IN THE MATTER OF:

NORTH ESSEX AUTHORITIES

SUSTAINABILITY APPRAISAL WORK IN CONNECTION WITH SECTION 1 LOCAL PLAN

FURTHER OPINION

Introduction

1. Further to my Opinion dated 21 March 2019, I am asked to address questions raised by the Inspector on the developing Sustainability Appraisal/SEA, as follows.

2. His letter dated 21 November 2018 addressed, inter alia, the Lightwood letter of 24 October 2018, stating (paragraph 13) that Lightwood's points concern (a) LUC's proposal to use different evaluation criteria from those used previously for the further SA work that they propose to undertake, and (b) whether there has been a proper scoping process for the Section 1 Plan as a whole. He stated in paragraph 15:

> "If my assumption and inference are correct, on the information currently before me I consider it unlikely that substantial prejudice to any party would arise specifically from changes in the evaluation criteria to be used in the further SA work, given the extent of the proposed consultation process on any such changes…".

Paragraph 16 addressed Lightwood's point (b), leading to paragraph 17 which stated:

> "Notwithstanding an absence of complaints**, I suggest that it would be prudent for the NEAs to seek a legal opinion** on whether the process they describe here meets the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004, and in particular Regulation 12(5) in respect of consultation on the scope and level of detail of the SA Report for the Section 1 Plan as a whole. The legal opinion would need to consider whether the relevant requirements of the Regulations have been followed; and if any have not, whether any prejudice potentially caused thereby is capable of being remedied, and what the necessary remedial steps would be".

3. Paragraph 6 of his letter of 10 December 2018 stated:

> "The legality of the SA scoping for the Section 1 plan as a whole, and consultation thereon, is a separate (and wider) issue from the more narrow point of the legality of making changes to the assessment criteria for further SA work. In my view it would be sensible to resolve this wider issue soon, if that is possible, rather than leaving it to be considered at the hearing sessions later next year".

It is plainly appropriate that these matters be addressed at this stage.

4. The courts have made it clear, time and again, that any scrutiny of the process required by the Local Plan Regulations and the SEA Directive and Regulations can only take place in the light of a detailed assessment of the facts in any given case. It is therefore necessary to set out the background to this matter in some detail.

Background

5. Three local planning authorities, Braintree District Council, Colchester Borough Council and Tendering District Council have come together to form the NEA's. Individually, they originally embarked on their respective programmes for local plan replacement with separate drafts for each authority. In July 2014 Colchester Borough Council published its then Sustainability Appraisal Scoping Report. Consultation on this document took place between 1 July and 5 August 2014. The Report made

reference to the need to develop greenfield land for housing, but contained no reference to large settlements/ garden communities. In December 2014 Braintree District Council published its SA Scoping Report. This made reference (paragraph 2.3) inter alia to "…new settlements which could follow Garden City or Garden Suburb design principles". Braintree consulted on this document in January/March 2015. In June 2015 Tendering District Council published its Sustainability Appraisal Scoping Report. Its approach to major new development reflected that for Colchester. Consultation on this Report took place later in 2015.

6. In June 2016 the three authorities published a Memorandum of Co-operation: Collaborative Working on Strategic Growth Priorities in North and Central Essex. It recorded the joint decision to produce a common strategic section for the current reviews of each of the local plans, "Part 1" (now called Section 1).

7. SA of the Section 1 plan was carried out by Essex County Council's Place Services at both the Preferred Options and the Draft Publication Stage. The resulting reports were published for consultation alongside the Plan in June 2016 and June 2017 respectively. No further Scoping Report was prepared at either stage. The 2016 SA Report contains an assessment of the preferred spatial strategy and four alternatives to it, and an assessment of eleven GC options, of which three were selected for inclusion in the Preferred Options version of the Plan.

8. The 2017 SA appraised three different approaches to strategic growth, and an assessment of the cumulative impacts of the three allocated GC's and of nine alternative combinations.

9. Paragraph 95 of the Inspector's letter dated 8 June 2018 stated:

> "It may be that the NEA's had decided, before the 2016 report was complete, which GC's they wished to include in the preferred options version of the Plan. That in itself is not unlawful, provided that the SA is approached with an open mind, and that its results and the consultation responses on it are taken into account in the ongoing preparation of the Plan. Similarly, the fact that the spatial strategy and the three allocated GC's remained essentially unchanged between the preferred options and the submitted versions of the Plan is not necessarily evidence of a closed-minded approach to plan preparation. The important question is whether the SA and the related plan preparation processes were carried out lawfully and with due regard to national policy and guidance".

