RE: BRAINTREE LOCAL PLAN SECTION 2

SUSTAINABILITY APPRAISAL

RESPONSE OF BRAINTREE DISTRICT COUNCIL TO COUNSEL OPINION SUBMITTED BY THE WILLIAMS GROUP

INTRODUCTION

1. This is the response of Braintree District Council ("the Council") to the Opinion of Paul Tucker QC and Freddie Humphreys dated 7th July 2021 ("the PT/FH Opinion") which was submitted by the Williams Group to the examination of the Braintree Local Plan Section 2 ("the Section 2 Plan").

2. This response addresses the two separate issues raised in the PT/FH Opinion, namely:

   (1) Whether undertaking an update to the sustainability appraisal ("SA") of the Section 2 Plan, and consulting on that update, in conjunction with main modification consultation would meet the legal requirements established in the SEA Directive[1], as transposed into domestic law by the SEA Regulations.[2]

   (2) The duty of disclosure, and issues of procedural fairness.

3. This response also takes account of the additional submissions that have been made by other parties following the submission of the PT/FH Opinion.[3]

COMPLIANCE WITH THE SEA DIRECTIVE/REGULATIONS

The Legal Framework

4. Article 4(1) of the SEA Directive requires an environmental assessment to be carried out *"during the preparation of a plan or programme and before its adoption…." (emphasis added)*.

5. Article 2(b) defines "environmental assessment" for the purposes of the SEA Directive as follows:

   > *"'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the*

[1] Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment

[2] Environmental Assessment of Plans and Programmes Regulations 2004

[3] There have been three. From Edward Gittens on behalf of the Granville Group (13th July 2021); Gladman Developments (13th July) and Mark East (17th July).

results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9".

6. Accordingly, the environmental report – which in this case means the Section 2 Plan Sustainability Appraisal Report (July 2017) ("the Section 2 Plan SA") and would include any subsequent update to it – forms part of the environmental assessment but does not constitute the entirety of that assessment. The environmental assessment also includes *inter alia* the consultations responses, as well as the taking account of the results of the sustainability appraisal, and responses to it, as part of the examination process.

7. Article 5 sets out requirements for an "environmental report". It provides:

> *"Where an environmental assessment is required under article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."*

8. Given the contents of the PT/FH Opinion it is not necessary to set out the contents of Annex I (which are transposed into domestic law by Regulation 12 and Schedule 2 of the SEA Regulations).

9. Article 6 sets out requirements for consultation. Article 6(1) requires that the draft plan and the environmental report be made available *inter alia* to the public. Article 6(2) provides that:

> *"The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report <u>before the adoption of the plan</u>…" <u>(emphasis added)</u>*

10. The SEA Directive does not stipulate what is required in order for the consultation to be "effective". It is necessarily fact specific. It is clear, however, that effective consultation must be undertaken at a time before the *adoption* of the plan. This, therefore, undoubtedly allows consultation on the sustainability appraisal (or any update to the sustainability appraisal) to take place during the examination process itself.

11. Regulation 13 of the SEA Regulations transposes Article 6(2) into domestic law. It requires *inter alia* that the consultation period on the draft plan and the environmental report *"must be of such a 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"*[4]: Regulation 13(3).

12. Article 8 requires the environmental report prepared under article 5 and the opinions expressed under article 6 to be *"taken into account during the preparation of the plan or programme*

[4] The 'relevant documents' being the draft plan, and its accompanying environmental report: Reg 13(1)

and before its adoption…" (emphasis added). This requirement is transposed into domestic law by Regulation 8 of the SEA Regulations.

13. In *R (oao Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52 the Supreme Court, having set out the relevant provisions of the SEA Directive, summarised and approved earlier case-law concerning the iterative nature of the environmental assessment process, as well as the ability to "cure" defects in environmental reports as part of that process:

> *"66. In Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2, Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111-126). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88; [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48-54). We agree with this analysis.*
>
> *67. It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7."*

14. The Supreme Court also confirmed, by reference to Article 5 of the SEA Directive and Regulation 12 of the SEA Regulations that, "*…it is plain from the language "as may reasonably be required" that the SEA Regulations, like the SEA Directive, allow the plan-making authority to make a judgment on the nature of the information in Schedule 2 and the level of detail to be provided in an environmental report, whether as published initially or in any subsequent amendment or supplement." (emphasis added)*

Context

SA of the Section 1 Plan

15. The Braintree Local Plan Section 1 ("the Section 1 Plan") and the Section 2 Plan were the subject of separate sustainability appraisals prior to their submission for examination. The SA of the Section 1 Plan (which is a shared strategic plan produced collaboratively by the Council, Colchester Borough Council Tendring District Council) was undertaken by Essex County Council's Place Services ("the Place Services' SA"). It was subject to consultation as part of the Regulation 19 consultation on the Section 1 Plan.

