OF CAUSE

FURTHER OPINION

Introduction

1. I have been asked to provide a Further Opinion in relation to some of the Inspector's questions for the Additional Hearing Session for Matter 1 as set out in the Inspector's Agenda. This additional session has been necessitated by concerns regarding the handling by one of the NEAs (Braintree DC) of "duly-made representations at the Regulation 19 consultation stage" from Lightwood Strategic. As a general observation, it is incumbent on, and imperative that, Braintree DC (and ultimately the inspector) can demonstrate that, notwithstanding this failure by Braintree DC, the whole planning-making process is still legally sound. In my opinion it is not. Whilst the Plan is being promoted by the NEA, the reality is that the Additional Hearing Session has been necessitated by the failure of just one of the authorities (Braintree DC). Therefore, this Further Opinion concentrates on the actions and omissions of Braintree DC although it must be recognised that, as a consequence, any illegality on Braintree DC's part will inevitably contaminate the Plan as a whole and therefore affects all the NEAs.

2. This Further Opinion begins by examining certain key events and also some features arising out of the selective chronology set out by the NEA in Appendix 1 to its written response dated 23 March 2018 to Lightwood Strategic Hearing Statement that either appear unclear or to have been omitted from

consideration (but noting that Appendix 1 only covers a period from March 2016 to May 2017) and only in the context of Lightwood Strategic's involvement.

3. Furthermore, given the failings of Braintree DC in relation to Lightwood Strategic, and the chronology set out below, there is a danger that these legal failings, if not adequately addressed at this stage, in the context of a Joint Strategic Local Plan that covers three separate local planning authority areas and the proposed scale of development proposed (including timeframe) which effectively stretches way beyond the Plan period), could set an undesirable precedent.

Relevant Chronology

4. The chronology set out in the NEA response including Appendix) provides only a partial and rather vague account of the key stages in the preparation of the Local Plan. It also fails to reflect the wider context which, in my opinion, is fundamental to the inspector's questions and which goes to the lawfulness of the Plan preparation process and, more significantly, the SA/SEA process.

5. In paragraph 4, the NEA states that all three councils began preparing individual Local Plans sometime in 2014 although no precise dates are provided. Furthermore, the first sentence of paragraph 5 states that "the Councils were working together but three separate processes were undertaken". No further detail is provided. However, this appears to sit uncomfortably with the contemporaneous documents. In October 2014 Braintree DC commissioned Land Use Consultants to provide a Sustainability Appraisal for the Braintree Local Plan and the report was produced in December 2014. The only reference in the report to Braintree DC "working together" appears to be in paragraph 2.6 which simply states: "The Council is also working with other local neighbouring authorities to ensure that any cross- boundary issues are dealt with appropriately and to ensure that growth across all authorities can be delivered effectively, with the necessary infrastructure improvements." Paragraph 3.76

notes that Braintree district is considered to be a single housing market area by the 2014 SHMA. Furthermore, there is no reference to neighbouring local plans (both existing and emerging) in Appendix 1 to the report. Subsequently, Braintree DC considered the report and other emerging Local Plan issues at its Local Plan Sub-Committee meeting on 12 January 2015. Other than the reference in paragraph 2.6 of the Land Use Consultants' report referred to above, there is no other reference to the NEA "working together" in the manner suggested in the NEA response, or at all. In particular, no reference is to be found in Agenda Item 5 – Local Plan Issues and Scoping, Item6 – SA/SEA – Local Plan or Item 7 – the Local Development Scheme. Similarly, no mention of these matters is to be found in the minutes of that meeting. Moreover, there is no suggestion that there would be a Joint Core Strategy or that new garden communities would be created in North Essex.

6. Paragraphs 8 and 9 of the NEA response contain no meaningful details of these matters. It is unclear when in 2015 the NEA agreed "to formally work together" including when, between who agreement was reached and how this agreement was reached and whether it is duly minuted or otherwise recorded. Similarly, there is no information as to what is meant by "all relevant sites" nor is there any information about who the promoters of the largest sites to which reference is made were, when they had been invited to meetings and what was the outcome of those meetings. Paragraph 9 does not detail when and who "concluded that housing need, for the plan period and beyond, would be best met by the promotion of three garden communities" or how the locations were identified. This is crucial to the whole issue of the procedural fairness of the consultation process and to issues of pre-determination and apparent bias that arise out of a consideration of the Supreme Court's decision referred to in paragraphs 23 and 24 below. It could be said that this lack of detail and subsequent restricted choice of reasonable alternatives may have been intentional and designed to disguise a choice already made by Braintree DC (and the other NEA). If so, then this would be caught by paragraph 42 of the judgment of Lord Reed in that Supreme Court decision.

