



Hearing Statement for Matter 1

For hearing scheduled on 9th May 2018

(excluding paragraphs removed at the Inspector's request)

Please see below CAUSE's response to the Inspector's questions which we hope will assist the Inspector. In the statement we refer to the following documents, submitted as appendices:

	Appendix Title	Page
1	PWC report dated 16 th December 2016 (heavily redacted)	Separate attachment
2	Garden Town Capacity Funding application 2017/18	Separate attachment
3	Further analysis of Section 1 Sustainability Appraisal	11
4	Analysis of NEA appraisal of Monks Wood	Not included
5	Counsel's further opinion	Separate attachment
6	Additional comments: North Herts study	Submitted separately
7	Duty to Cooperate: A12 re-routing correspondence	14

1(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:

(i) co-operation between the NEAs themselves:

1. The NEA's paper of 23rd March 2018 makes it clear that they have fallen short in their duty to co-operate in the manner required of them by the 2004 Act. They have now admitted¹ what we have long suspected – that the three locations were agreed between the authorities as long ago as 2015².

2. This agreement came before any of the key evidence was available - the AECOM feasibility study, the sustainability appraisals and the responses on preferred options and submission draft Plans. It provides confirmation that the decision was

¹ NEA Response to Lightwood Strategic Matter 1 Hearing Statement paras 8 and 9.

² A detailed analysis of the timing of decisions made is provided in Counsel's Further Opinion, App 5.

predetermined and that the evidence was backfilled later, an approach open to legal challenge on the basis that minds were closed before the options were evaluated.³

3. Lightwood Strategic ('Lightwood') has shown that their proposals were side-lined and downplayed as "objector proposals". CAUSE's experience⁴ is consistent with Lightwood's⁵. We can therefore show that there was a pattern of behaviour and not a lone error as suggested by the NEAs.

4. We believe this pattern was driven by the failure to co-operate proportionately given the scale and long-term significance of the proposals. Once political agreement had been reached on the three locations it was very difficult for officers or Councillors to make changes or consider alternatives. Alternatives were not welcomed for proper assessment and minds were closed. It was easier to press ahead through adverse evidence than to renegotiate the political agreement.

5. The NPPF requires the authorities to seek the most appropriate strategy (para 182⁶) not a politically convenient one. It places a high emphasis on the duty to co-operate, requiring them to cooperate "effectively" (para 181). There is no county or regional Plan, so for large-scale development the planning system depends on this duty to co-operate⁷, and the bar is rightly set high.

6. We submit that the shortcomings in co-operation have resulted in a predetermined plan which cannot be sound. We agree with Lightwood that such a shortfall cannot be rectified. A section 33A failure brings the Plan to an end.

ii) co-operation with prescribed bodies:

7. Colchester and ECC have not met their duty to co-operate with the Highways Authorities over the route of the A12. They conducted almost parallel consultations which ignored each other: the 2017 A12 consultation ignored the Garden Communities: and the first DPD consultation ignored the previous A12 proposals. The correspondence in appendix 7 illustrates the friction which continues to this day.

8. As a result the A12 improvements are now being delayed⁸ while yet another consultation is carried out, and the Garden Communities are publicly seen to hold up desperately needed infrastructure rather than bring it forward.

³ See Local Government Association Probity in Planning guide page 8.

⁴ We met with disinterest and resistance from the NEAs when we attempted to present the Metro Plan, a sustainable transit-oriented proposal, to them as early as November 2015. It was clear at that early stage that decisions to move forward with large scale garden communities in three locations were already entrenched.

⁵Page 73, CAUSE Hearing Statement: <http://www.cause4livingessex.com/wp-content/uploads/2017/07/HEARING-STATEMENT-4TH-DECEMBER-2017.pdf>

⁶ Para 182: ".....the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence....."

⁸ See letter from the Department for Transport ref 222122 dated 10th April 2017 in appendix 7

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

2(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?

9. The NEAs should have evaluated all reasonable options rather than just choosing the biggest.

10. CAUSE has prepared a paper laying out other serious shortcomings in the decision-making process in a paper that the Inspector has suggested is outside the scope of Matter 1: but we feel that the points on pages 1 and 2 are highly pertinent and the paper remains available to him if it would be helpful.

11. These comments on the flaws in the decision-making process do not mean we support development at Monks Wood any more than West Tey. Both are equally misconceived.

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

12. We are cautious about answering narrow questions (such as “exactly how many prisoners should have been shot?”) for fear that the broader principle (“have they had a fair trial?”) is forgotten in the process. This plan cannot be given a ‘quick fix.’ The problems go much deeper. The many ways in which the SA is neither legally compliant nor fit for purpose are laid out in Appendix 3.

13. The NEAs should of course have evaluated Monks Wood at a full range of scales from 1500-15000. Rather than choosing just the biggest and then dismissing it as unsustainable, they should have evaluated all reasonable alternatives and then sought the best.

14. The same applies to the NEAs’ dismissal of the Metro plan. Rather than trying to make it work they assumed it had to be implemented at the largest possible scale, then tried to demonstrate that the land isn’t available.

15. This pattern of behaviour is evidence that minds were closed. Instead of looking for the best option, new proposals are taken to an extreme and then (subjectively in our view) dismissed. This may be clever advocacy, but it is unsound planning.

16. In particular the NEAs are showing a clear and unjustified bias towards big settlements. Thus they have only considered Monks Wood at 15,000 homes. They have set a minimum GC size of 5,000 (again unjustified) and used that as a reason to rule out the Metro plan.

17. We submit that the motive for upping the scale was the need to attract MHCLG funding rather than bone fide planning considerations. For evidence see Appendix 2, the HCA Garden Town Capacity funding application 2017/18, a document littered with claims about scale and ambition such as the statement below:

“Before setting out factors that have influenced the work programme it is important to recognise that, since the original bid, **a third Garden Community has been drawn into the programme and the overall scale of ambition has more than doubled** (from 21,000 homes in 2015 to now up to 45,000). The programme has also evolved considerably since its inception driven by bold and ambitious local leadership and a strong cross authority partnership to ensure that the long term growth potential for North Essex fully addresses the Garden City agenda and realises its maximum potential.”

18. It would not be unreasonable to conclude from this document that NEGC has become a vanity project. The scale and ambition is played up to attract funding rather than because delivery will be improved.

2(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?

19. The SA should indeed have assessed all reasonable alternatives including i) the combinations suggested by the question and ii) combinations which include varying the size of the GC programme (Part 1) in relation to what we call “Balanced Growth⁹”, the approach taken in Part 2.

20. Question 2(c) thus exposes a fundamental flaw in the Plan which we consider in more detail below.

Summary of scenarios							
Sources: non technical summary and Lightwood hearing statements							
	BG	WB	MW	WT	NC	EC	MP
	Balanced Growth	West Braintree	Monks Wood	Colchester / Braintree Borders	North Colchester	Tendring / Colchester Borders	Metro Plan
Scenarios							
1		Dark Blue	Light Blue			Dark Blue	
2					Light Blue	Dark Blue	Light Blue
3				Dark Blue		Dark Blue	
4				Dark Blue	Light Blue	Dark Blue	
5		Dark Blue	Light Blue	Dark Blue			
6							
7							
8		Dark Blue				Dark Blue	Light Blue
9		Dark Blue				Dark Blue	Light Blue
Missing per Lightwood		At different scale from scenario 5					

Fig 1.