16. Following the initial examination hearings into the Section 1 Plan in early 2018 the examining inspector (Inspector Clews) concluded that the Place Services' SA of the Section 1 Plan had a number of shortcomings. These were, principally: in respect of the objectivity of the assessment of the spatial strategy, and alternatives to it; the clarity of the alternatives, and reasons for selecting them; and the selection of alternative Garden Communities.[5] As a result he concluded that the Place Services' SA did not provide a robust basis on which to find the spatial strategy established by the Section 1 Plan sound.[6] However, Inspector Clews concluded that the deficiencies that he had identified in the Place Services' SA were capable of being rectified by further SA work as part of the examination process, specifically rejecting submissions to the contrary.[7]

17. LUC were subsequently appointed by the joint authorities to undertake the further SA work to address the shortcomings of the Place Services' SA. LUC produced an Additional Sustainability Appraisal of the Section 1 Plan ("the Additional SA") in July 2019. Following significant scrutiny at the reconvened examination hearings in January 2020, Inspector Clews concluded that the Additional SA had rectified the deficiencies in the Place Services' SA, and that, when considered together, they met the statutory requirements.[8]

18. It is important to note that the Place Services' SA and the Additional SA assessed the likely significant effects of, and reasonable alternatives to, the Section 1 Plan *as submitted*. Accordingly, they undertook a sustainability appraisal of the Section 1 Plan which included the three garden communities as part of the Spatial Strategy[9], as well as site specific policies promoting the individual garden communities and identifying broad locations for their development.[10]

19. Following the reconvened examination hearings Inspector Clews also concluded that two of the three garden communities had not been demonstrated to be deliverable and therefore would need to be removed for the Section 1 Plan to be sound. [11] The inspector explained the need for main modifications to remove two of the garden communities from the Plan, together with other main modifications as a result of the representations and discussions at the hearing sessions. The inspector also explained that the main modifications would need to be the subject of public consultation, and that further SA work may need to be undertaken

[5] Letter 8 June 2018 [IED/011] §93-129
[6] *Ibid* §119
[7] Letter of 8 June 2018 [IED/011] §121
[8] Letter 15 May 2020 [IED/022] §60-116
[9] Policy SP2 – Spatial Strategy for North Essex
[10] Policy SP7 – Development and Delivery of New Garden Communities in North Essex; SP9 – Colchester/Braintree Boarders Garden Community; and SP10 – West of Braintree Garden Community
[11] Letter 15 May 2020 [IED/022] §117-266, in particular §255-266.

and consulted upon.[12] He highlighted that the consultation responses *may* give rise to the need for further hearing sessions.[13]

20. In August 2020 LUC produced a sustainability appraisal of the proposed main modifications ("the MM SA"). This assessed the likely significant effects of the Section 1 Plan as proposed to be amended by the main modifications. This included, but was not limited to, the removal of the garden communities. The MM SA also considered the impacts of the proposed modifications on the reasonable alternatives already assessed and whether any new reasonable alternatives required assessment.

21. The proposed main modifications, together with the MM SA, were the subject of a six-week public consultation in late 2020.

22. Following that consultation, on 10 December 2020 Inspector Clews issued his report on the examination of the Section 1 Plan. He did so without considering it necessary to hold further examination hearings.

23. His report found that, subject to the main modifications which he recommended[14], the Section 1 Plan was sound and legally compliant. In doing so, he took account *inter alia* the findings of the MM SA, as well as the responses to the public consultation on the main modifications and the MM SA which has taken place in late 2020.[15]

24. In the context of the PT/FH Opinion it is highly relevant to observe that the removal of the two garden communities from the Section 1 Plan – which had ramifications both in terms of the plan's spatial strategy, but also removed two of the three allocations from the Plan – was first subject of a SA at main modification stage, <u>after</u> the examination hearings had taken place. This precisely mirrors the proposed course of action in respect of the Section 2 Plan which the PT/FH Opinion contends would potentially be unlawful.[16]

25. No criticism was made by the Williams Group to the approach adopted by Inspector Clews (despite the Williams Group having made representations as part of the main modification consultation), and no legal challenge was brought to the Council's subsequent adoption of

[12] Letter 15 May 2020 [IED/022] §269-§270
[13] Letter 15 May 2020 [IED/022] §271
[14] Which were not significantly different from those subject to consultation and the MM SA: Inspector's Report 10 December 2020 §5
[15] Inspector's Report 10 December 2020 §5, and §18-19
[16] Save that, of course, the garden communities were subject to specific policies in, and land identified by, the Section 1 Plan, whereas there influence on the Section 2 Plan is simply as a consequence of their inclusion in the Section 1 Plan.

the Section 1 Plan on the basis that approach to the updating of the SA was contrary to the requirements of the SEA Directive or Regulations (or, for that matter, on any basis).