7. Notwithstanding paragraph 6 above, in December 2015 Braintree DC published its Local Plan Update 2 which contained no reference to, or suggestions of, the NEA "working together" or garden communities.

8. In June 2016 Braintree DC published its Local Plan Update 3. Once again it made no reference to the NEA "working together" although it identified seven of the biggest sites "we propose to allocate" which included 2,500 homes during the Local Plan period (with potential to rise after 2033) at West of Braintree New Garden Community and 1,500 homes (with potential to rise after 2033) at Marks Tey New Garden Community. Moreover, there was no suggestion, let alone reference, to the NEA "working together" which begs the question "why not?"

9. On 24 June 2016 Land Use Consultants produced its Main Report Sustainability Appraisal for the Braintree Local Plan. It contains a reference to new garden communities in an incongruous and short chapter 5 (comprising just two paragraphs) which notes at paragraph 5.2: "The Spatial Strategy section of the Draft Local Plan does not contain any policies. Instead, the strategy is implemented through the more detailed spatial policies of the Draft Local Plan, notably the New Garden Community policies of the Shared Strategic Plan, Policy LPP 1: Location of Employment Land, Policy LPP 8: Primary Shopping Areas, Policy LPP 9: District Centre, Policy LPP 16 Housing Provision and Delivery, and the Strategic Growth Location policies LPP17-LPP21. Each of these policies and the related site allocations is individually assessed in the following sections of this SA Report or by Place Services in their SA of the Shared Strategic Plan. In addition, an assessment of the cumulative effects of the Draft Local Plan is made in Chapter 10. As such, no separate assessment of the Spatial Strategy section of the Draft Local Plan is required." More importantly, paragraph 10.3 on page 199 states: "The Garden Community Areas of Search are anticipated to deliver around 25% of the total dwelling requirement for Braintree over the Local Plan period, and therefore will make a significant contribution to overall housing need. **The potential effects of developing in these Areas of Search have been <u>separately appraised</u> by Place Services, although it should be noted**

that there is potential for cumulative effects with other proposed development in the Draft Local Plan, for example along the A120 corridor and the proposed strategic growth locations at Braintree itself, and along the A12 corridor and the proposed strategic growth locations at Feering and Witham, and also with development in neighbouring districts." (my emphasis) It would appear, therefore, that there have been two separate appraisals and no evidence of co-ordination. These fleeting references to new garden communities also appears to sit uncomfortably alongside the consultation response submitted by Colchester BC LPISR12.

10. Three days later, on 27 June 2016, Braintree DC published for consultation its regulation 18 Local Plan Draft Document for Consultation 2016. Consultation closed on 19 August 2016. This draft refers, for the first time, to two new garden communities in Braintree in policy LPP16. It simply describes them as West of Braintree New Garden Community (with a minimum number of new homes in the plan period of 2,500 homes) and Marks Tey New Garden Community (1,150 new homes). There is no elaboration on, or justification for, these two garden communities other than that found in paragraph 6.70 which is a mere two sentences in length.

11. However, earlier in the year, Braintree DC Local Plan Sub-Committee at its meeting on Monday 14 March 2016 under Agenda Item 6 – Broad Spatial Strategy considered a short item on garden communities as set out in paragraphs 2.15 – 2.17 of the report. It is clear from paragraph 3.4 of that report that the concept of garden communities was still in embryonic form and it observes: "**If** garden communities are considered as an appropriate location for new growth they will be added to the spatial hierarchy at this point. Given the likely scale of these communities in the long term it is considered that these will be classified as 'towns'." (My emphasis)

12. Subsequently, on 25 May 2016 Braintree DC's Local Plan Sub-Committee considered a report as Agenda Item 6 – Braintree Draft Local Plan – Garden Communities which recommended just two new garden communities West of

Braintree and at Marks Tey. The report also notes at paragraph 1.6 that: "The garden community approach is supported by central government. The Department for Communities and Local Government (DCLG) have awarded the four authorities funding to support this work and officer time through ATLAS (Advisory Team for Large Allocations). No further details of this have been provided.

