

Matter 1: Legal and procedural requirements; Key Issues, Vision and Strategic Objectives (Chapter 1)

Main issues: 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 and legal compliance?

Questions:

1)Is there clear evidence that, in the preparation of the Section 1 Plan, the North Essex Authorities [NEAs] 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]?

(a) Did the NEAs meet the Duty to Co-operate in respect of their handling of the proposals by Lightwood Strategic for the inclusion in the Section 1 Plan of a new settlement [“Monks Wood”] on the Pattiswick Estate to the east of Braintree, particularly in respect of:

The NEAs note that the Duty to Co-operate requires co-operation between the relevant parties in relation to strategic issues. The extent of that duty in relation to any objection depends on the nature of the objection, and is affected by the planning authority's view on whether or not changes are likely to be made to the plan as a consequence of the objection.

(i) co-operation between the NEAs themselves, and

The NEAs have met the Duty to Co-operate in respect of the consideration of the Lightwood Strategic proposal for a new community at Monks Wood. Co-operation between the local authorities has been constructive, active and carried out on an ongoing basis to maximise the effectiveness of the Plan making process. The NEAs undertook fortnightly meeting throughout the Local Plan preparation to make all decisions on common issues jointly on the progression of the Local Plan to examination, and then through the examination sessions. The Monks Wood proposal was regularly discussed at those meetings. Specifically, this consideration resulted in the commissioning of several pieces of external work including:

- The joint commissioning of AECOM to undertake an independent assessment of the Monks Wood alternative option (alongside the Metrotown alternative option and North Colchester). As noted by Lightwood, AECOM commenced their assessment of Monks Wood later than the assessment of other alternative locations for garden communities largely because Monks Wood was identified as an alternative later than the others and information requested by Braintree to inform the assessment was not forthcoming.

- The joint commissioning of the Section 1 Sustainability Appraisal and the joint agreement of alternative spatial options considered therein.
- The joint commissioning of representatives of NEGC and Arcadis to meet with Lightwood Strategic and consider the opportunities for the site to meet the requirements of the North Essex Garden Community principles with regard to land value capture.

The Councils fully shared all information received on Monks Wood and it was considered alongside other strategic options for development. A timeline identifying the exchanges with Lightwood and the NEAs is attached at Appendix 1. As between the authorities there is no doubt that there was co-operation in relation to all relevant issues.

(ii) co-operation with neighbouring authorities and prescribed bodies?

As set out in the Braintree Duty to Co-operate Statement, the Preferred Option Local Plan and Submission Local Plan were subject to consultation and co-operation with all neighbouring authorities and prescribed bodies.

The objection and the sustainability analysis of the Monks Wood proposal was in the public domain and interested prescribed bodies would have been aware of it and it was open to them to comment on these proposals. The NEAs take the view, in the circumstances of the emerging preferred options, that the Duty to Co-Operate does not extend to a positive duty on local authorities to draw specific objection sites to the attention of neighbouring authorities and prescribed bodies.

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

The NEA believe that they have complied with their SA requirements. The evolving and preferred options have been tested alongside reasonable alternatives. The alternatives have included Monks Wood (and other options) and a combination of the preferred locations. Size has been considered appropriately to the extent that it is a factor determining the preferred locations of the garden communities. More than adequate evidence on the strategic environmental effects was available to the NEAs in order to make a proper planning judgement about the most appropriate development strategy. They chose a strategy that did not include Monks Wood. A critique of alleged failings in the SA should not be used as a vehicle for undermining that preferred strategy.

(a) Should the individual SA assessment of the Monks Wood proposal, and the assessment of alternatives for the spatial strategy, have been carried on the basis that Monks Wood could be delivered at various different scales of development?

Appendix 1 of the Sustainability Appraisal (June 2017) ('the SA') includes an assessment of the comparative sustainability pros and cons of alternatives for delivering strategic scale

growth in the North Essex Area. The Framework for Assessing Garden Community Options is detailed in Table 7 of the SA (page 61) and was formulated using Garden City Principles. The same Framework was used for assessing Monks Wood in the AECOM's Evaluation of Alternatives: Monks Wood, Braintree (ref: EB/010) and is detailed in Section 3 (page 37 onwards) of that document.

