

# Matter 1 Hearing Statement, Lightwood Strategic

## Legal and procedural requirements

### Main issue:

- **Have the relevant legal requirements been met in the preparation of the Section 1 Plan?**
- **Do any amendments need to be made to Chapter 1 of the Section 1 Plan in order to ensure its soundness?**

### Questions:

- 1. Is there clear evidence that, in the preparation of the Section 1 Plan, the North Essex Authorities have engaged constructively, actively and on an ongoing basis with neighbouring authorities and prescribed bodies on strategic matters and issues with cross-boundary impacts in accordance with section 33A of the Planning and Compulsory Purchase Act 2004, as amended [the 2004 Act]?**
  - 1.1. Braintree District Council (and by extension the NEAs) has failed the Duty to Co-operate [DTC] in relation to the formulation of the spatial strategy of the Part 1 Local Plan, and specifically in respect of Garden Communities.
  - 1.2. The root cause of failure stems from the lack of the meaningful and timely consideration of Monks Wood in parity with other new settlement options during the Regulation 18 phase of plan-making (before, during and in the months following consultation on Preferred Options in Summer 2016). Internal plan-making failings within Braintree in respect of the preparation of the evidence base for reasonable alternative have not enabled the Duty to be discharged. Our case is a 'too little, too late' argument in respect of Section 33A.
  - 1.3. The DTC imposed by section 33A applies in respect of the preparation of development plan documents "so far as relating to a strategic matter". Braintree's Duty to Co-operate Statement [DTCS] (SDBDC/005), confirms that the planning of Garden Communities is a strategic matter, which if course is correct.
  - 1.4. The potential for a new settlement in the urban hierarchy between Braintree and Colchester has functional implications for the housing market area and the functional economic area, e.g. in relation to movement along the A120 corridor to access higher order settlements. Further, Monks Wood could have either reduced or replaced 'West of Braintree' (which extends into Uttlesford) and/or reduced or replaced 'Colchester Braintree Borders'. Giving Chelmsford the opportunity to co-operate is of significance in this respect as it is within the Housing Market Area (and the Functional Economic Area). There is a significant difference between a 5,000 home new village on the A120 and a new town of 24,000 homes on the A12.
  - 1.5. The Duty requires authorities "engage constructively, actively and on an ongoing basis" to "maximise the effectiveness of Local Plan preparation" (PPG ID: 9-001-20140306). Deciding what ought to be done to maximise effectiveness and what measures of constructive engagement should be taken

requires evaluative judgments to be made by the person subject to the duty regarding the planning issues that they are engaged with.

- 1.6. In the case of the North Essex Part 1 Plan the three authorities have adopted a joint planning approach. This requires two things:
  - i. That they have effectively co-operated between themselves within the framework that has been set up;
  - ii. That there is effective co-operation between the NEAs, neighbouring authorities and the prescribed bodies (as set out on page 1 of Braintree's DTC Statement).
- 1.7. The NEAs have manifestly failed in both regards as evidenced below.
- 1.8. Planning Practice Guidance ID REF: 9-011-20140306 states that:

*“Effective cooperation requires sustained joint working. It is unlikely to be met by an exchange of correspondence, conversation or consultations between authorities alone”.*
- 1.9. Appendix 1 to this hearing statement is a timeline of plan-making prepared by Lightwood. In addition, the NEA's have provided a timeline in respect of the consideration of Monks Wood (Dentons' email of 30<sup>th</sup> January 2018); albeit without attaching the email correspondence alluded to.
- 1.10. Appendix 2 to this hearing statement is a schedule of email correspondence between Lightwood and the NEAs for the period 9<sup>th</sup> March 2016 – 5<sup>th</sup> June 2017, together with those emails and relevant attachments (not including documents that were appended to Lightwood's Regulation 19 representations).
- 1.11. There are but two references to Monks Wood in Braintree's DTC statement, and both relate to the belated publication of the AECOM assessment of this location in May 2017.
- 1.12. This AECOM assessment of Monks Wood was not commissioned until December 2016. In contrast, AECOM were instructed on March 2016 to assess four other garden community locations. A press release on the AECOM website of 15<sup>th</sup> March 2016 confirms their appointment. The AECOM work was reported in June 2016. Monks Wood was made known to Braintree DC on 9<sup>th</sup> March 2016 with an estimated capacity of 5,000-6,000 dwellings (Email 1). However, on 11<sup>th</sup> March 2016 Braintree DC responded that Monks Wood would not be considered in the preparation of the Regulation 18 Plan as an option, but rather as an objection site (Email 2), even though the evidence base was not in place, nor the preferred form of the Plan recommended to Councillors to approval.
- 1.13. The Dentons timeline indicates communication between the NEAs themselves, and with Essex CC on the 10<sup>th</sup> of March 2016 but (a) such communication cannot have included any meaningful assessment of Monks Wood between the NEAs and (b) no claim is made of any DTC communication between the NEAs, neighbouring authorities or prescribed bodies.