13. In June 2016, Place Services of Essex County Council (one of the NEAs) produced its Sustainability Appraisal and Strategic Environmental Assessment for the NEA's Common Strategic Part 1 for Local Plans. Thus, it follows that the decision to proceed with the garden communities in Braintree district was taken before the completion of either the Land Use Consultants or Place Services SA/SEA. It was also taken prior to the publication of the draft for consultation. In doing so it appears to have been encouraged by central government and it may also explain why Lightwood Strategic's representations were mishandled by Braintree DC.

14. On 13 May 2016 AECOM produced its first draft of the North Essex Garden Communities Charter. A further draft was prepared on 16 June 2016 with a final draft prepared on 24 June 2016.

15. The above chronology also needs so to be considered alongside the timeline set out by Lightwood Strategic in its Matter 1 Hearing Statement and Appendices 1 and 2. It appears from this that AECOM were instructed in March 2016 to assess four garden community locations (not including Monks Wood) even though Monks Wood was made known to Braintree DC on 9 March 2016 with an estimated capacity of 5,000-6,000 dwellings. Curiously, on 11 March 2016, Braintree DC responded that Monks Wood would not be considered in the preparation of the Regulation 18 plan as an option. As Lightwood Strategic point out at paragraph 1.13 Denton's timeline in NEA Appendix 1 suggests that communication between the NEAs and with Essex CC on 10 March 2016 cannot have included any meaningful assessment of Monks Wood.

16. Lightwood Strategic assert at paragraph 1.16 of its Hearing Statement that there is 'further evidence of the premature dismissal of Monks Wood" to be found in the Braintree DC Local Plan Sub-Committee meeting of 31 October 2016 and notes that AECOM were subsequently commissioned to consider Monks Wood only in December 2016. Paragraph 1.17 is also telling. What remains unanswered is why Braintree DC was so determined to prematurely dismiss Monks Wood. It could be said that the process is tainted by a marked lack of transparency.

17. In paragraph 1.19 of its Hearing Statement, Lightwood Strategic identify six powerful, if not incontrovertible, points regarding the failure of Braintree DC in relation to its duty to cooperate before concluding in paragraph 1.20 that it is not possible for the inspector to reasonably conclude that Braintree has complied with its duty and consequently the failure to comply with section 33A must bring progress with the Plan to an immediate end.

18. In February 2017 DCLG produced its Housing White Paper "Fixing our broken housing market" which discussed the idea of promoting ten new garden cities or towns and fourteen new garden villages – see paragraphs 1.35 and A.56-58 and Figure A1 which showed a location for a new garden town and North Essex (Colchester, Braintree, Tendring).

The Relevant Legal Framework

19. It is unnecessary for me to set out in any detail the relevant statutory provisions regarding the development plan preparation process and SA/SEA issues as this has been neatly summarised in a number of relevant judgments such as *Heard v Broadland District Council, South Norfolk District Council and Norwich City Council* [2012] EWHC 344 (Admin) per Ouseley J at paragraphs 6- 13 (and where the claimant succeeded in his challenge to a Joint Core Strategy on the basis of failings in the SA/SEA process). Another example can be found in the first instance decision of Patterson J in *No Adastral New Town Limited v Suffolk Coastal District Council and Secretary of State for Communities and Local*

Government [2014] EWHC 223 (Admin) and by the Court of Appeal in that case at [2015] EWCA Civ 88 at paragraphs 11- 14.

20. Whilst Lightwood Strategic have made reference in paragraph 2.3 of its Hearing Statement to certain cases regarding the "curing" of defects, it is necessary to sound a note of caution. Whilst there is relevant case law that concerns alleged and admitted failures by local planning authorities in relation to SA/SEA issues, none of the cases have involved, as a matter of fact and law, development of the scale, nature and extent being promoted by the NEA. The proposed garden cities involve development of a magnitude that is unprecedented and covers three separate local planning authority areas over a long timeframe where decisions taken now in relation to the Joint Strategic Plan will set in stone a framework for significant development in the wider area for many years beyond the plan period. Therefore, any comfort that the NEA and others may seek to draw from case law may well be unwarranted. For example, there is an echo (in paragraph 11 of the NEA response of 23 March 2018) of Singh J's comments in paragraph 125 of his judgment in *Cogent Land LLP v Rochford DC and Bellway Homes Ltd* [2012] EWHC 2542 (Admin). However, it is clear from his judgment Singh J that it was highly fact sensitive. The circumstances in that case were significantly different from those under consideration by the NEA and the inspector. It involved only one local planning authority, not three. It involved just one site and in one general location and did not provide the framework for substantial new development that would take place over a period way in excess of the stated Plan period. A similar point can be made with regard to the decision of the Court of Appeal in *No Adastral New Town Ltd v Suffolk Coastal DC and others* [2015] EWCA Civ 88 where the main area of complaint was based on a proposed increase on one area from 1050 to 2000 houses.

