RE: BRAINTREE, PART 2 LOCAL PLAN EXAMINATION

OPINION

Introduction

1. We are asked by Emery Planning to advise the Williams Group on matters that have arisen during the examination of Part 2 of the Braintree Local Plan ("BLP2").

2. Emery in their submissions on "Main Matter 1: Legal Requirements and Overarching Issues relating solely to the policies within BLP Section 2" raised a number of serious concerns about the sustainability appraisal ("the SA") that the BLP2 had been subject to. During the hearing session on this matter Braintree District Council ("the Council") accepted that the SA the BLP2 had been subject to needed to be updated. However, they contended that this update could be carried out once the Inspector had recommended main modifications.

3. It will be recalled that the part 1 local plan had been subject to not dis-similar concerns when it was first presented to the examination hearing some years ago, resulting in a substantial body of work which was then separately consulted upon.

4. It has also become apparent during the hearing sessions that the Council have produced a number of documents upon which they rely to support matters fundamental to the BLP2, for example development boundaries, that they have inexplicably not previously disclosed to participants to the examination, prior to their attendance at the hearing sessions.

5. We are asked to advise on the following matters:

    a. The ability to carry out an updated SA process at the Main Modifications stage and the implications for the robustness/legality of the BLP2; and
    b. The duty of disclosure that is imposed on the Council during the examination process and the consequent ability to conduct a meaningful examination hearing in accordance with the principles of natural justice in the circumstances.

Sustainability Appraisal

Legal Framework

6. The requirement to produce a sustainability appraisal is contained in s.19 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"):

   "*(5) The local planning authority must also—*
   (a) carry out an appraisal of the sustainability of the proposals in each [development plan document];
   (b) prepare a report of the findings of the appraisal."

7. What must be contained in such an appraisal is governed by the Environmental Assessment of Plans and Programmes Regulations 2004 ("the 2004 Regs"). In particular regulation 12 requires:

   "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of—
   (a) implementing the plan or programme; and
   (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
   (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of—
   (a) current knowledge and methods of assessment;
   (b) the contents and level of detail in the plan or programme;
   (c) the stage of the plan or programme in the decision-making process; and
   (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

8. Failure to comply with these requirements have led to the quashing of development plans. In *Heard v Broadland District Council, South Norfolk District Council, Norwich City Council* [2012] EWHC 344 (Admin) Ousley J found that the Joint Core Strategy subject of the challenge was legally flawed due to a failure to carry out a proper assessment of reasonable alternatives in the sustainability appraisal. In doing so he found at [71]:

"71. There is no express requirement in the directive either that alternatives be appraised to the same level as the preferred option. Mr Harwood again relies on the Commission guidance to evidence a legal obligation left unexpressed in the directive. Again, it seems to me that, although there is a case for the examination of a preferred option in greater detail, the aim of the directive, which may affect which alternatives it is reasonable to select, is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination along side whatever, even at the outset, may be the preferred option. It is part of the purpose of this process to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of what the authority regards as reasonable alternatives."

9. Regulation 13 of the 2004 Regs imposes a duty to consult in relation to development plans and relevant documents:

"*13.— Consultation procedures*
(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report ("the relevant documents") shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.
(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall–
...
(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent.
(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents."

10. The courts have unequivocally confirmed that the requirement under this regulation is for effective consultation. For example at [93] in *Linda Kendall v Rochford District Council* [2014] EWHC 3866 (Admin) Lindblom J (as he then was) stated:

"*As is explicit in article 6(2) and implicit in regulation 13(2)(d) and (3) , the opportunity given to the public to express their opinions on the documents, including, perhaps most importantly, their opinions on the assessment of alternative allocations in the sustainability*

appraisal, had to be not merely an "early" opportunity but also an "effective" one. It would only have been an effective opportunity if those being consulted were conscious of it and able to act on it in time."