Further SA of the Section 2 Plan: the Council's proposed approach

26. The sustainability appraisal of the Section 2 Plan ("the Section 2 Plan SA") was undertaken in June 2017, prior to submission of the plan for examination. Like the SA of the Section 1 Plan, it was subject to consultation as part of the Regulation 19 consultation. Unlike the original SA of the Section 1 Plan, the Section 2 Plan SA was undertaken by LUC.

27. As was explained at the recent examination hearings the Council accept that further SA work is likely to be necessary as a result of main modifications which will be proposed by the inspectors following the examination hearings. This is likely to include (but not be limited to) assessing the impact of the consequential amendments to the Section 2 Plan which are required as a result of the removal of the two garden communities from the Section 1 Plan.

28. The Council considers that the appropriate time for undertaking further SA work in respect of the Section 2 Plan is once all of the proposed main modifications have been identified by the inspectors. As was briefly touched upon at the hearing sessions, this is for the following reasons:

    (1) The Section 2 Plan SA does not suffer from the significant shortcomings identified by Inspector Clews in respect of the Place Services' SA. To the contrary, it is a robust sustainability appraisal in its own terms (and notably was produced by the same specialist consultancy as produced the Additional SA and MM SA of the Section 1 Plan which were found by Inspector Clews to have rectified the deficiencies in the Place Service's SA). The need for a supplementary SA arises, therefore, <u>not</u> because of any inherent flaws in the Section 2 Plan SA, but rather because of the need for main modifications that will be necessary to make the Section 2 Plan sound.

    (2) The purpose of the examination is to assess the soundness, and legal compliance, of the Section 2 Plan *as submitted* for examination. The Section 2 Plan SA assesses the likely significant effects of the Section 2 Plan as submitted, as well as likely significant effects of reasonable alternatives to the submitted plan.

    (3) It would have therefore been premature to undertake further SA work prior to the hearing sessions and the identification of the proposed main modifications by the examining inspectors (including the modifications which may be necessary as a consequence of the removal of the Garden Communities from the Section 1 Plan). Adopting such an approach would have had the effect of undertaking sustainability

appraisal of a plan which was not before the inspectors for examination and/or upon the basis of assumed modifications which the inspectors had yet not identified as being necessary to make the plan sound.

(4) Any additional SA work undertaken before the hearing sessions would have also necessarily been in respect of only a partial update to the Section 2 Plan, assessing only the ramifications of those modifications which the Council considered necessary in light of the removal of the Garden Communities from the Section 1 Plan. It is undoubtedly preferable to undertake supplementary SA work once all the proposed main modifications have been identified by the inspectors. Not only is this a more proportionate and less time-consuming approach than undertaking the further SA in multiple stages, it also allows for the ramifications of any proposed modifications to be considered holistically, rather than on a piecemeal basis.

(5) The garden communities were part of the strategy of, and were allocated within, the Section 1 Plan. Accordingly, the removal of two of the garden communities has already been the subject of a SA, within the MM SA of the Section 1 Plan.

(6) For the reasons expanded on below, the examination process is sufficiently flexible to ensure that any additional SA work is the subject of a lawful and meaningful consultation, whether or not further examination hearings are required.

Identifying the dispute

29. It is instructive to begin by considering what the PT/FH Opinion does not contend.

30. First, there is (rightly) no contention that the SA of the Section 2 Plan contains any inherent flaws which render it legally inadequate. The 'flaws' to which the Opinion refers are as a result of the "*removal of the two garden communities, the impact…[of which] has not been assessed as part of the SA for the BLP2.*"[17] In short, the PT/FH Opinion contends that the SA of the Section 2 Plan needs to be updated to take account of the consequential modifications to the Section 2 Plan which will be necessary as a result of the deletion of the garden communities. This is uncontroversial between the parties.

31. Second, (again, rightly) PT/FH do not contend that they identify an insuperable problem. They accept (at least implicitly) that further sustainability appraisal is capable of being undertaken as part of the examination process to address the 'flaws' they identify.[18]

[17] PT/FH Opinion §5
[18] See, e.g PT/FH Opinion §24(b)

32. The dispute, therefore, boils down to a question of the appropriate timing of the further SA work.

33. Is it necessary, as the PT/FH Opinion appears to contend[19], to avoid a breach of the SEA Directive and Regulations that further SA work is undertaken, and consulted upon, before any further steps in the examination are taken?