- 1.14. By the time the NEAs had their AECOM commissioned assessments of the four original sites, together with Monks Wood (May 2017) it gave very little time, or indeed any time to effectively co-operate with neighbouring authorities or prescribed bodies, prior to either the May 16<sup>th</sup> 2017 Braintree Local Plan Sub Committee Meeting, nor following Council meeting on June 5<sup>th</sup> 2017, nor the production of the Sustainability Appraisal (dated June 2017).
- 1.15. The DTC Statement makes no claim of the attempt to discharge the Duty between the NEA's, neighbouring authorities and the prescribed bodies in respect of the potential effect of Monk Wood on the spatial strategy based on evidence.
- 1.16. In addition, further evidence of the premature dismissal of Monks Wood is found in respect of Braintree DC's 31<sup>st</sup> October 2016 Local Plan Sub-Committee meeting. This meeting considered whether changes should be made to the Part 2 Plan vision for Braintree in light of the Regulation 18 consultation responses on both the Part 1 and Part 2 Plans. The recommendation from officers to the committee, and the agreed outcome, was to retain West of Braintree and Braintree and Colchester/Braintree Borders, with no reference to Monks Wood as an option and prior to any commissioning of AECOM to consider Monks Wood (which happened in December 2016).
- 1.17. Subsequently, the 15<sup>th</sup> November 2016 email from Emma Goodings (Email 22) states that the Local Plan Sustainability Appraisal was currently being revised in light of consultation responses and that it would be published shortly (in advance of AECOM being instructed, yet after the recommendation of the 31<sup>st</sup> October LP Sub-Committee).
- 1.18. All of the above indicates that the decision to reject Monks Wood was made without complying with the Duty, internally to the Plan area, as there was no assessment/evidence base to conduct the exercise against, and also externally as there is no evidence that any evidence was shared with neighbouring authorities or the prescribed bodies to discharge the Duty.
- 1.19. By reference to the timeline (Appendix 1) and our commentary on it, it can be seen that:
  - i. At critical stages in plan-preparation the Monks Wood option was effectively hidden as a reasonable alternative from authorities neighbouring the Plan area, and the prescribed bodies. No effective consultee views could be made on the site in isolation on or as part of a spatial strategy;
  - ii. Joint working has not been sustained, rather it has been last minute, and, based on the timeline, triggered only in reaction to either the Lord Kerslake-led peer review in respect of testing alternatives (January 2017 but reported to CEx's in December 2016) and/or Lightwoods email and letter to John Haydon (dated 16<sup>th</sup> December 2016), with the same message (Email 26);
  - iii. The Lord Kerslake Led review was clearly commenting on the Preferred Plan and its merits, which must have been part of the briefing materials. Page 6 of the report attests to this. The Lord Kerslake report

also refers to evidence from CAUSE, presumably in respect of the Metro concept, but there is no mention of Monks Wood in the report as an option, suggesting that the review team were unaware of it even though the NEA's AECOM work had not reported, i.e. the Council couldn't have technically discounted the location at this stage in the process – yet seemed dis-interested on his view of its credentials.

- iv. There is no evidence that Monks Wood was subject to any authority-led assessment from March-December 2016. If the site was not subject to serious assessment during this period it is unlikely that any meaningful Duty to Cooperate engagement took place between the NEA's, with other LA's or with prescribed bodies. There is nothing on the DTC statement to suggest otherwise.
- v. Fatally, the dye was cast in respect of the Regulation 19 plan by virtue of the 31<sup>st</sup> October 2016 Braintree LP sub-Committee meeting. We observe no reporting of Monks Wood prior to that decision, following the Regulation 18 consultation. This is incompatible with the effective operation of the Duty.
- vi. There is no evidence that all of the LA's beyond the Plan area, nor prescribed bodies were made aware of Monks Wood. The prescribed bodies have a key role in making plans effective. They cannot fulfil their role unless they are advised of all the options and the Council's evidence based assessment of these.