⁹ By “Balanced Growth” we mean the traditional pattern of growth in North Essex where communities each bear a share. The Section 2 plan already takes broadly this approach which can easily be extended by i) use of Community Infrastructure Levy for infrastructure, instead of debt-based growth ii) a more determined approach to regeneration of previously used land, including rural sites, farmsteads and sites below 0.25hectares, and a call for brownfield sites iii) growth based on Neighbourhood Plans iv) sustainable, master-planned urban extensions v) transit-oriented development vi) de-regulation for smaller sites supported by CIL.

21. Fig 1 shows the combinations considered by the NEAs: but none includes greater or lesser degrees of “Balanced Growth” in section 2 versus greater or lesser degrees of “Garden Community” growth in section 1.

22. It appears that two early decisions were taken:

- i. that exactly 7500 homes were needed in the Garden Communities over the plan period, no more, no less;
- ii. that the plan would be split into two sections, with ‘Balanced Growth’ in section 2 and large, stand-alone garden communities in section 1.

23. It might have been acceptable to make early decisions on a provisional basis if it was the first stage of a genuinely iterative process or if the NEAs could demonstrate a willingness to make changes. But there has been no justification of, or evidence to support, either decision, and the NEA’s have made no changes and nor attempted to assess the obvious reasonable alternatives. Nor is there any justification for the decision that ‘strategic’ (section 1) growth would be exclusively focused on large-scale stand-alone settlements.

24. We argue above that shortcomings in cross border co-operation lie behind this failure. It was easier to ignore reasonable alternatives than to renegotiate a split negotiated between three authorities.

25. Balanced growth is as an eminently reasonable alternative. It has proved to be deliverable in East Anglia for many years. By contrast the track record of large new standalone settlements is poor.

26. A compliant sustainability appraisal cannot ignore this option or other options which cross between sections 1 and 2. We submit that such a fundamental omission cannot be backfilled, especially where the two parts of the plan have different sponsors, different SAs and different inspection arrangements.

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

30. We are concerned that Lightwood talks only of reassessing different combinations of garden community locations rather than a fundamental re-appraisal. We fear that they, together with the NEAs, will try to use the Cogent Land case¹⁰ to apply a sticking plaster to the Plan which suits their purpose. But the Cogent case was highly fact sensitive, as noted in Singh J’s judgement. We list below the ways in which the NEGC facts differ so fundamentally that it provides no support for an “Addendum” approach to fixing the plan.

Cogent Land	NEGC
600 dwellings under consideration	42,000 dwellings + up to 15000 at Monks Wood
A 25 year build-out programme	50 year + project
1 local authority in charge	4 local authorities struggling to co-operate, and all settlements on borders
Many recent precedents for small developments	No UK precedents for new towns of this scale since Milton Keynes
No issues of size, delivery structure	Serious long-term choices to be made which

or funding	require proper appraisal
No public money at stake	£3 billion infrastructure project. Peak borrowing of £400m+ for West Tey alone
Cogent shifted position on material issues and thereby weakened its case (paras 109 and 138 of the judgement)	N/A
Evidence was presented that minds were still 'open' when the addendum was done by independent consultants (para 95 – Cllr Hudson)	The NEAs have themselves confirmed in para 9 of their statement that the GC decision was made in late 2015. They have bragged about the central government support they are receiving and how the law will be changed to help them. They have told opposition groups that it is all decided. So much money and political capital has been invested that it is hard to envisage an objective evaluation either from the NEAs or one of their consultants.

31. We can see no way to rectify the SA without a full reappraisal covering both the section 1 and section 2 plans. Given the evidence of closed minds it would have to be prepared by an independent third party, not by the NEAs or their existing consultants. We refer again to our 'Additional comments: North Herts Study'

32. In conclusion, a full range of combinations must include Balanced Growth, with an assessment of the section 1/section 2 split. It cannot be fair to favour the requests of one party which has gained leverage over the Examination while not respecting the more reasonable requests of other parties. The "unbalanced" nature of the Part 1 plan adds a significant further grievance, especially for rural communities who are suffering the brunt of the growth and whose views have been ignored. They understandably feel bullied.

2(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?

33. Yes.

(ii) which specific requirements are those?

34. Appendix 3 outlines the SA's legal shortcomings.

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

35. Having admitted that the decision on locations was made in 2015 it will be impossible for the NEAs to make the SA compliant. The process needs to be restarted and done with an open mind on the basis of a proper analytical framework and genuine consultation

7 (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 Regulations¹¹ 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**

36. Yes. Lightwood's representations were clearly omitted, whether deliberately or in error.

- iii) **Regulation 22(3)(a)(iii) – requirement to make all representations publicly available**

37. Lightwood's plans were not made publicly available until 6 months after 9th March 2016 when they were first submitted. Members of the public first became aware of them in September 2016, outside the Preferred Options consultation period when they should have been discussed. CAUSE submitted a letter to Braintree on 21 October 2016 setting out concerns about the proposal:

<http://www.cause4livingessex.com/about-cause/cause-papers-and-evidence/monks-wood-bdc-letter-21-oct-2016-final/>

- 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**

38. This defect can only be remedied by redoing the consultation process on the whole Part 1 Plan. It would be wrong to invite comments on the Lightwood proposals in isolation when it is widely known that the authorities are so committed to the original three locations.

7(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?

39. Much attention has been given to Lightwood's interests but less to those of the communities affected.

40. The failure of the NEAs to submit representations to the Planning Inspectorate means that local communities have been unable to participate fully in the Examination process. If the Monks Wood Action Group¹², Stisted Action Group, Stisted Parish Council and other surrounding Parish NEAs had been aware that Lightwood continued to promote Monks Wood through the Plan, then they would have been able to submit full hearing statements in response and to request

¹¹ Of the *Town and Country Planning (Local Planning) (England) Regulations 2012*, as amended.

¹² Represented by CAUSE

attendance at the whole Examination in Public in January. Attendance on May 9th is not a substitute, because only Matter 1 will be examined there. They need to be invited to participate in matters 2- 9 also.

41. On a practical note, Lightwood has been able to submit several documents and appendices promoting its proposal and was able to insert itself into week 2 of the Examination. There was no opportunity for the groups mentioned above to insert themselves similarly.

42. Local communities have been unable to 'have their say' and participate fully and are prejudiced by this.

43. Natural justice would require that consultation be a two-way process and genuinely inform plan-making in North Essex. The NEAs have made it clear through their actions that consultation is a one-way process and interested local people are to be dismissed as NIMBYs. We feel that Council leaders are imposing urbanisation on what they see as "blank canvas" countryside in a way that was never intended by the Localism Act.

44. Any attempt to reach a compromise with Lightwood behind closed doors will be contrary to natural justice and open to legal challenge. The Lightwood situation can only be properly resolved by a full reappraisal followed by consultation.

7(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?

45. State Aid: The PWC report warns that a public/private NEGC structure may contravene the EU rules that make state aid illegal. The NEAs have confirmed that they have legal advice on this key subject but have refused to release it.

46. PWC tell us that the cost of capital for any PPP solution is likely to be much higher than the 6% assumed in the Hvas report and in all CAUSE's workings. Without a public sector guarantee the interest margin for a new development corporation will be up to 10%¹³ due to the risky nature of the enterprise. This is just the margin, not the total interest cost. Any guarantee given will be illegal state aid unless charged on arms-length terms which will be high due to the risk.

47. 1996 Human Rights Act: we have not had the opportunity to respond to Denton's comments on CPO, which also go to the root of deliverability. They conclude that "After extensive advice the NEA are confident that the garden communities can be delivered at appropriate land values". Denton's response shows that the reality of deliverability is not properly understood: so we have prepared a paper challenging the conclusion and would be happy to share it with the Inspector if it would assist him.