21. Of greater relevance to the facts (including the chronology) of the NEA Joint Strategic (Section 1) Plan and the handling of Lightwood Strategic's representations are the decisions of Ouseley J in *Heard v Broadland District Council, South Norfolk District Council and Norwich City Council* [2012] EWHC 344 (Admin) at paragraphs 53 – 72 and Collins J in *Save Historic Newmarket Ltd*

v Forest Heath District Council [2011] EWHC 606 at paragraphs 17 and 40 and especially where Collins J said at paragraph 17: "It is clear from the terms of Article 5 of the Directive and the guidance from the Commission that the authority responsible for the adoption of the plan or programme as well as the authorities and public consulted must be presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option (See Commission Guidance Paragraphs 5.11 to 5.14). Equally, the environmental assessment and the draft plan must operate together so that consultees can consider each in the light of the other."

22. A further relevant case is the decision of the Court of Appeal regarding the need for the assessment of reasonable alternatives under SEA Regulation 12 in *Ashdown Forest Economic Development LLP v Wealden District Council and South Downs National Park Authority* [2015] EWCA Civ 681 – see Richards LJ at paragraph 9.

23. There is a further legal consideration that is central to the inspector's questions. Planning law is not a stand-alone area of law. In reality it is part of the wider body of public law and must be viewed in that context. Therefore, in addition to the legislation surrounding plan preparation and the SA/SEA the identified by the inspector, there are a number of highly relevant cases that establish that for, a public consultation such as those involved in the plan preparation process to be lawful, principles of fairness, the proper presentation and consideration of reasonable alternatives and adequacy of information provided to consultees are engaged – see the Supreme Court decision in *R (oao Moseley) v Haringey LBC* [2014] UKSC 56 (in particular paragraphs 35 – 42 from the judgment of Lord Reed) , *Devon County Council v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin) and *R (oao Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin). From these cases it can be seen that, in relation to this Joint Strategic (Section 1) Plan where SA/SEA are an integral part of the process and that where there is a clear statutory duty to consult, wider legal issues regarding public participation are crucial to the lawfulness of the plan making process, particularly given the requirements of

the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention) of which the UK is a signatory and which requires the Government to provide real and meaningful opportunities for public participation in the preparation of policies relating to the environment.

24. It is clear from the cases referred to in the paragraph above, that the local plan preparation process is governed by principles of procedural fairness, the provision of full information so that informed responses can be formulated and an absence of apparent bias. The last principle includes issues of pre-determination and, on the issue of reasonable alternatives, these should not be presented as if the garden communities were an inevitable consequence of meeting the increased housing need as it would be misleading to suggest that there were no other alternatives – see Lord Reed at paragraph 42 of *Moseley.*

The Inspector's Questions

Legal and procedural requirements

Main issue: Have the relevant legal requirements been met in the preparation of the Section 1 Plan?

Do any amendments need to be made to Chapter 1 of the Section 1 Plan in order to ensure its soundness?

Questions:

1. **Is there clear evidence that, in the preparation of the Section 1 Plan, the North Essex Authorities have engaged constructively, actively and on an ongoing basis with neighbouring authorities and prescribed bodies on strategic matters and issues with cross-boundary impacts in accordance with section 33A of the Planning and Compulsory Purchase Act 2004, as amended [the 2004 Act]?**

25. On the basis of the chronology of facts set to above, in my opinion Lightwood Strategic's view of the law as expressed in paragraph 1.5 and the conclusion in

paragraph 1.7 is correct. I therefore agree with Lightwood Strategic's view as expressed in paragraph 1.20 and that the failure to comply with the duty in section 33A means that the Plan should not be allowed to proceed.

Have the North Essex Authorities complied with the requirements of section 19(5) of the 2004 Act with regard to Sustainability Appraisal?