34. Or would it be lawful for the additional SA work to take account of all proposed main modifications (including, but not limited to, the modifications necessary as a result of the deletion of the garden communities from the Section 1 Plan), and for the consultation on the additional SA to take place in conjunction with consultation on the proposed main modifications (as is the Council's proposed approach)?[20]

The proposed approach would not give rise to conflicts with the SEA Directive and Regulations

35. The PT/FH Opinion advances two reasons why, in their view, additional SA work at the main modification stage *may* conflict with the requirements of the SEA Directive and Regulations (noting that their Opinion is somewhat equivocal, identifying only "likely" and "potential" conflicts).

36. First, it is suggested that additional SA work at the main modification stage could not properly consider reasonable alternatives, and would "*essentially amount to an ex-post facto justification of the approach taken in the [Section 2 Plan] rather than a genuine assessment of reasonable alternatives*".[21]

37. Second, it is argued that consultation on the additional SA work at the main modification stage would not be effective, because it would not allow consultees or the public to make meaningful representations on what the outcome of the additional SA work means for the Section 2 Plan.[22]

38. Neither contention withstands scrutiny.

39. The first contention is without any foundation. There is no proper basis to allege that LUC – who are independent, specialists in their field – would not undertake a genuine assessment

[19] PT/FH Opinion §19
[20] It is also noted that the issue raised by Mr Gittins on behalf of The Granville Group also boils down to a question of timing of the additional SA work. Like PT/FH, Mr Gittins considers that further SA work *"should be the subject of separate and earlier consultation"* :§3. The same is true of the submission on behalf of Gladman.
[21] PT/FH Opinion §15
[22] PT/FH Opinion §16

of the impact that the main modifications may have (if any) on reasonable alternatives to the Section 2 Plan, or that they would engage in ex-post facto justification.

40. Indeed, the MM SA in respect of the Section 1 Plan demonstrates that the issue of reasonable alternatives can properly be considered at the main modification stage. As part of the MM SA, LUC considered whether, and to what extent, the deletion of the garden communities (as well as the other proposed main modifications) affected the reasonable alternatives which had already been considered. Where appropriate LUC reconsidered the reasonable alternatives that had previously been assessed.[23] There is no suggestion within Inspector Clews report that the MM SA failed to properly reconsider the issue of reasonable alternatives or that the MM SA amounted to an ex-post facto justification of the Section 1 Plan's strategy, quite the contrary.

41. Moreover, if, having seen the additional SA work, there consultees were concerned that the supplementary SA had not properly considered the impact of the proposed main modifications (including those consequential to the deletion of the garden communities) on the reasonable alternatives, then this is precisely the type of issue that could be raised as part of the consultation on the additional SA work, and then considered by the examining inspectors.

42. The second contention – that the process would not allow for meaningful consultation - is also entirely unpersuasive. It ignores:

    (1) the (at least) six-week period that would be allowed for consultation;

    (2) the fact that, as is explained in PINS procedural guidance[24], and as the inspectors examining the Section 2 Plan expressly stated in their Guidance Note[25], the same weight is given to written representations as to those made orally at hearings sessions;

    (3) that the examining inspectors have the power to reconvene hearing sessions following the consultation on the main modifications and the additional SA work if they consider it appropriate. The PINS procedural guidance explains, in terms, that *"It might occasionally be necessary for the Inspector to arrange one or more further hearing sessions during the reporting period, for example to resolve a fundamental soundness issue.*

[23] For example in relation to SP3: Meeting Housing Needs
[24] *Procedure Guide for Local Plan Examinations*, para 3.17 & 3.25
[25] INSP001, para 15

Significant representations on the proposed MMs might also give rise to the need for further hearings."[26]

(4) as explained above, that Inspector Clews adopted this very approach to the assessment of, and consultation on, the ramifications of the deletion of the garden communities for the Section 1 Plan, and its accompanying SA.

43. In summary, the Council is firmly of the view that the proposed course of action – of updating the SA to take account of all the proposed main modifications, and consulting on the supplementary SA in conjunction with the consultation on the main modifications - would not give rise to conflicts with the requirements of the SEA Directive and Regulations, either in terms of the adequacy of the environmental report itself or the requirement that consultation on the environmental report be effective. Moreover, it considers that the approach proposed in the PT/FH Opinion[27] of a multi-staged SA process would give rise to unnecessary duplication and delay.

DISCLOSURE /PROCEDURAL FAIRNESS

44. The Council do not dispute, as a generality, the legal framework set out in the PT/FH Opinion concerning the principles of procedural fairness.[28] However, the PT/FH Opinion does not go as far as to allege that there has been breach of those principles by the Council in this examination, still less give any particulars of what any alleged breach.

45. As such, there is no particularised allegation of procedural unfairness to which the Council is able to respond.

Robert Williams

On behalf of Braintree District Council

12th August 2021

[26] *Procedure Guide for Local Plan Examinations*, para 5.20. See also para 6.10
[27] PT/FH Opinion §16
[28] PT/FH Opinion §20-21