48. Nationally Significant Infrastructure Projects: the GCs may qualify as NSIPs and become entangled in a different planning regime. NEGC is not directly involved in building houses: it is undertaking a £3bn infrastructure project¹⁴, a scale that would

¹³ See PWC report 14 December 2016 page 23

¹⁴ The £3bn figure appears in the funding application at Appendix 2.

qualify as an NSIP. The promised Mass Rapid Transit System will cost about £1bn which may qualify on its own. The Plan needs to clarify the split of responsibilities between the Local Authorities and central government and address the conflict of interest issues laid out in paras 48-51 below.

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 reward¹⁵ from development?**

50. The PWC report (Appendix 1) sets out strong warnings about the proposed new approaches and to the issues around risk and reward. These points were raised in December 2016 and we seek to understand what the NEAs have done since to address them.

51. We believe that a Plan which makes major long- term decisions must cover issues of delivery and risk; and we are disappointed that the NEAs intend to remove the reference to risk and reward. Ignoring risk may be reasonable for a routine plan but for major long-term projects it has to be considered to maintain credibility. It is like a child saying s/he will buy a house without any thought as to how s/he will raise the money. It becomes an aspiration rather than a “plan”.

52. Removing references to risk and reward will not resolve the fundamental conflict of interest inherent in the Plan. The NEAs are both regulators of and investors in the LDVs, two roles that are not compatible.

- On the one hand The NEAs need to demonstrate that the Plan is deliverable. Thus the need for references to new approaches to delivery and risk sharing.
- On the other hand the NEAs must separate their own financial interests from their planning role.

Both Lightwood’s and CAUSE’s Counsel have pointed to this conflict in written opinions. How can a Council grant planning permissions to land in which it has an interest while ignoring similar land alongside? Will this open up a development free for all that the NEAs cannot control? How can the NEAs try to buy land at below market value and then award themselves planning permissions?

53. To remedy these conflicts

- EITHER Planning Committee members need to demonstrate that their planning decisions are not biased by the impact of the GCs on Council finances. We regard this as impossible given their responsibilities as

¹⁵ 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)

Councillors and the scale of debt likely to be added to the NEA balance sheets¹⁶ and consequences for their annual surplus or deficit¹⁷

- OR the NEAs would need to relinquish control of the development corporation structure, resigning their directorships and passing surpluses or deficits elsewhere. Local leadership, a main tenet of the GC strategy, would have to be abandoned

54. We understand that the proposed corporate structure involves four layers of corporate bodies: adding the separations above will lead to slow and dysfunctional decision making.

55. This is a fundamental conflict that puts the whole Part 1 Plan at risk. It is not easily resolved and if the Plan is adopted it is likely to raise its head in Court.

56. The NEAs should be asked to provide evidence that they have addressed all the practical financing issues laid out in the PWC report. Detail can be provided later in the DPD but they must show now that they have addressed financial realities and that there is a viable funding solution. The evidence available so far strongly suggests that there isn't and that the Plan is therefore undeliverable.

57. We submit that the Part 1 Plan cannot possibly be found sound on the basis of the evidence available.

¹⁶ The peak debt for West Tey will be £405m per corrected Hvas figures. Colchester's existing borrowing is £130m.

¹⁷ A 10% interest margin on £400m would be £40m per annum which is more than twice Colchester's £17m annual receipts from Council Tax and Non-Domestic Rates. Funding its share of W. Tey would dominate Colchester's finances and make it impossible for planning committee members to be seen to be independent.

Appendix 3. CAUSE Comments on Section 1 Sustainability Appraisal

1. We believe that the North Essex Authorities (NEA's) are in contravention of Sustainability Appraisal requirements:
 - 1.1 The NEA's are required, under the SEA Directive and EU Assessment of Plans & Programmes Regulations (2004) to prepare a report which identifies, describes and evaluates the likely significant effects on the environment of implementing a plan or programme, and reasonable alternatives.
 - 1.2 In addition, we believe that the NEA's have failed against paragraphs 182 of the NPPF, to seek the most appropriate strategy, by ignoring different options, sizes and combinations and also paragraph 7, by failing to take into account the economic dimension of sustainability. This has important consequences for size, delivery mechanism and location of new settlements.
 - 1.3 The NEAs have admitted that the locations were decided in 2015, before the SA was prepared. The EIA Directive requires a Strategic Environmental Appraisal which draws conclusions from the evidence, not vice versa. Any plan relying on such a flawed process will be subject to challenge.
 - 1.4 We have not seen a clear summary of alternatives considered when preparing a joint spatial strategy for north Essex, nor reasons for selection and rejection of options.
 - 1.5 Further, CAUSE believes that the NEA's decision to focus long-term growth in three, very large settlements has not been justified. We have never had answers to our questions about why other options such as smaller sustainable urban extensions are not considered appropriate, nor is there evidence to justify the size or choice of sites of the three garden communities in Section 1.
 - 1.6 We have seen no explanation or justification for splitting the Plan into a Section 1 and Section 2, how the Section 1 came about in the first place and how the problems of carrying out a robust sustainability appraisal for two sections have been addressed. We seek to understand how it is possible to assess the two sections in isolation, separate from each other. This approach does not allow for a full cumulative picture of likely environmental impacts on north Essex of the two sections, nor for mitigation measures to be explained and set out. There is no report evaluating the cumulative impact of Section 1 on the north Essex environment, nor one evaluating the impact of Sections 1 & 2 combined.

Therefore we believe that the authorities are in contravention of paragraph 5.12 of the Directive guidance¹⁸, which states, *“It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they not are considered to be the best option.”*

- 1.7 Consultations & predetermination. Councillors’ guidance on predetermination takes the view that, “A councillor will always be judged against an objective test of whether the reasonable onlooker, with knowledge of relevant facts, would consider the councillor biased.” CAUSE would be pleased to provide a list of events and incidents which demonstrate that a great number of councillors decided long ago that garden communities should proceed and have operated with a closed mind, unwilling to listen to evidence against the NEGC project or even to ask questions on behalf of CAUSE.
- 2.1 Perhaps the strongest indication of predetermination is the decision by officers to recommend that Issues & Options DPD Consultations should proceed in December 2017, **before the Examination in Public of the Section 1 Plan** and that councillors across three councils voted in favour of this recommendation. This decision was despite a written request from a number of action groups to postpone the consultation until after the Inspector’s report so that local people would know what exactly it was they were being consulted on. This was a clear sign to CAUSE and to the public that the councils have no interest in the proper process of plan-making and that all involved in Section 1 have a closed mind.
- 2.2 We also have concerns about the way consultation responses throughout plan-making have been side-lined. Concerns by residents were listed in agenda packs for local plan meetings but no further action was taken to ensure that changes to the plan were made as it progressed from the first, Issues & Options, phase.
- 2.3 No attempts were made to understand CAUSE’s Metro Plan and there were no attempts to seek clarification from CAUSE about the proposal. A reasonable observer could only conclude that, as with Lightwood’s proposal, the authorities had already made up their minds and had embarked on a settled plan. There was no willingness to keep an open mind about alternative options. Bias towards sites and a strategy (stand-alone garden communities) already chosen was clear. Attendees at (and those listening to podcasts of) Braintree’s Local Plan meetings have become accustomed to perfunctory discussion about major issues and refusal to address concerns raised by the public.
- 2.4 The responses to the recent Issues & Options DPD consultation for each site were overwhelmingly negative about the proposals, and cannot form a mandate for a future DPD. This is important: consultation responses have to be taken

¹⁸ http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

into account. Paragraph 7.4 of the Directive guidance¹⁹ sets it out clearly, with emphasis:

7.4. This definition clearly states that **consultation** is an inseparable part of the assessment. Further, the results of the consultation have to be **taken into account** when the decision is being made. If either element is missing, there is, by definition, no environmental assessment in conformity with the Directive. This underlines the importance that is attached to consultation in the assessment.