Discussion

11. The BLP2 was progressed in parallel to the Part 1 Local Plan ("BLP1") and was submitted to PINS at the same time in October 2017. However, the BLP1 Examination took over 3 years and during this time the BLP2 was put on hold. During the BLP1 examination fundamental concerns were raised by a number of parties in respect of the sustainability appraisal carried out to accompany the BLP1 with the consequence that the Examination was paused to allow revised and updated sustainability assessments to be carried out. The additional sustainability work was subject to consultation and subsequently updated Matter/hearing statements for the BLP1.

12. The Inspector who examined BLP1, Roger Clews, found extensive failings in the sustainability appraisal which supported it. In his view, these had to be addressed before the plan could be progressed. These were detailed in Inspector Clews' letter of 8.6.18 most notably at [93] – [129]. The Council opted to follow Option 2 of Inspector Clews' suggestions to remedy the situation. Inspector Clews identified that this would have consequences for BLP2 in his letter of 8.6.18:

"*153. It seems to me that in this option the Section 2 examinations could not sensibly proceed before the additional Section 1 hearings had taken place and the Inspector's initial views on the revised proposals were known, as any significant revisions to Section 1 would have consequences for the examination of Section 2.*
154. It is also possible under Option 2 that other parts of the evidence base for both Section 1 and Section 2 might become out of date or overtaken by changes in national policy. Should this occur, there would be a risk of additional delay to the examination of both parts of the Plan while the relevant evidence is updated and any necessary modifications are brought forward."

13. It is now clear, and accepted by the Council, that parts of the evidence base for the BLP2 (notably the SA) have become out of date. It rightly now accepts that the SA must therefore be updated in order for the legal requirements set out above to be complied with. In our opinion it is clear that Inspector Clews anticipated that in this scenario the SA update would take place prior to the examination of the BLP2 so that it could meaningfully inform that

examination. For reasons that are difficult to discern, that has so far not taken place, and the examination is being conducted against a backdrop of an out of date SA which is one of the central documents to the process. This is contrary to the approach proposed by Inspector Clews, and is an obvious procedural failing on the part of the Council.

14. It is important to recognise that the SA is not simply out of date because of the passage of time but because the plan strategy which it is supposed to assess has fundamentally changed. The BLP1 was modified by the removal of two of the garden communities, the impact of that is very significant and has not been assessed as part of the SA for the BLP2. These are not minor changes but ones that go to the heart of the Council's planning strategy.

15. Regardless of what Inspector Clews envisaged happening, the legal duties imposed by the 2004 Act and the 2004 Regs remain. It is right that SA addendums can be produced to address changed circumstances but they have to be done in a manner that properly considers reasonable alternatives. Failure to do so constitutes a clear legal error. If the SA update occurs at the main modification stage, we struggle to see how this requirement could be met. By carrying out an SA update at that stage it would essentially amount to an ex-post facto justification of the approach taken in BLP2 rather than a genuine assessment of reasonable alternatives.

16. Further, the SA should be subject to meaningful consultation. For the consultation to be meaningful the outcome of it must have the ability to influence the plan making process. Carrying out the SA update (which it is agreed is necessary) at the main modifications stage does not seem to afford any consultees (or the public) the ability to make meaningful representations on what the outcomes of that exercise mean for BLP2. Furthermore, whilst the courts have held that the production of an SA can occur over time, by supplements, nonetheless it is intended to inform the examination, which includes the undertaking of the examination hearings. Without a proper SA being available to inform how the Council contends that the plan is justified, the task of the objectors and more importantly, the Inspector is seriously hampered. Were the necessary changes minor or comparatively trivial then the point would not arise – but here the point is fundamental and ought to have been addressed long before the hearing sessions.