Paragraph 96 went on to identify three principal shortcomings in those respects.

10. The Inspector went on to conclude that, because of his identified shortcomings, he concluded that it had not been demonstrated that the chosen spatial strategy is the most appropriate one when considered against the reasonable alternatives, as the tests of soundness require. He went on to make suggestions as to how those shortcomings might be rectified. In doing so, he relied on the principle that deficiencies in SA may be rectified, or "cured", by later SA work, established in the *Cogent Land* case and restated by the Court of Appeal in *No Adastral New Town Ltd*.

11. Paragraphs 123-129 set out detailed suggestions for further SA work.

12. Separately from SA matters, the Inspector had identified his grounds for concluding that the GC proposals were not adequately justified and had not been shown to have a reasonable prospect of being viably developed. "As submitted, they are therefore unsound": paragraph 130. He identified three Options for the NEA's to consider, of which Option 2 would involve the NEA's carrying out the necessary further work on the evidence base and SA. Paragraph 152 indicated that it would be necessary to

suspend the examination of Section 1 while the identified work was carried out and consultation on the SA and any revised strategic proposals takes place.

13. By letter dated 19 October 2018 the NEA's set out to the Inspector their choice of Option 2. They advised the Inspector that new independent consultants, LUC, had been appointed to carry out the further SA work, and enclosed a proposed scope for that work (dated October 2018).

14. In his letter dated 21 November 2018 the Inspector observed (paragraph 6) that the NEA's are approaching the necessary further work on the SA and the evidence base "with an appropriately open mind and without preconceptions as to the outcome. That is important if the further work is to be carried out successfully…"

15. The NEA's responded on 30 November 2018. Among other matters, the letter confirmed the extent of intended consultation on the LUC Method Scoping Statement.

16. The Inspector responded by letter dated 10 December 2018. He confirmed that the amendments that had been made to the Method Scoping Statement (now the December 2018 version) dealt appropriately with his points. He thanked the NEA's for confirming that the proposed consultation on the Statement will include consultation on the proposed revised assessment criteria, and will involve all those who took part in the examination hearings held in January and May 2018. He stated that now all the NEA's proposals for further work on the evidence base and SA have been clarified, it was appropriate to announce a pause in the examination while that further work takes place.

17. The LUC Method Scoping Statement dated December 2018 refers to the main objective to address the shortcomings of previous SA work "…while retaining consistency with the SA objectives used to date in the SA": 1.14. LUC consider it "…good practice and appropriate to carry out further consultation on the scope and level of detail of the additional SA work to be carried out…": 1.16. The additional SA work is designed to address the Inspector's concerns, and will form an addendum to, and will need to be read in conjunction with, the SA (June 2017) of the Plan as a whole: 2.1. The previous sustainability objectives "…will continue to be used to frame the additional SA work in order to maintain consistency": 2.8.

18. LUC draw attention to certain deficiencies in the SA work to date, and state (2.11):

> "Due to the shortcomings, LUC does not intend to use the Garden Community framework in the additional SA work. Instead, it is proposed that the assessment of alternative locations for strategic development is guided by a new set of assessment criteria that are clearly linked to the SA Framework. These criteria are set out in Appendix 1".

19. The approach to alternatives is addressed: 2.17, 2.18. Also, LUC proposes to carry out SA of non-Garden Community options so that an equivalent level of detail is available to inform combinations of alternative locations for strategic development for all the spatial strategy options to be tested: 2.19.

20. The Method Scoping Statement was subject to public consultation, which closed on 1 February 2019. All members of the public were able to comment on the content of the Statement, but the consultation bodies and participants in the Section 1 examination were specifically invited to comment. The Statement is being refined in the light of comments received. A summary of the consultation responses is being prepared, and the resulting changes are to be notified to the Inspector.

21. A workshop for stakeholders took place on 29 March 2019. The NEA's do not intend to publish an updated methodology following that event, but instead will include updated methodology in the draft version of the SA.