The assessment of Garden Community options (and sub-options) has been undertaken on a basis that allows comparison of options. As detailed on page 61 of the SA, the appraisal of Garden Community options was assessed on a largely qualitative basis in line with the strategic nature of each option and the information available for each option at that point.

The housing related SA Objective (6), which forms part of the Framework for Assessing Garden Community Options, is titled 'Provision of a mix of tenures, including affordable homes and a range of housing types (including self-build/custom build and gypsy and traveller pitches).' This is the only Objective within the SA to which scale of development has any bearing. The Monks Wood site was identified in the Sworders document provided to Braintree District Council on 9 March 2016 as having a total site area of c.845 hectares, with reference made to an indicative masterplan covering c.540 hectares. That site area informed the AECOM assessment of the site's development capacity (page 32 of EB/010). Significantly positive impacts were assessed for the Monks Wood option in line with this SA Objective. On page 210 of the SA it is stated that, '*the Monks Wood Garden Community Option can be expected to have significantly positive impacts at this stage, and are all indistinguishable in regard to the opportunities of each option to adhere to relevant Garden City Principles regarding housing supply, type and tenure including gypsy and traveller provision.*' Aside from the Metro Plan option, all the Garden Community options were assessed as having a strong prospect of fully meeting the criteria of this SA Objective with significant wider benefits due to their scale and availability.

The approach taken was to assess the spatial strategy options within the SA at a high-level, exploring the broad geographical scope and whether they have any cumulative environmental, social and economic effects. The precise quantum (i.e. the scale of development) of the various Garden Community options was not a consideration in that assessment. As a result the assessment in the AECOM Evaluation of Alternatives (ref: EB/010) of Monks Wood at a single quantum does not affect the adequacy of the exercise undertaken.

(b) If so, what other scale(s) of development at Monks Wood should have been assessed?

As explained in response to question (a), the relative overall scale of development was not a consideration in the assessment of alternatives and so there was no need to assess other scales of development for Monks Wood as part of that exercise.

Dwelling numbers were considered as part of the exercise of identifying reasonable alternatives, however no comparative assessment was undertaken for different scales as part of the SA as they could all be expected to provide 'a mix of tenures, including

affordable homes and a range of housing types' as per the aspirations of SA Objective 6 (Housing). Similarly, all options explored were considered 'deliverable' in the sense of commercial attractiveness, with different effects identified regarding whether they are deemed capable of delivering necessary physical / social / green infrastructure (as per SA Objective 10). The SA acknowledges that the Monks Wood option is available and is in single ownership; however uncertainty surrounds the ability to deliver necessary infrastructure on site, particularly regarding the re-routing of the A120 and utility infrastructure as identified in the AECOM Concept Feasibility Study (EB/010). The same uncertainty regarding the A120 routing consultation is considered as part of the Colchester/Braintree Borders appraisal.

The SA on page 220, states that, *'the proposal was submitted during the Braintree District Council Preferred Options Local Plan consultation by a single promoter and the land is in single ownership. As greenfield agricultural land with direct access from the existing A120, the proposal indicates that development could be commenced relatively quickly and within 6-10 years, although much depends on the preferred route emanating from the A120 re-routing consultation. The extent of first phase development could be constrained by the need to invest heavily in utility infrastructure, which is consistent with the site's rural location is currently very limited [sic] in terms of physical networks and capacity; however for the purposes of a consistent appraisal across all options, impacts are identified as similar to those of other rural locations. Overall, uncertain impacts are highlighted.'*

Indicative dwelling numbers were not a consideration in the assessment of Monks Wood or any of the options against any SA Objectives. Some Garden Community sub-options, at different scales, have been assessed in the SA to explore the different land-take implications of these. The main purpose of this exercise was to identify environmental constraints within the various areas (EB/008). The assessed sub-options were taken from the AECOM Concept Feasibility Study (EB/008). This enabled the assessment of Garden Community options in the SA to be undertaken to the same level of detail, as a consistent methodology was used between the AECOM Studies and the SA.