17. Thus, as a matter of pure logic, it is agreed that the SA should inform the BLP2, it is agreed that the SA is relevant to all the matters that are to be discussed at the current examination and it is agreed that the SA is out of date. It must also, presumably be accepted that the flaws with the SA are not trivial or minor but are fundamental – were the plan to be adopted on the

basis of the current SA then it would undoubtedly be subject to a quashing order by the Courts as being legally defective (were such an application made under s113 of the 2004 Act). In the absence of the up to date information that ought to be contained in the SA, it seems to us obvious that the examination cannot meaningfully explore all the issues it needs to as it simply does not have the necessary up to date information to inform that process whose efficacy would be seriously undermined.

18. In our opinion the proposed route of dealing with the SA update at the main modifications stage, given that the flaws in the document are fundamental, is likely to be in conflict with the legal obligations set out in the 2004 Act and the 2004 Regs. At the very least, the approach is lacking in sound planning logic, and is unfair to participants since it deprives them of sight of a key part of the Council's justification at the point that the plan is subject to hearing sessions. This flaw is particularly egregious for those participants who are promoting strategies involving large scale urban extensions which are intended to be reactive to the changes arising from the part 1 Local Plan

19. The most obvious way to avoid falling into legal error, which runs the risk of undermining the entire BLP2, would be to adjourn the examination now to allow the necessary SA work to be undertaken in a tight timescale, so that it can meaningfully inform the plan making process.

Disclosure

Legal Framework

20. A common law duty of fairness applies to all public proceedings. The principles of which were summarised in the seminal House of Lords case of *Regina v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531:

"*What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not*

to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

21. Procedural fairness is a common ground of challenge to planning decisions. The issues were well explored in *Dyason v The Secretary of State for the Environment & Anr* [1998] JPL 778 which concerned a challenge to a planning appeal that had been conducted by the informal hearing procedure. The opinion of Lord Justice Pill at 784 is informative:

"*There is a danger upon the procedure now followed by the Secretary of State of observing the right to be heard by holding a 'hearing', that can lead for such consideration is forgotten. The danger is that the "more relaxed" atmosphere could lead not to a "full and fair" hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an inspector*."

Discussion

22. Failure to disclose documents which the Council rely upon to justify the approach taken in the BLP2 would constitute a clear error of law:

    a. One of the purposes of the regime created by the 2004 Act and the 2004 Regs is that it allows "early and effective" consultation with stakeholders. That simply cannot be fulfilled if essential documents are not disclosed to all parties and they are not given time to properly consider them and make representations on them;
    b. The examination in public is bound to be conducted in accordance with the common law principle of fairness. What that requires in any given situation varies, however, it seems to us unarguable that at a minimum it requires that all parties to a proceeding

are provided with copies of any material that another party wishes to rely upon. This is particularly so where the information is highly relevant to a matter of principle importance and a matter that a party has made submissions on. In the absence of the disclosure of material it is impossible for a party, in this case Williams Gallagher through their representatives Emery, to meaningfully engage in the examination. In the absence of early disclosure the examination will be procedurally unfair; and

c. The Inspector as the decision maker and individual responsible for the conduct of the examination has a duty to ensure that the process is conducted fairly. In the absence of requiring disclosure and providing affected parties proper time to consider and respond to such material, in our opinion, the Inspector would be failing in that duty.

23. In our opinion these propositions are uncontroversial. It is a trite matter that public proceedings must be conducted fairly and failure to disclose relevant material is a quintessential failure that creates unfairness. To proceed without affording the parties a proper opportunity to read and react to key documents is plainly procedurally unfair and to proceed with the hearings without enabling the opportunity to properly address their content would be in tension with fundamental principles of natural justice.

Conclusion

24. In our opinion:
    a. The proposed course of action to address the need for an updated SA raises numerous potential conflicts with the 2004 Act and the 2004 Regs;
    b. The soundest way forward would be to adjourn the examination so that the updated SA work can take place; and
    c. The Council must disclose any documents they wish to rely on as part of the justification for the BLP2 and consultees must be afforded reasonable time to consider them and make representations on them.

25. We advise accordingly. If we can be of any further assistance to those instructing they should not hesitate to contact us.

PAUL G TUCKER QC

FREDDIE HUMPHREYS

7th July 2021

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