Queries which have been raised

22. The Lightwood letter dated 24 October 2018, referred to above, makes the following contentions. The primary argument is that a SA scoping should have been carried out for Section 1 as a whole and it is argued that, in the absence of such scoping, it is not legally compliant. Reference is made to the proposal in the Method Scoping Statement to change the evaluation framework for the further SA work (as referred to above). It is suggested (a) that the NEA's "are attempting to "short-circuit" the necessary plan-making process of scoping an evaluative SA framework, devising options, testing alternatives, and consulting on a Plan via a Reg. 18 and Reg. 19 process" and (b) that changes to the SA evaluative framework require a return to this earlier stage of the plan-making process.

23. By email from the programme officer of 1 November 2018, the Inspector sought clarity on two legal aspects. First, in relation to the contention that statutory consultees were not consulted prior to the Regulation 18 Plan being put forward, the question was asked: which specific regulations require that statutory consultees are consulted on the scope of the SA prior to a Regulation 18 plan being prepared? Second, in the context of a contention that change to the scope of the SA "…requires a plan-making process outside the (suspended) examination phase, not within it", the question was: what is the legal basis for this contention?

24. The reply from Lightwood of 5 November 2018 referred to a table at paragraph 013 ID 11-013-20140306 of the NPPG, headed Sustainability Appraisal Process, which indicates, inter alia, that consultation with the consultation bodies on the scope of the SA would take place at Stage A, prior to Regulation 18 consultation. The contention is made: "If the scope is to be changed (as opposed to more options being assessed or correctly assessed within the SA's existing framework) there would need to be a new Reg. 12 scoping consultation to provide the foundation for the altered appraisal. This would take the process back to prior to the Reg. 18 stage".

25. The Inspector's letter dated 21 November 2018 is written in the light of these exchanges. The Inspector stated at paragraph 15:

> "…on the information currently before me I consider it unlikely that substantial prejudice to any party would arise specifically from changes in the evaluation criteria to be used in the further SA work, given the extent of the proposed consultation process on any such changes. However, I reserve the right to reconsider that view in the light of any legal opinion(s) that may be submitted…"

Relevant law (including guidance)

26. Part 2 of the Planning and Compulsory Purchase Act 2004 contains the provisions relating to the preparation and adoption of local plans. Section 19(5) requires a sustainability appraisal report in relation to the proposals. There is no reference in the Act to, let alone any requirement for, a scoping exercise or report. Section 20 relates to the submission of the local plan for examination. Submission cannot take place unless the local planning authority have complied with the Town and Country Planning (Local Planning) (England) Regulations 2012. Section 20(3) requires the authority to send to the Secretary of State the submission version of the Plan, and other prescribed documents. The effect of regulations 17, 19 and 22 is that the

sustainability appraisal report must be publicised, and submitted under section 20(3). No requirement is made in relation to any scoping report.

27. EU Directive 2001/42/EC lays down the requirements for environmental assessment of plans. Article 5(4) requires the consultation bodies to be consulted "when deciding on the scope and level of detail of the information which must be included in the environmental report". No requirement is specified as to the means by which scope etc. shall be decided, and there is no requirement for a scoping report.

28. The Environmental Assessment of Plans and Programmes Regulations 2004 give effect to the Directive. Regulation 4 identifies the consultation bodies. Regulation 8 requires that, before adoption of a local plan, account shall be taken of "the environmental report for the plan or programme". Again, there is no reference to scoping, or a scoping report, let alone at any specified stage. Regulation 12 prescribes the content of the environmental report. Regulation 12(5) provides: "When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies".

29. In the Local Planning Regulations 2012 there are two formal consultation stages (regulations 18 and 19) and further stages are often added. Neither the SEA Directive, nor the transposing Regulations 2004, nor the Local Planning Regulations 2012 require that SEA takes place at each stage. The requirement is that the Plan cannot be adopted without consideration of the environmental report. Further, as noted above, there is no Directive, statutory, or regulation requirement for a scoping opinion. To recap, the requirement is that the consultation bodies shall be consulted on the "scope and level of detail of the information that must be included in the report…". The

required contents of the report are mandated by regulation 12(3) and Schedule 2 of the 2004 Regulations.

30. As noted above, there is merely guidance that illustrates the relationship between the sustainability appraisal process and local plan preparation.