The AECOM Evaluation of Alternatives Report for Monks Wood identified only one land-take option. The SA assessed land-take options as they were submitted and details provided as part of the Local Plan process. It was not considered appropriate within the SA or the AECOM Concept Feasibility Study sub-divide the originally submitted Monks Wood option into smaller land-take options. There would have been numerous potential sub-options to assess within the SA, with no suggestion that such lesser options were reasonable alternatives, being both realistic and deliverable.

Lightwood identified 4 different land-take options and presented these for the first time to the Councils on the 31st March 2017. This did not allow sufficient time for them to be factored into the finalised AECOM Evaluation of Alternatives Study for Monks Wood and the subsequent SA, which was finalised in early May 2017. Nor did the timeframes allow for the assessment of the 'settled' quantum of 7,000 homes at Monks Wood notified on 9 April 2017. Monks Wood was assessed based on the information available. It should be noted however that provided options met the 5,000 dwelling limit, quantum was treated the same way in the assessment of the Garden Community options and the assessment of alternatives for the spatial strategy.

(c) Should the SA assessment of combinations of three proposed garden communities also have assessed a combination or combinations that included Monks Wood together with various scales of development at Colchester/Braintree Borders and Tendring/Colchester Borders?

The SA explored Garden Community combinations on a scenario basis (scenarios are identified on page 227). These scenarios are set out in the right-hand column of the table on page 227 of the SA. The assessment of scenarios focused on the cumulative effects of Garden Communities in broad areas.

The combination of West of Braintree, Tendring /Colchester Borders and Monks Wood was explored in Alternative Scenario 1. This scenario was identified in light of an assumption that A120 re-routing will either benefit (i.e. improve access to) one of Monks Wood or the Colchester / Braintree Borders Garden Community¹.

Alternative Scenario 5 (representing a western focus of Garden Communities to address the fact that housing in Braintree is relatively unaffordable) assesses the combination of Monks Wood and Colchester / Braintree Borders; thus the assessment of these two Garden Communities cumulatively has been undertaken. A number of negative impacts were assessed from the combination of the Monks Wood and Colchester / Braintree Borders GC due to their relative close proximity. Page 229 of the SA also includes that, *'based on an assumption that the Monks Wood and Colchester / Braintree Borders options would not both be viable / developable from any one A120 re-routing option, the access implications surrounding both would likely have some negative impacts in the broad area.'* This is reflected within the NEAs 'reason for rejection' for Alternative Scenario 5 within table 30 (page 241 - 242) of the SA. Further, Alternative scenario 5 was discounted by the NEAs as 'the deliverability and sustainability of Garden Communities was considered to be best served by their location in three distinct areas of the strategic area' (page 243 of the SA). The NEAs were entitled to exercise planning judgement in reaching a view that there was a spatial logic to dispersing the new communities along the A120 corridor. As the option of Monks Wood together with Colchester/Braintree Borders and Tendring/Colchester Borders is not distinctively different to Alternative 5, there was considered no reason to include it within the SA as a reasonable alternative.

Scales of development were not a consideration within the SA in the assessment of Garden Community combinations. In order to focus on whether effects could be considered 'significant', the maximum land-take options were used in the assessment. It was not felt to be necessary to assess scales of alternative development. Considering Monks Wood together with the sites forming part of Alternatives 1 and 5 would not have changed the main identified effects arising from each site's broad geographic location in any event.

¹ The Inspector is asked to note that there is a typo in Column 5 of the table on page 227 of the Sustainability Appraisal which incorrectly refers to the re-routing of the A120 benefitting one of Monks Wood or the Colchester/Tendring Borders Garden Community. This should refer it to benefitting one of Monks Wood or the Colchester/Braintree Borders Garden Community.

(d) If so, what specific combination(s) should have been assessed?

It is considered that the SA included the assessment of all reasonable alternative combinations. Planning Practice Guidance for Sustainability Appraisal states that ‘reasonable alternatives are the different realistic options considered by the plan-maker in developing the policies in its plan. They must be sufficiently distinct to highlight the different sustainability implications of each.’ As a result, it is not necessary for authorities to explore every possible permutation. The NEAs considered the combination of West of Braintree, Tendring/Colchester Borders and Monks Wood at their maximum extent as part of Alternative Scenario 1. Having concluded that this combination would include too much of a Braintree focus, it was not necessary for the NEAs to then consider alternative scales of development with a similar Braintree focus. Ultimately, the identification of reasonable alternatives is a matter of evaluative assessment for the NEAs.