1.20. On the evidence available, the Inspector cannot reasonably conclude that Braintree DC has complied with the Duty on the evidence before the examination. A Section 33A failure brings the Plan to an end.

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

- 2.1. A Sustainability Appraisal of the Plan has been carried out, but the Environmental Report does not meet the SEA Directive and the Plan is therefore vulnerable to a successful legal challenge.
- 2.2. We set out our case below but lead with our conclusion that the only way that the issue can be rectified is for the NEA's to prepare a further iteration of the Environmental Report for consultation. Subject to the outputs from the updated SA and consultation responses, there may be soundness implications for the spatial strategy of the Plan.
- 2.3. **No Adastral New Town Ltd v Suffolk Coastal District Council & Ors [2015] EWCA Civ 88** confirms that earlier breaches of the SEA Directive/SEA Regulations may be cured by later steps [56-59]. The Court of Appeal essentially endorsed the reasoning of Singh J, at paragraphs 112-113 and 125, in **Cogent Land v Rochford DC [2012] EWHC 2542 (Admin); [2013] 1 P&CR 2**
- 2.4. SEA revisions must not fall into the trap of 'ex post facto' rationalisation to uphold an earlier chosen preference. Objective re-assessment is required and

it is advisable for the author to be unencumbered by earlier involvement in the SEA process.

- 2.5. The SA reports on four key areas in respect of Garden Communities. Each is relevant to the deficiency of the Environmental Report.

*One - The SA assesses individual GC locations at various scales, led by the outputs of the AECOM work, but this is not the case for Monks Wood.*

- 2.6. Monks Wood is erroneously only assessed at the one scale of 15,000 dwellings. The correspondence and documentation provided by Sworders and Lightwood to Braintree DC during its plan-making processes (and when) is presented below:

- i. Sworders email of 9<sup>th</sup> March 2016 identifies an estimated capacity of 5000-6,000 homes (Email 1);
- ii. Lightwood's representations (Email 12) on the Reg 18 consultation (August 2016) highlight that least 5,000 dwellings could come forward (in line with the NEA's unjustified<sup>1</sup> threshold for the consideration of new settlements);
- iii. Lightwood tabled a master planning document at a meeting with Emma Goodings on November 21<sup>st</sup> 2016 and this showed three phased concept of 3,100-3,500 dwellings. That document was then emailed to Braintree DC on 24<sup>th</sup> November 2016 (Email 25);
- iv. In the absence of comparative assessment from the NEA's, Lightwood prepared its own versions of AECOM's Volumes 1-3 of June 2016 (supplied to Braintree DC on 31<sup>st</sup> March 2017) (Email 38). Lightwood's Volume 3 presented four potential concepts in terms of scale (4,000, 8,000, 11,600, and 13,600 homes).
- v. Following more detailed assessment, based on environmental studies supplied to Braintree on 9<sup>th</sup> April 2017, the upper end of the development concept (prepared by John Simpson Architects) settled at 7,000 homes.

- 2.7. Paragraph 4.26 of Garden Communities Topic Paper states that "*there was some uncertainty through material submitted over the anticipated scale of development which may have impacts on the proposals ability to provide larger pieces of infrastructure. A masterplan for the scheme was only supplied in May 2017*". Lightwood submit that there was sufficient certainty to warrant the testing of a lower level of development, and that for the other GC locations the authors of the SA (Essex CC) were in any case led by the jointly commissioned AECOM work, not developer-led submissions.

- 2.8. The AECOM Report that the NEA's commissioned for Monks Wood (Final Report, May 2017) sets out a single development capacity of 5,151 dwellings. The SA draws on the June 2016 based AECOM capacities for the other GC

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<sup>1</sup> 'unjustified' in that Governments threshold for Garden Communities is 1,500 dwellings and Essex CC accept that development at a scale of 3,000 dwellings would support the provisions of a 4FE secondary school.

locations. This is not the case for Monks Wood. Instead a single figure of 15,000 homes is appraised.