2.5 Paragraph 71 of Heard vs Broadlands judgement²⁰ puts it nicely, *“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.”*

2.6 In the judgement for Cogent vs Rochford,²¹ Singh J refers (in paragraphs 117-119) to Re Seaport Investments [2008] and notes that it is necessary for a public consultation to be capable of exerting appropriate influence on a draft plan. The environmental report must avoid a settled outcome and enable responses to be capable of influencing outcome. Where a plan becomes largely settled before the development of an environmental report, the fulfilment of the Directive and Regulations may be placed in jeopardy.

2.7 There has not been robust analysis and assessment of alternative options in any of the sustainability appraisals, and there are still strategic questions remaining unanswered. As such, we do not believe the requirements of the Directive have been fully carried out or that the contents of the SA reports have been sufficiently robust.

¹⁹ http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

²⁰ <http://www.richardbuxton.co.uk/sites/default/files/transcripts/Heard%20v%20Broadlands%20DC%2024.2.12.pdf>

²¹

https://www.rochford.gov.uk/sites/default/files/planning_core_cogent_judgement_s_0.pdf

Appendix 7 – Correspondence re A12 re-routing



THE RT. HON. PRITI PATEL MP
WITHAM

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Mr Neil Gilbranch
22 School Road
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Essex
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Our Ref: ZA49753

4 April 2018

Dear Mr Gilbranch,

It was nice to meet with you today and I am also grateful for your further correspondence regarding the A12 Widening Scheme and Garden Settlement proposals.

In relation to your correspondence, I am awaiting a response from the Department for Transport to the previous representations I made on your behalf and will let you know when they reply.

In respect of the HIF bid and the latest proposed re-route, this has prompted some public interest. As discussed earlier today, I am concerned that the re-route was put forward by Colchester Borough Council without prior warning or consultation. Decisions on future road infrastructure are crucial to this part of Essex and need to be undertaken in a fully open and transparent manner.

Colchester Borough Council have completely mishandled this entire process and that has undermined trust in the local plan process. Now their inappropriate meddling in the A12 route has further complicated matters and upset even more people. I will be holding them to account for their actions and the misery they are causing.

If there are any particular points you would like me to raise directly with the NEGC on your behalf please do let me know.

Yours sincerely,

with my good wishes

Rt Hon Priti Patel
Member of Parliament for Witham

Putting the Witham Constituency, Essex and Britain first.



Department
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Web Site: www.gov.uk/dft

Our Ref: 222122
Your Ref:

10 April 2018

Neil Gilbranch

Dear Mr Gilbranch

A12 widening scheme

Thank you for your email of 16 March regarding the A12 widening scheme. I have been asked to reply to your query.

Highways England and the Department are currently awaiting the outcome of the planning report on the major housing development near Marks Tey, adjacent to the A12 corridor. The route options for the A12 widening scheme between junctions 24 and 25 can only be finalised once the housing proposals have been confirmed, when the current planning inquiry reaches its conclusion. Highways England will then hold a further public consultation on any revisions to the scheme, covering those parts that will need to change from the proposals consulted on in 2017. Following that consultation, the preferred route for the A12 widening scheme will be announced and it will then proceed to its own planning stages through the Development Consent Order Process.

Each scheme will follow its own planning approval process, first the housing scheme and then the A12 road scheme. This inevitably means that announcements on the A12 scheme will take place later than we had previously hoped, but it will ensure that the road scheme is able to take full account of the planned housing development, once that has been confirmed. Highways England are working with Essex County Council, Colchester Borough Council and Braintree District Council to ensure that these schemes are coordinated as far as possible.

Yours sincerely

Shumuna Rahman
Strategic Roads, Economics and Statistics



North Essex Garden Communities

14th December 2016

Final Report

Important notice

This Report has been prepared for Colchester Borough Council under its letter of appointment dated 16 September 2016 and on the terms therein, the purpose of which is to provide Colchester Borough Council with commercial and financial advisory services in relation to the North Essex Garden Communities.

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1. Background

Context

Colchester Borough Council, Braintree District Council and Tendring District Council are in the process of updating their respective Local Plans to address projected demand for housing in the region. The process has identified a number of sites with potential to accommodate significant growth in residential units.

These local authorities, working in partnership with Essex County Council (together “the Councils”) have agreed to take a long term, strategic approach to delivery of three particular major sites and want to drive delivery of these sites in accordance with “Garden City” principles¹.

The Councils, with support from legal advisors (SNR Dentons), technical advisors (Garden Communities Partnerships, Aecom, and Cushman and Wakefield), the Homes and Communities Agency and Hyas Associates, have been working together over the past 12 months to progress a delivery approach. The Councils have developed a Heads of Terms to reflect the evolving delivery approach and to support engagement with stakeholders. Furthermore, the Councils have undertaken preliminary financial modelling to better understand the potential viability of each of the three key sites identified.

This Report

Colchester Borough Council (on behalf of the Councils) has appointed PwC to provide a high-level commercial review of the Councils’ evolving commercial approach to delivering the three identified garden communities evolves:

- The proposed delivery arrangements (in so far as they have been developed);
- The initial financial modelling undertaken on each of the 3 identified sites; and,
- Potential funding and financing mechanisms that could be used to support delivery.

The remainder of this report sets out our findings under the following headings:

- Review of proposed delivery arrangements;
- Review of financial modelling;
- Potential funding and financing; and,
- Conclusions and recommendations.

The report is based upon information that was made available by the 25th October 2016, save for where explicitly identified in the text.

¹ Garden Cities are described by the Town and Country Planning Association as “holistically planned new settlements which enhance the natural environment and offer high-quality affordable housing and locally accessible work in beautiful, healthy and sociable communities” – as taken from the TCPA website, <https://www.tepa.org.uk/garden-city-principles>

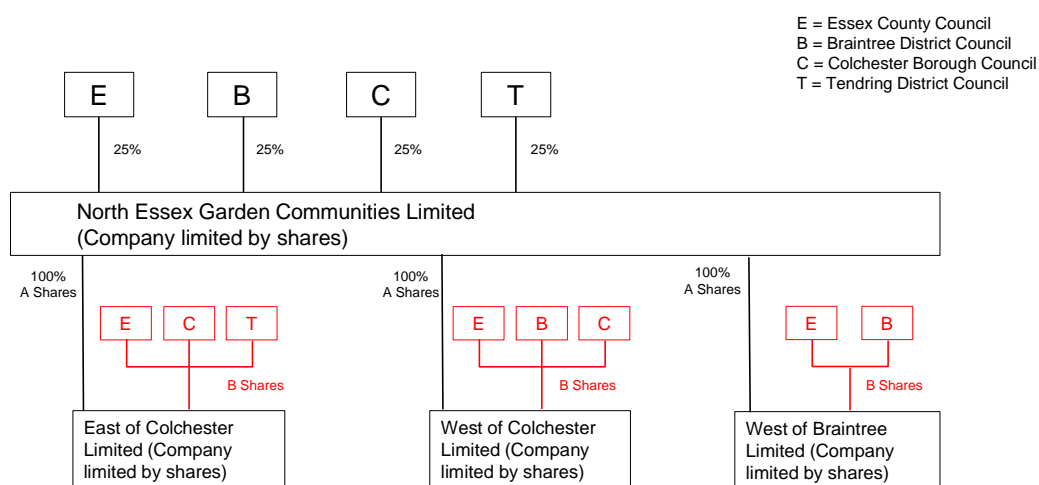
2. Review of proposed delivery arrangements