(e) If the Inspector finds that there are shortcomings in the SA in respect of (a) and/or (c) above:

(i) would this mean that the SA fails to comply with relevant legal requirements?

(ii) which specific requirements are those?

(iii) what steps would be required to make the SA legally compliant?

The NEA do not believe that there are any material shortcomings in the SA. If the Inspector concludes otherwise then an updated SA will be required.

The NEAs anticipate that there will be a need for Proposed Modifications to the Section 1 Plan and that that will have to be supported by an updated SA. The scope of that SA could be expanded to ensure that any shortcomings in the original are addressed.

The NEAs would then have to consider, before publishing the Proposed Modifications, whether the conclusions of that updated SA give reasons to change the strategy in Section 1 as proposed to be modified. If not then the modifications and the supporting updated SA would be published for public consultation, with any objections being provided to the Inspector before a final decision could be made on the Local Plan.

If the NEA concluded that the updated SA provided evidence that required an amendment to the Section 1 Plan then the consequences of that would have to be addressed at that time and the implications would depend on the nature of the proposed change.

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

(a) Is it agreed that, as a consequence of the NEAs’ failure to register Lightwood Strategic’s duly-made representations at Regulation 19 consultation stage, the following

Regulations were breached in respect of those representations, and consequently that section 20(3) of the Planning and Compulsory Purchase Act 2004 was also breached?:

- i. Regulation 22(1)(c) – requirement to prepare a statement of representations and submit it to the Secretary of State: the failure in this respect is that the submitted statement did not accurately set out the number of representations made or summarise all the main issues raised in those representations**
- ii. Regulation 22(1)(d) – requirement to submit all representations to the Secretary of State**
- iii. Regulation 22(3)(a)(iii) – requirement to make all representations publicly available**
- iv. Regulation 22(3)(b) – requirement to notify the general consultation bodies and specific consultation bodies that representations are available for inspection: notification was given as required, therefore any failure in this respect is that not all the representations were available for inspection**
- v. Regulation 22(3)(c) – requirement to notify those who so request of the submission of the Local Plan to the Secretary of State**
- vi. Regulation 24 – requirement to give all those making representations six weeks’ notice of the opening of the hearing sessions**

The NEAs accept that they have not fully complied with the requirements of Regulation 22 and 24, and Section 20.

(b) Taking into account all the steps that have been taken to enable Lightwood Strategic to participate in the examination process, since the Inspector was alerted on 18 January 2018 to the NEAs’ failure to register their duly-made representations, in what way(s) might Lightwood Strategic’s interests, the interests of any other party or parties, and/or the interests of natural justice be prejudiced by those breaches?

The consequence of a breach of Regulations 22 and 24, and consequently Section 20(3) depends on the nature of the breach and the steps that have been taken to remedy it.

For example, a failure to provide one of the objections to the Secretary of State on the due date is easily corrected by late submission and cannot, conceivably, be said to lead to an incurable flaw.

The response to that failure has been proportionate. Lightwood were able to participate in the Examination and did so fully. Their objection has been considered by all parties. They have had the opportunity to submit additional information. An additional examination day has been scheduled to make sure that the other issues on which they wished to comment can be heard. Third parties have been made fully aware of the objections.

The NEAs deeply regret the inconvenience that has been caused to Lightwood by the failure to register their objection but believe that the steps that have been taken make it lawful for the plan to continue to adoption if found to be sound and have satisfied other legal requirements.

(c) Are there any other relevant legislative requirements, not identified elsewhere on this agenda, with which the NEAs have failed to comply in the preparation and submission of the Section 1 Plan? If so, what are the consequences of that failure, and how can it be remedied?

The NEAs are not aware of any other legislative requirements that have not been met.

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

(a) Is it lawful for a Local Plan and its policies to require or encourage

(i) new approaches to delivery and partnership working, and

(ii) the sharing between the public and private sectors of risk and reward* from development?