- 2.9. Monks Wood at 15,000 dwellings (a town) is a materially different proposition to Monks Wood at 3,000-5000 or 7,000 dwellings (a village). The SA has not assessed the correct proposition. Paragraph 3.45 of Lightwood's representations confirm that "Monks Wood is a deliverable proposition at the minimum size for a garden village (1,500 homes) and it can grow to 7,000 homes and does not need to reach the scale of a 'town' to be viably developed.
- 2.10. This SA point reinforces a DTC point. If Essex CC were assessing a proposal of 15,000 homes, and the SA was forming (as it should have) the basis Duty based discussions (albeit very late in the process) on alternatives, then those discussions (or that joint working) was taking place on a false premise and cannot have been effective. There can only be similar conclusions in respect of neighbouring authorities and other prescribed bodies. The SA failings cannot be disentangled from the Duty to Cooperate.

*Two – Scoring of Monks Wood (at 15,000) and the preferred locations*

- 2.11. Lightwood strongly contests the appraisal of Monks Wood in comparison with the preferred GC locations, not least or exclusively in relation to the SA objectives on housing, infrastructure and deliverability. Matter 1 is not the place to address SA assessment in detail, but we register that there are issues.
- 2.12. Patently, Monks Wood is underscored and other sites are over scored in respect of the SA objective on deliverability. In respect of the other locations there is a disconnect between the Hyas Viability Report, affordable housing, and the SA's deliverability and housing objectives. The Hyas Model identifies backloaded infrastructure provision, far beyond the plan period (rail at Marks Tey), yet this is not acknowledged.
- 2.13. Fundamentally, the scale of the proposition that has been tested in the SA is wrong. Further, Monks Wood was not assessed on the same basis as the preferred options (only at one scale).
- 2.14. Consequently, the plan-making process to date, as a whole, has not given the public sufficient opportunity to reflect upon and respond to the policies and allocations proposed in light of the sustainability appraisal published alongside it. Therefore, the public has not been afforded effective participation in the plan-making process such that Lightwood or any other individual member of the public has suffered prejudice for the purposes of s.113 of the 2004 Act. It is entirely conceivable that, based on the assessment of the correct scale at Monks Wood, the outcome of the plan making process may be different and similarly once the unjustified garden community threshold of 5,000 homes is removed.

*Three – Strategic Optioneering: The SA presents six alternative strategies for the spatial strategy (Policy SP2) in addition to the preferred strategy of three Garden Communities; these are:*

- 1) Allocating all the Garden Community options;

- 2) One Garden Community;
  - 3) Two Garden Communities;
  - 4) A focus on existing settlements only;
  - 5) A focus on stimulating infrastructure and investment opportunities;
  - 6) Cause's Metro Plan.
- 2.15. We refer the Inspector to paragraphs 3.62 to 3.73 of our August 2017 representations for our critique, especially in respect of alternative strategy 5, and in respect of the reasoning behind rejecting some of the other options. Given the gravity of the decisions being made we considered the reasoning to be inadequate.
- 2.16. The SA's reasoning for discounting 'A focus on stimulating infrastructure and investment opportunities' is not clear or intelligible. At the time of writing the SA, no preferred route option for the A120 had been determined by Essex CC. Further, the assessment of this option was made on the basis of 15,000 homes at Monks Wood.
- 2.17. We also contest that the SA's assessment of alternative strategies (1-3) cannot be sound if it was assessing Monks Wood at 15,000 homes.
- 2.18. Moreover, the periods, short, medium and long term within the SA in respect of the assessment of temporal effects of the alternative strategic scenarios are defined as being contained entirely within the plan period. At the end of the plan period the preferred GC's will be debt heavy places of at most (and likely less than) 2,500 homes and the specific GC benefits will not have been delivered.
- Four: The 'in-principle' preferred spatial strategy is for three garden communities and the SA tested 9 potential combinations, but avoided the presentation of a crucial 10<sup>th</sup> combination.*
- 2.19. In our representations on the SA we observed the non-assessment of Monks Wood (at any, or the correct scale) in combination with various scales of development at Colchester/Braintree Borders and East Colchester, even though this was within the terms scope of the preferred strategy for 3 Garden Communities.
- 2.20. Evidently plan-makers saw the value in testing a long list of potential combinations. The absence of the combination referred to above is referred to in paragraphs 3.58-59 of Lightwood's representations and Question 3 of Lightwoods Matter 6 hearing statement.
- 2.21. We suggest that, at the correct scales of development, the combination alluded to above is the most sustainable option for a spatial strategy involving 3 new garden communities. It is not presented in the SA as it creates a difficult set of results for the NEAs to deal with. The reasoning for the non-appraisal of this combination, i.e. that it is not appropriate to have two new settlements between Braintree and Colchester (ref the explanation in the SA in respect of alternative spatial strategy '5' and the alleged "*unsustainable concentration of sites in certain areas*"), is not robust. Such a judgement is not evidence based and should not have been presented in order to avoid the SA of this combination. A robust SA demands that this