Overview

The Councils have undertaken a significant amount of work, supported by their advisors, to develop a proposed delivery structure that would link the four Councils together in delivery and provide dedicated delivery vehicles for each of the three major development sites identified. The two key tiers of the proposed delivery structure are:

- **North Essex Garden Communities Limited (“NEGC”)** – a holding company owned in equal proportion by each of the four Councils, whose primary purpose is aligning stakeholder approach and interest via a single strategic body. The stated aims of that body are to agree masterplans and drive quality, consistency and standards of delivery. It may also have a role (as per the current Heads of Terms) in coordinating the funding of the Local Development Vehicles, although it is unclear based on current information how this role would work in practice; and,
- **Three Local Development Vehicles (“LDVs”)** - shares in these vehicles will be owned by the NEGC and by those local authorities across whose administrative boundaries the sites sit. The primary purpose of each LDV is to facilitate the delivery of the Garden Communities. As such, they will have responsibility for the master planning, securing planning consents, delivering and financing infrastructure, and instructing landowners to sell serviced plots to realise value in accordance with a to-be-agreed phasing and delivery plan.

The diagram below summarises the relationship between these two tiers:



A Shares - voting shares; no right to dividend

B Shares - non-voting shares; right to dividends; principal right to capital return

As per the terms of our engagement, we have performed a high-level review of this delivery model, focussing on key commercial and financial considerations. Our observations can be summarised around the following key themes:

- Commercial appeal of structure;
- Risk, reward and value share; and,
- Clarity provided on commercially important processes.

“Commercial appeal” of structure

The Councils have sought to develop a delivery structure that recognises that the success of the project will require partnership working and buy-in from the private sector, including landowners and potential investors. This is particularly important for the sites being considered because the Councils (a) do not currently have an ownership interest in the sites and (b) do want to influence and have some control over how the sites are delivered. This creates a complex commercial relationship between the Councils and other stakeholders. As such, our high-level review focusses on the extent to which the proposed structure might appeal commercially to potential partners, including landowners and potential investors, with a particular focus on how risks and returns could be allocated and managed effectively.

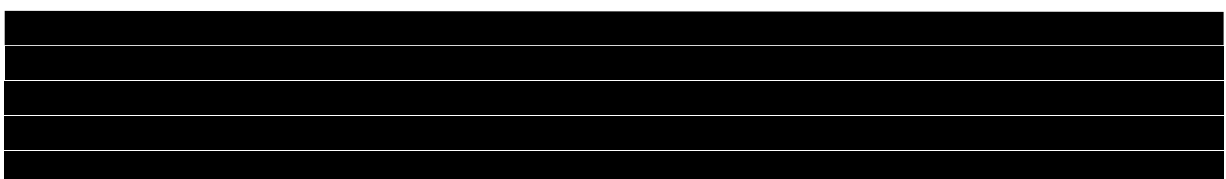
Benefits

- The NEGC offers a range of benefits by virtue of providing a clear way for the Councils to engage with each other and to drive forward delivery in a consistent manner by establishing a common set of principles to underpin each development. On schemes of this size, scale and complexity, the private sector typically values having a single public sector interface that it can engage with. For example, the Mayfield regeneration scheme in Manchester adopted this approach in facilitating its three public sector partners – the Mayfield Partnership (Manchester City Council, Transport for Greater Manchester and London & Continental Railways) - to enter a deal with U&I plc for the £850m regeneration of 24 acres adjacent to Piccadilly train station (September 2016).
- The establishment of each individual LDV as a company limited by shares is typical for large scale, complex projects such as those envisaged here. It provides a means of managing the delivery risk of each site as well as providing clear accountability for delivery. Dedicated project delivery vehicles for specific scheme and groups of landowners provide a transparent way to invest and is likely to appeal to both landowners and investors. This use of scheme specific delivery vehicles is typical for development schemes such as those proposed here.

Potential challenges

The Councils do not own the sites to be developed and want to have control over scheme delivery. This creates challenges for delivery and the delivery structures proposed by the Councils.

- ***Appeal to the private sector*** – the appeal of the current proposals has been considered acknowledging the potential for a number of potential interfaces with the private sector, namely (i) current landowners, (ii) developers and (iii) prospective investors. Creating a delivery structure which is attractive to the private sector is important in the context of this project, particularly given that the LDVs do not own any of the land and given that there is a significant financing requirement, which may or may not be provided by the private sector



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- **Role of NEGC and decision-making** - the role of the NEGC, as currently stated, suggests it – and it alone - will approve and monitor the business plans of each LDV. Typically in projects of this scale and complexity, establishing effective governance frameworks for long term partnerships - to monitor and control activity and inform decision making - are essential. Further development of current proposals will be needed to provide additional clarity to potential support private sector landowners to better understand how this will work in practice. For example, a mechanism that allows business plans to be revised without appropriate involvement may not provide private sector partners with the level of control or certainty they require when choosing to allocate and / or invest their resources.

It is noted that NEGC, a company limited by shares and can have independent directors. However, given it is owned entirely by the public sector, and funding is likely to be provided at LDV level, the potential role of the NEGC in influencing LDV delivery needs to be clear (and appropriate). Should NEGC’s role extend beyond strategy and enabling support, landowners or 3rd party investors may be wary of the LDV’s ability to deliver to plan without interference. In other words, private partners are more likely to accept decision making and influence from those investing in delivery (ie the public sector via its direct investment of funding into the LDVs) but are likely to be wary of influence exerted from NEGC (via a shares) that, without further definition of its role and remit, could impact upon the LDV’s ability to fulfil its agreed business plan.

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- As viability of specific sites becomes clearer, the Council should keep the appropriateness of current delivery arrangements under review by considering the range of potential alternative options available and the relative impact they could deliver for the Councils. This approach is typical for such a large scale and complex project in its early stages of development. Some projects, for example Thurrock’s £1bn

regeneration of Purfleet, were taken to market “delivery structure blind”, whereby the partner procurement process was used to shape the most effective way to deliver partners’ outcomes.

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Summary

Overall, the Councils have proposed an initial framework to delivering the Garden Settlements that contains a number of key benefits that are likely to appeal to landowners. A key positive is the way in which it brings together the Councils to work in a coherent way to drive delivery across the three major areas. The proposed approach also offers land owners an attractive commercial proposition – an upfront price for land with potential for a substantial uplift following public sector investment.

If the LDV’s role is to coordinate delivery of infrastructure and sell land (e.g. a land trading model) then the “commercial appeal” of the proposed structure may well be high with many landowners, but the Council’s need to satisfy themselves as to whether it is appropriate to protect / manage its own investment risk. Further refinement of current proposals could be considered as part of that process.

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3. Review of financial model

Overview

To support their assessment of site viability and long term financial performance of each Local Development Vehicle (“LDV”), the Councils have developed detailed financial models for each site. Each financial model has been approached from the perspective of the LDVs and builds upon technical information on costs and values provided to the Councils by Aecom and Cushman and Wakefield.