31. The relationship between the environmental report and the emerging plan was addressed in the Northern Ireland case of *Seaport Investment Limited* (2007) NIQB 62. Weatherup J stated at paragraph 47:

> *"The scheme of the Directive and the Regulations clearly envisages the parallel development of the environmental report and the draft plan with the former impacting on the development of the latter throughout the periods before, during and after the public consultation. In the period before public consultation the developing environmental report will influence the developing plan and there will be engagement with the consultation body on the contents of the report. Where the latter becomes largely settled, even though as a draft plan, before the development of the former, then the fulfilment of the scheme of the Directive and the Regulations may be placed in jeopardy. The later public consultation on the environmental report and draft plan may not be capable of exerting the appropriate influence on the contents of the draft plan…".*

32. However, the English High Court decision in Cogent Land LLP v. Rochford DC [2013] JPL 170 addressed the implications of Seaport in detail. The Judge held at paragraph 124:

> *"I accept Bellway's submission that the Claimant's primary argument seeks to extend the principles in Forest Heath and Heard…beyond their proper limit. Those were both cases where the court was satisfied that no adequate assessment of alternatives had been produced prior to adoption of the plans in those cases. Although they comment (understandably) on the desirability of producing an environmental report in tandem with the draft plan, as does Seaport, neither is authority for the proposition that alleged effects in an environmental report cannot be cured by a later document".*

I emphasise, again, that what is being addressed here is some deficiency in the environmental report, not any deficiency in relation to scoping. Further, at paragraphs 125-126, the Judge went on to reflect on the "absurdity" of the claimant's contention of winding back the clock to the beginning of the process.

Assessment

33. I referred above (paragraph 23) to the Inspector's first question in the email of 1 November 2018. The answer is that there is no such requirement in the statutory scheme.

34. The Inspector's second question led to Lightwood's contention set out at paragraph 24 above. There is no basis in the statutory scheme for this contention. The assertion is based merely on guidance.

35. Further, it is unrealistic to say that the process is taking place "outside the examination phase". The examination is, of course, paused or suspended. But the revised SA will be produced, consulted on, and considered at further hearings and ultimately in the Inspector's report.

36. As in Cogent, there is an air of complete unreality in Lightwood's contentions. The SA for the combined Section 1 Plans was published in June 2016, in tandem with the Regulation 18 Preferred Options. Nearly three years have passed, in which there have been the Regulation 19 Plan with its accompanying SA of June 2017, and the Plan has been submitted for examination. Examination hearings were held in 2018. The Inspector issued his first response on 8 June 2018. The NEA's opted to pursue the proposals in Section 1, identified further evidence to meet the Inspector's concerns,

and appointed new SA consultants; the Inspector paused the examination pending further work on the evidence and the SA, with a view to hearings resuming later in 2019. There has been extensive consultation with the consultation bodies, and generally, at every stage. The resumed hearings will consider, no doubt exhaustively, the adequacy of the entire SA process.

37. It is relevant to note that until after the first set of hearings (May 2018) no-one had suggested any failure to consult in accordance with regulation 12(5), i.e. as at June 2016. The issue had not been raised by Lightwood and had not been raised by any of the consultation bodies. Further, the consultation bodies have been actively engaged in the plan-making process, making submissions through the plan development and examination process. Environment Agency, Historic England and Natural England each submitted hearing statements for the Section 1 examination. None of those statements raised concerns about the adequacy of the scoping exercise.

Conclusion

38. I acknowledge that, in hindsight, it might have been preferable for there to have been a separate scoping report prepared for the common Section 1 Plans in or around June 2016. However, SA was prepared for the June 2016 and June 2017 processes. I am not aware that it is suggested by anyone that any significant environmental topic was omitted from those SA's as a result.

39. However, the sequence of events does not disclose any breach of the Directive, the statute, or the two sets of Regulations.

40. Further, while the Inspector will undoubtedly keep an open mind in relation to the causing of any prejudice at the end of the entire process, I share his present view as to

the lack of such prejudice. To put it another way, any breach of the guidance in relation to scoping is being and will be amply cured by the subsequent processes.

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25th April 2019

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FURTHER OPINION

Dentons
(KSES/SJA)

Our Ref: CLM-