combination of options is assessed, with Monks Wood presented at a realistic capacity. Subsequent debates can then be had on whether it is appropriate to have two new settlements between Braintree and Colchester and at what scale

- 2.22. Returning to our opening point, as Monks Wood has not been assessed at the correct scale there is 'prejudice' to parties involved in the plan-making process.
- 2.23. Monks Wood has not been assessed despite being a reasonable alternative. The Council don't deny this and told the hearings orally that it was swept up within Option 5 and therefore did not need to be assessed separately within the preferred strategic scenario. However (a) that reasoning is not found in the SA and (b) it is palpably wrong. Strategic Option 5 was assessed based on 15,000 homes at Monks Wood and 24,000 homes at Marks Tey. Where is the assessment of small scale, village sized development either side of Coggeshall? This is a markedly different proposition and perhaps was not tested as Marks Tey 'fails' deliverability wise at a more modest scale whereas Monks Wood does not.

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

- 7.1. As evidenced by the email from Laura Chase (Colchester) of 19<sup>th</sup> Jan 2018, it is clear that the authorities, albeit unintentionally, have not fully complied with:

### Regulation 22: Submission of documents and information to the Secretary of State in respect of

- i. (1) (c) (v), as Lightwood's representations were not summarised, or part of a summary of representations made in the statement that was sent to the SoS.
- ii. (1) (d), as copies of Lightwood's representations were not sent to the SoS.
- iii. (3) (a) (ii-iv) as copies of Lightwood's representations were not made publicly available.
- iv. (3) (b) as the general consultation bodies and each of the specific consultation bodies were denied knowledge of the issues raised by Lightwood
- v. (3) (c) as Lightwood requested to be notified of the submission of the Local Plan to the Secretary of State that it has been so submitted.

- 7.2. The effect of Bullets i-iii means that the NEA's are in breach of Section 20 (3) of the Act.

- 7.3. By extension there is also failure to comply with Regulation 24: Independent Examination, which effectively means that Lightwood was denied the six weeks' notice that there were entitled to in respect of the hearings.

- 7.4. All of the above means that the examination of the Plan has begun and continued on a false basis, compounding the DTC and Sustainability Appraisal failures.

- 7.5. Lightwood was prejudiced by not being informed of the submission of the Plan, leading to consequential issues in respect of the examination timetable, e.g. non-receipt of hearing statement matters or deadlines. Consequently, very late statements were made for Matters 6-8 in a very compressed timeframe in order



to enable the second week of hearing to proceed as planned, but not without prejudice to Lightwoods preparation.

7.6. Lightwood has also been prejudiced because the examination begins on submission and therefore the Inspector's assessment and scoping of hearing matters has not been based on Lightwood's duly made representations. Additional prejudice to Lightwood results from specific consultees and the public being unaware of the points and evidence that we were leading with.

7.7. General and specific consultation bodies, such as CAUSE, were themselves prejudiced in their preparation, over and above prejudice caused by a deficient environmental report.

7.8. A failure in respect of Section 20 (3) of the Act and Regulation 22 is not curable.

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

9.1. Not in respect of sharing in the 'risk and reward' aspect of the Vision, which then flows into Policy SP2 of the spatial strategy.

9.2. Lightwood made oral submissions on sharing 'risk and reward' and Policy SP2 during the second week of the examination hearings. It is plain that in seeking to share "risk and reward", i.e. appropriate land value and commercial return, both by taking profit through the LDV and "interest farming" (the debt heavy borrowing) through a requirement in policy, the NEAs are going beyond the legitimate actions of a LPA discharging its functions under the planning acts. Written submissions can be made if invited by, and helpful to, the Inspector.

9.3. Equally, that approach has intentionally underpinned and informed the strategy to date including the location and importantly the vast scale of the Garden Communities, committing to 43,000 units now to deliver 7,500 units in the plan period.

**12/02/2018**