We understand that each financial model is intended to serve as an ongoing tool that is updated to reflect the latest information available. Hyas Associates has been appointed to support the Councils in maintaining and managing the models accordingly.

Given the importance of the financial model to ongoing decision-making for the Councils, PwC has been requested to undertake a high-level review of the financial model, focused on:

- The model as a **technical tool**, including the extent to which it adheres to best practice, is internally consistent and demonstrates arithmetic accuracy; and,
- The model as a **commercial tool**, reflecting the reliance the Councils are placing on the model to assess each project as an investment proposition.

Based on discussions with the Councils and Hyas Associates, who confirmed that, structurally, the models were consistent, we have focused our review on one of the models only, namely that for the West of Colchester scheme³. Please note that the version of the model reviewed was dated 6th September 2016.

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Summary and recommendations

Based on our high-level review, we understand that the Councils have developed a financial modelling tool that has been helpful in informing its views on the potential viability of the prospective sites. This tool is broadly consistent with modelling best-practice, has been undertaken in a way which protects the integrity of the modelling in each worksheet.

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- Providing the Councils with the information they require to understand the potential capital and revenue impacts on the investments they may be asked to make;
- Developing a tool that accurately resembles the emerging deal terms in key commercial documentation such as the heads of terms. This will help the Councils to fully explore the range of positions they can take on key commercial issues and better inform decisions that impact on the Councils' risk position and ability to secure value for money from any investment.

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4. Review of potential financing options

Overview

Delivering the proposed Garden Settlements is anticipated to require significant upfront expenditure to develop the masterplans, obtain planning consents, and deliver the enabling and supporting infrastructure required to create serviced plots that can then be sold to the market. A central question for the Councils moving forward concerns what mechanism(s) could be established to bridge the gap between the expenditure and returns identified.

Amongst the broad principles that create the context for addressing this question are:

- **Project viability** – does the project generate sufficient funding (that is, revenues) to repay the financing, and the costs of that financing, that may be required to meet the level of expenditure anticipated?
- **Financing the LDVs** – assuming viability the LDV will need to consider what options for raising the initial investment required there are, and how can this be structured to utilise the funding available from the project in ways that are cost-effective and provide value for money to the public sector and other stakeholders involved in delivering the project.
- **Additional sources of funding** – where the current sources of funding and viability do not support the financing of the project (regardless of the source of that finance), are there additional sources of funding that can be identified and used to support the financing requirement of the project?

These principles and themes have been used as the basis for structuring our approach to providing a high-level review of the potential financing options for the scheme.

In practice, the financing considerations for large-scale development projects such as these are complex. The purpose of the analysis set out in this paper is to support the Councils to focus on the key issues that will need to be tackled between now and any investment decisions being taken. There is time to work through these issues, but the complexity and challenges should not be understated.

For example, and with reference to the findings of the high-level commercial review, it is anticipated that the financing and funding solutions for each project are likely to be different, may draw upon a cocktail of different approaches and sources of finance and funding, and will ultimately need to be structured in a way that provides each Council with appropriate risk-adjusted returns, in line with their respective risk appetite and role in delivery, and overall value for money.

Project viability

This sub-section is structured as follows:

- **Project overviews** - summarises key financial information for each of the LDVs based on information provided by the Councils to support an initial view on project and commercial viability; and,
- **More detailed analysis** – of one of the LDVs in particular, analysing some of the key investment characteristics of that LDV. This is on the understanding that the broad picture for that LDV is replicated across the other LDVs.

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and without further work being undertaken to more fully understand and improve the overall viability.

High-level approaches to financing the LDVs

Subject to viability, LDVs could be financed with a combination of equity finance and debt finance, and each is considered in further detail below. The emphasis of the high-level review undertaken is however on the approach to the debt component of the capital structure, given this is how the financial model and heads of terms are currently drafted. It is however highlighted that Councils should consider the extent to which additional equity

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investment may be required and how this may impact the investment decisions they may be asked to make in the future.

This section is therefore structured as follows:

- **Equity** – provides an overview of a number of the key considerations from an equity perspective, particularly with regard to factors that may mean additional equity is required by the LDVs;
- **Debt finance** – summarises two approaches to the LDVs accessing debt finance including (a) Council borrowing and on-lending, and (b) the Councils providing a guarantee to support the LDV to access private finance. For each approach, detail on the pros, cons and additional considerations are provided.

Equity

As a broader commercial point, it is noted that in the documentation and modelling developed by the Councils to date, an overriding principle is that there will be minimal levels of equity in the LDVs, which will be predominantly (in the model this is 100%, for example) debt financed. This approach potentially raises a number of important legal and commercial issues, including:

- **State Aid** – given the interfaces that the LDV will have with the market, and the benefit that may derive to the private sector as a result of the public sector's role in the LDV, the state aid implications of the arrangement may need to be considered further. With regard to the capital structure proposed, the level of gearing may be important in this context given that (a) debt is typically priced more cheaply than equity to reflect the respective risks of those instruments, and (b) if the LDV has a greater level of debt than equivalent market participants and is in effect passing on the benefit of more, low cost finance, then this could create a state aid risk. To the extent that it has not already been considered, we recommend that further advice is sought from your legal advisors, and the outcome of that advice reflected in an updated financial model and heads of terms;
- **Taxation** – from a tax perspective, with loans provided to the LDV by a connected party, the deductibility of the interest expense will be subject to an arm's length test by HMRC. This will consider whether the terms of the debt are consistent with the terms on which a commercial lender would be prepared to lend and may impact on the level of corporation tax payable. It is recommended that the financial model includes this functionality given the material impact it can have on the project as an investment proposition. More detailed information is provided by the Council's tax workstream.

With regard to equity investors, the default position in the term sheets is for each LDV to issue nominal equity to NEGC and those Councils within whose administrative boundaries the particular schemes sit. Flexibility exists in those term sheets for equity to be issued (a) to the other Councils and (b) to other third parties, which may include landowners or other investors.

It is anticipated that an equity investor would have a return expectation from the LDV. This return expectation would typically be in excess of the return to debt investors given the different levels of risk being taken. Given the approach taken to financial modelling and the assumptions around capital structure to date it is not clear what level of equity return investors would currently be projected to receive – and how this might compare to their return requirements. Subject to further analysis being undertaken, this may create further questions around the viability of the scheme and its ability to appeal to potential investors.

Debt finance

For the reasons outlined above and in the high-level review of the financial model, there remain a number of factors that need to be worked through before the Councils can take a definitive approach to how the LDVs are financed. As such, the purpose of this subsection is to provide some initial thoughts on the type of approaches that the Councils might consider with regard to debt financing.

Two broad approaches are considered, namely:

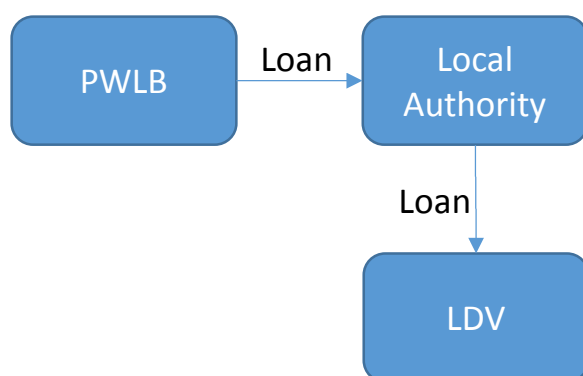
- The Councils borrowing, either from the Public Works Loan Board or another source (for example, municipal bonds), and then on-lending to the LDVs;
- The LDVs raising private finance, potentially from institutional investors, banks, and other financial institutions, potentially with the support of a financial guarantee from the Councils.