The NEAs have taken an innovative approach, consistent with the Duty to Co-operate, in promoting a common Section 1 Local Plan. They have been bold in promoting three garden communities taking a long term view, and looking beyond the plan period, at how they want North Essex to develop. In order to secure the delivery of high quality garden communities they have been actively exploring different models of development, and have set up the wholly owned North Essex Garden Communities Limited as a potential delivery vehicle. Alongside that, and subject to the Local Plan being found sound, they have also been reviewing the possibility of requesting that the Secretary of State uses the powers in the Neighbourhood Planning Act 2017 to designate the garden communities as locally led new towns and to create a development corporation. The Regulations which enable the designation of locally led new towns are expected to be laid before Parliament in April 2018. The role that that a locally-led new town development corporation could play as a delivery vehicle for the North Essex Garden Communities is recognised and supported by the Secretary of State for Housing, Communities and Local Government (see attached correspondence between the Secretary of State and Bernard Jenkins MP at Appendix 2.)

The local authorities have promoted three garden communities in part because of their dissatisfaction with the way in which major development is otherwise delivered. They do not want more of the same and are challenging land owners, developers and the community to find and use new and better ways to deliver new homes, employment space and the social infrastructure required to support it. The NEAs think that that ambition should be reflected in the Local Plan.

The NEAs have suggested the deletion of the reference to the public and private sector sharing risk and reward from the Local Plan. It is capable of misinterpretation. Whatever approach to delivery is adopted for the garden communities the public sector will be making a significant investment in them. There is a commitment to ensure that infrastructure is provided at the appropriate time which will, at least, require the public sector to forward fund it. There is a commitment to major infrastructure upgrades in the area which will be partially public sector funded. There is proposed investment in rapid transit that will be

shaped around the new communities. The public sector will be taking risk in making these investments. The reward will largely come in the ability to secure high quality new communities in the right place and at the right time. It will also come in ensuring that that success allows repayment, as far as is lawful and reasonable, of the investment by the public sector in bringing it forward.

While the NEAs accept that the words should not be used (and were not intended to be used) as a means of "profit sharing" or "interest farming" they were meant to be a clear signal that the new communities would be expected to pay for their fair share of the overall infrastructure investment, and that land values would have to adjust to reflect that. The NEAs accept that a local authority can only charge for its services where authorised expressly or by necessary implication (as per *Attorney-General v Wilts United Dairies Ltd* (EXD/021/A). The NEAs anticipate that the deletion of the words 'risk and reward' will remove any misunderstanding that the policy purports to levy such charges as a condition of garden community development. The wording is not intended to levy such charges, and nor have the NEAs threatened to do so as the reference to *Congreve v Secretary of State for Home Office* [1976] 1 QB suggests (EXD/021B). The wording was to intended to capture the principle that developers are expected to make a fair contribution to the overall infrastructure requirements of the new communities, recognising the upfront risk that the local authorities will be taking in forward-funding that infrastructure. In light of the deletion of the 'risk and reward' wording the NEAs do not consider it necessary to comment further on EXD/021/A or EXD/021B.

The Inspector has been provided with a copy of the case of *Hazell v London Borough [of Hammersmith and Fulham 1992] 2 AC 1* (EXD/021C). It was suggested to the Inspector that in seeking to share 'risk and reward' the NEAs would be acting beyond their statutory powers, although there appears to be some confusion whether specific reference to this case was intended. It is anticipated that the deletion of this wording will settle any misinterpretation which has resulted and negate the need for legal submissions on this case at the further hearing session.

Hazell v London Borough of Hammersmith and Fulham concerned the application of Section 111 Local Government Act 1972. Under Section 111 under a local authority has the "power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions." As referenced in paragraph C on page 22 of the judgement, planning is plainly a function of a local authority, so subject to other legislative controls, a local authority has a broad power to do that which is conducive to the discharge of that function.

The NEAs are aware of the importance of the separation of powers and do not consider that the Local Plan in any way undermines that. The NEAs do not necessary to comment further on this point or on the case of *M v Home Office [1993] UKHL 5* (EXD/021/D).

**** Participants are asked to note that the NEAs now propose to remove the reference to “risk and reward” from the Vision for North Essex (and from policy SP7)***

Appendix 1 - Timeline identifying the exchanges with Lightwood and the NEAs

Appendix 2 - Correspondence between the Secretary of State and Bernard Jenkins MP