26. In my opinion, bearing in mind the facts set out above and, in particular, the relevant case law, the whole Plan making process and the SA/SEA is fundamentally flawed. I do not agree with Lightwood Strategic that the Plan is capable of being cured as argued in paragraph 2.3 because the defects are too significant, and the *Cogent Land* and *No Adastral New Town Ltd* decisions are clearly distinguishable. Furthermore, in the light of the case law identified in paragraph 23 above, and the manner in which the garden communities concept has been advanced by the NEA, in my opinion the consultation process needs also to consider, in the light of the inclusion of Monks Wood, all reasonable alternatives to the garden communities concept, bearing in mind that originally the Braintree Local Plan was being promoted without any garden community being mooted.

27. In my view the approach of Collins J in *Save Historic Newmarket* and Ouseley J in *Heard* represents the correct legal approach to take and that the Plan preparation should be start all over again. However, I do agree with the submission in paragraph 2.4 that any permissible revisions must not fall into the trap of 'ex post facto' rationalisations and that this must apply to any new Plan.

28. I agree with the thrust of Lightwood Strategic's observations in paragraphs 2.6 – 2.23.

Have the North Essex Authorities complied with all other relevant legislative requirements in the preparation and submission of the Section 1 Plan?

29. I see no reason to disagree with Lightwood Strategic's view as set out in paragraphs 7.1 – 7.8. I note that at paragraph 7.7 Lightwood Strategic recognise the clear prejudice suffered by CAUSE and others. However, I do not believe that this goes far enough.

30. For the reasons set out in paragraph 23 above, it would be wrong to simply limit considerations under this question to the relevant legislative requirements. Those requirements cannot be viewed in isolation but must be seen in the context of the relevant applicable case law relating to statutory duties to consult with the public and public participation in accordance with Aarhus Convention requirements.

31. It follows that for reasons that CAUSE have identified before, there are many deeply troubling aspects of the consultation process that appear to run counter to established case law and especially the judgment of the Supreme Court in *Moseley (supra)*. Therefore, the consultation process regarding the Plan does not meet the legislative requirements when the relevant case law is taken into consideration, as it must.

Do the Vision for North Essex and the Strategic Objectives provide an appropriate framework for the policies of the Section 1 Plan?

32. I agree with Lightwood Strategic's observations in paragraphs 9.1 – 9.3. I particularly agree with the description of "the vast scale of the Garden Communities, committing to 43,000 units now to deliver 7,500 units in the plan period." Paragraph 9.2 is highly relevant and to an extent echoes the observations that I made in my original Opinion.

33. It follows from the above that, in my opinion, the current Plan is fundamentally flawed and that these flaws cannot be cured by a simple *Cogent Land* sticking plaster approach. However, it is very important that the inspector is made aware of these concerns immediately because, if any statutory challenge under section113 is subsequently mounted based on these concerns, the court will expect that these concerns were first raised with the inspector at the earliest opportunity and will demand to see evidence of this. If not, then it is likely that the court will dismiss the challenge on that basis alone.

34. Whilst it is not strictly necessary at this stage to consider this further point, it could be said that the relative haste in which these proposals emerged from central government raises questions as to whether the planning system in general, and the SA/SEA process in particular is being manipulated for reasons of political expediency. It also leads to concerns as whether there are any identified legal difficulties in central government or the NEA seeking to utilise the New Towns Act 1981 and given that this legislation pre-dates the SEA Directive and its implementation in the UK and, therefore, may be incompatible with EU legislation in the absence of proper SA/SEA of the overall concept of new garden towns and villages in the 21st century.

35. The concept of new garden communities has been promoted actively by the Town and Country Planning Association since 2011 when it published its document "Re-imagining garden cities for the 21st century" which was followed by a suite of documents including "Land value capture and infrastructure delivery through SLICs" (Strategic Land and Infrastructure Contracts). The concept was also actively supported by the free-market think tanks Policy Exchange (2016) and the Centre for Policy Studies (2014).)

36. Given the above observations, and the fact that the NEA have admitted that there have been substantial discussions with, and encouragement from, central government regarding the NEA garden communities (which arguably is self-evident from the White Paper) then the nature and scope of central government's involvement may well be a central issue in any section 113 legal

challenge and, if so, both the NEA and central government will be bound by the duty of candour to disclose to CAUSE, and to the court, full details of all contact (whether meetings, emails, correspondence and telephone discussions) between all those involved at the NEA and in central government (including ministers and senior officials) in order to establish whether the normal principles of planning law, and the public participation requirements of the Aarhus Convention, have not been circumvented or ignored.

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