These two approaches, the pros, cons and further considerations for each, and the potential impacts on the Councils' capital and revenue accounts are presented below.

At this stage, particularly given the observations around broader viability and deal structuring set out earlier in this section, the Councils are not yet in a position to “set the course” of any particular funding and financing strategy. The information that is presented below is intended to summarise the key issues for consideration. These can then be used to support the Councils' thinking around a strategy once a fuller understanding of the underlying deals has been developed.

Councils providing finance to the LDVs

One model for financing the LDVs is for one or more combination of the Councils borrowing from the Prudential Works Loan Board (or issuing a municipal bond, or other source of finance secured against its revenues and assets) and on-lending to the LDV. This approach is illustrated in the following diagram:



Based on the above, there are two key aspects of that proposed transaction that need to be considered. Firstly, the key considerations in relation to the Council sourcing the finance in the first place, and secondly, the key considerations in relation to the on-lending of those amounts to the LDV.

Council accessing finance – pros, cons, and further considerations

- Typically Councils are able to access low-cost finance from the prudential works loan board to finance capital projects. Alternatives to PWLB do exist including, for example, issuing a municipal bond. Note, these alternatives may require further processes to be completed (for example, obtaining a credit rating) and may attract additional costs;
- As the Councils will note, while PWLB does have some flexibility over repayment options and interest rates, this flexibility is limited. Additionally, all repayment options currently require interest to be paid. This may have implications for the Council where the LDV is not generating revenues; and,
- Where the Councils finance the projects entirely they are unable to benefit from the due diligence that may be undertaken by a third party lender. The onus will therefore be on the Councils to perform due diligence to the level required to provide them with comfort around their investments.

In addition, from a treasury management perspective, it is understood that the Councils are considering what scope there might be for a series of shorter term lending and subsequent refinancing over the life of the Garden Settlement developments. While this approach does introduce a refinancing risk to the project (which the Councils may have to accept ownership for) it may also provide the opportunity for the Councils to borrow at low rates and provide the opportunity for more regular reviews of the potential to leverage in private finance as part of the refinancing strategy. As such, the overall debt structure of the LDVs could change over time.

Council on-lending – considerations

- **Pricing, terms and security** – the Councils will need to price the loans made to the LDV in accordance with state aid requirements.

As a guide to pricing, the European Commission's Reference Rate Methodology sets out how state aid compliant loans might be priced with reference to a 12 month LIBOR rate and a margin priced in accordance with the creditworthiness of the counterparty and the level of security (collateralisation) relative to the loan exposure. This approach, and the key underlying principles, underpin the pricing that the Homes and Communities Agency has adopted in relation to loans that it makes, as well as a number of other local authorities who have created their own wholly-owned housing companies and created on-lending facilities to provide the required development finance.

In terms of application, by way of example based on the information available, given the LDVs will be newly-formed SPVs with no trading history and the level of security they are able to offer could be low, the initial margin applied could be up to 1000 basis points (10%) per annum (or equivalent to what the market would be willing to lend to the SPV at if lower). The provision of a parent company guarantee (for example, from one or more of the Councils) could help to significantly reduce this rate (that is, the creditworthiness assessment would typically focus on that of the guarantor), although the risks associated with this for the guarantor(s) would need to be more fully considered.

In addition, it is also worth noting that as the LDVs develop a trading history and potentially do create assets that can be offered as security to lenders then there may be scope for the interest rates to reduce.

Overall, it is recommended that the Councils consider the pricing of potential loans in the context of the state aid advice it is procuring from its legal advisors, particularly as there may or may not be state aid exemptions for specific elements of the infrastructure being provided. Nevertheless, in this instance the Councils should remain mindful of the risks inherent in the project and should develop a firmer understanding of what the risk-adjusted pricing for any investment could be.

- **Minimum Revenue Provision** – Where the Councils have undertaken additional borrowing to fund capital expenditure or investment, they would normally be required to set aside some of their revenues as provision for repaying that debt. The broad aim of the Minimum Revenue Provision ("MRP") is to ensure that the cost of the debt is provided for over a period that is reasonably commensurate with that over which the capital expenditure is benefiting the Councils.

Whilst we would expect the Councils to set aside an appropriate annual MRP for the borrowing of the LDC loan we are aware of a precedent whereby there may be no requirement for such a provision.¹¹ This has been successfully argued on the basis that the net assets of the LDV (or equivalent) are sufficient to repay this balance through the eventual sale of the land.

The Councils must satisfy themselves that such an MRP policy is prudent and consult their external auditors before it is adopted. The DCLG Guidance on MRP of February 2012 states that "Authorities are

¹¹ For example, Basildon Borough Council proposed (December 2014) to revise its Debt Repayment Policy as part of its investment of loan and equity into its wholly-owned company. This was on the basis that, because the Council was expecting the repayment of the loan and redemption of the equity in full, there was no requirement to make a provision for repayment of the loans that the Council funds these investments with. In the event that it became apparent that the Council would not receive repayment of such a loan in full or the value of equity is at risk then a provision for impairment may be made.

to have regard to such guidance" explaining that this is the same duty as compliance with other statutory regulations. The prudent provision of MRP by local authorities may, "in some cases consider that a more individually designed MRP approach is justified". Any significant departures from the guidance - of which potentially not providing MRP is such - must be discussed with external auditors.

When required, the MRP accounting entries impact the Movement in Reserves Statement: essentially reducing the General Fund Reserve and increasing the Capital Adjustment Account by an amount equal to the MRP on an annual basis. The Capital Adjustment Account is non-distributable.

- **Limited cash available at LDV level to pay interest costs** – based on the modelling undertaken by the Councils to date, the LDVs do not generate net cash flows before financing that can be used to pay interest and service debt.

As such, any Council providing a loan to the LDV will need to consider the extent to which it is comfortable with the risks that it will essentially be increasing its credit exposure to the LDV until such time that it can begin to repay the loan finance provided. From a cash perspective, this may have implications on the Councils' own ability to make repayments on the debt that it may have taken out to finance its on-lending. The wider treasury management implications of this arrangement will need to be assessed by each Council as and when the model is evolved and further information on individual Council impacts is more fully understood.

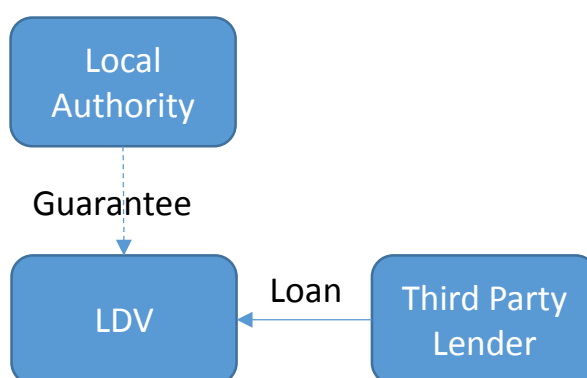
Potential Capital and Revenue implications

- Capital
 - Each year Councils are required to total their capital expenditure (capitalised amounts and REFCUS) and determine the extent to which this expenditure is to be financed from capital resources – capital grants, capital contributions and capital receipts. Any excess serves to increase the Capital Financing Requirement (CFR). The CFR records the historical capital expenditure that has been incurred by the Councils that has yet to be financed. It represents the underlying need to borrow for capital purposes, although the amount of actual borrowing taken out by a Council will depend on whether it has surpluses of cash arising from revenue balances, unused capital receipts, unapplied capital grants, etc. The CFR is reduced by setting aside revenue resources, either by lump-sum set-asides or by the annual charge of MRP.
 - Hence, a key consideration for the loan to the LDV is to assess any impact on the Councils' capital financing requirement ('CFR'), and hence the need to set aside capital resources (i.e. MRP, capital receipts etc.) to finance any CFR increases or where there is a decrease in the CFR, identify any over financing.
 - It is assumed the loan to the LDV is considered as capital expenditure on account of how, if the expenditure was incurred by the Councils, it would be treated as capital expenditure.
 - As such, appropriate entries will then have to be made to reflect the application of capital receipt or direct revenue financing in the usual way.
 - The loan to the LDV would be treated as a long-term debtor from the perspective of the Council.
 - Where there are any changes to the value of loan given, then it would have a corresponding effect on the CFR.
- Revenue – the key revenue considerations for the Councils are:

- With regards to any Council borrowing, the level of interest payable and any MRP made as a result of increased Capital Financing Requirement may need to be funded through the Council's Revenue budgets; and,
- Any interest payable on the loans to the LDVs can be allocated to the Councils' revenue accounts.

Councils providing guarantees to leverage private finance

A second approach for financing the LDV could be for the LDV itself to approach the market and seek to raise private finance. To support it in this endeavour, and mindful of the risks that have been identified above, it is anticipated that, at least in the early stages of the project, the Councils may have to provide a guarantee to the LDV. One way for structuring this approach is illustrated in the following diagram:



Leveraging private finance – pros, cons, and further considerations

- Providers of private finance will typically undertake extensive due diligence on the proposed investment opportunity. This can result in more robust propositions being created. The public sector can benefit from the rigour provided by third parties in this instance;
- In addition, there are a range of products available in the private finance market, with product choice in relation to the terms of investment, maturity, pricing, and drawdown and repayment profiles;
- However, it is likely that private finance will come at a premium to what the Councils can lend to the LDVs at (subject to state aid and value for money considerations). In this instance the Councils will need to consider the relative costs and benefits of alternative options;

One option available to the Council to reduce the costs of this finance is to provide a guarantee to potential investors. It should be noted that investors are likely to require this guarantee as a condition of their investment, particularly in the earlier years of the LDV's business plan where the greatest uncertainty exists. Through providing a guarantee, the Councils are at risk of having to meet the LDV's liabilities should it default. This exposure would need to be carefully monitored, and the probabilities and costs of it materializing reviewed. They would also need to be factored into the fee payable by the LDV to the Councils for providing the guarantee.

Further considerations of the guarantee

From the perspective of the Councils, there are a number of further considerations, particularly in relation to the guarantee, including:

- **State Aid** – in exchange for providing a credit enhancement to the LDVs the Councils will need to seek State Aid advice in relation to an acceptable form and terms of the guarantee, particularly as it allows the LDV to access funds at a cheaper rate than it would likely otherwise be able to.

- **Pricing guarantees** – partly linked to State Aid and partly a commercial issue in its own right, the Councils will need to consider what an appropriate risk-adjusted fee to charge the LDV is for the guarantees that it provides. The pricing would need to be informed by risk-based modelling to understand what an appropriate premium would be given the probability of the guarantee being called and for how much.
- **Managing potential risk exposure** – it is recommended that the Councils consider how they would respond to a guarantee being called. For example, the guarantee could cover a large and material amount of money. Upon the calling of the guarantee the Council will be obliged to cover this exposure from its own resources. This could have significant capital and revenue impacts, the implications of which would need to be fully assessed ahead of signing off the guarantee and continually monitored over the life of the guarantee.

Potential Capital and Revenue implications

- From an accounting perspective, the details of the guarantee will need to be reviewed to confirm its effect on the Councils. The following considerations will need to be further explored at the next stage:
 - The guarantees to provide credit enhancement confirms that the Councils have an interest in the LDV, which results in the Councils being exposed to variability of returns from the performance of the LDV. Such guarantees are included as part of the consideration to what extent the Council has control or joint control of, or significant influence over, the LDV.
 - Councils sometimes give financial guarantees that require them to make specified payments to reimburse the holder of a debt if the debtor fails to make payment when due in accordance with the terms of the contract. The Councils may decide to opt to charge a fee for accepting the risk involved in giving such guarantees, which as a result would be recognised as revenue receipts.
 - The financial guarantee contract shall be initially recognised at fair value. If the contract was issued in an orderly transaction between market participants, its fair value at inception will be the premium received unless there is evidence that this is not a reliable estimate of fair value. If no premium is received the fair value of the financial guarantee contract at inception shall be estimated by considering the probability of the guarantee being called and the likely amount payable under the guarantee.
 - Subsequently a financial guarantee shall be measured at the higher of the amount recognised initially and the amount determined in accordance with *IAS 37 Provisions, Contingent Liabilities and Contingent Assets* less when appropriate cumulative amortisation. Therefore, the carrying amount of the financial guarantee would remain at the original amount estimated at inception (less cumulative amortisation) unless payment under the guarantee becomes probable, at which point the amount of the liability shall be determined in accordance with IAS 37.
 - The entries on initial recognition would be to recognise the liability by crediting Financial Guarantee Liabilities and to charge the loss to Surplus or Deficit on the Provision of Services. If the amount determined in accordance with IAS 37 becomes greater than the carrying amount, the carrying amount should be increased to this amount. The movements in the carrying amount of the financial guarantee after initial recognition whether from subsequent re-measurement in accordance with IAS 37 or from amortisation of the liability in accordance with IAS 39 shall be debited or credited to Surplus or Deficit on the Provision of Services. Any consideration received for granting the financial guarantee should be credited to Surplus or Deficit on the Provision of Services.

Options for funding and securing further value

The key source of funding that the Councils have identified to repay the financing required to deliver the scheme is uplifts in land value as a result of the improvement works and changing planning status of the sites before they are sold to third party developers.

The main recommendation of this high-level review of financing options is for the Councils to undertake further financial modelling and analysis to enable them to fully understand the overall viability of the scheme given the costs of the various sources of finance that could be leveraged to deliver the scheme. This may identify a funding gap that needs to be addressed.

Subject to the outcomes of this analysis, it is envisaged that the Councils may need to consider additional sources of funding that could be accessed to support the delivery of the scheme. Potential options could include, but are not limited to:

- **Business rates** – based on current estimates, the schemes are anticipated to deliver 220,872 square metres of commercial space. To the extent that the business that occupy this space contribute business rates, this may provide one source of funding that could be accessed to support the overall financial viability of the scheme. Amongst the potential benefits of this income is the fact that, depending on when the commercial space is delivered, it could be start to be generated reasonably early on in the scheme;
- **Community Infrastructure Levy on adjacent schemes** – the current proposals are for the LDVs to secure land value uplifts on the sites. Given that the investments being made may have positive impacts on other, adjacent sites and schemes, the Councils might consider the extent to which a levy might be applied on those developments to help provide contributions towards the initial costs; and,
- **Alternative sources of gap funding** – depending on the extent of the viability gap and the amount of funding that can be provided from a range of additional sources, the Councils may need to consider what options exist in relation to gap funding for the project (see below).

Potential “asks” of government

The Garden Settlement developments envisaged by the Councils have the potential to align closely with the Government’s agenda, particularly with regard to accelerating the delivery of new homes and the broader move to greater devolution.

Given this, and in the context of the Government’s imminent Housing White Paper (due January 2017), there could be a window of opportunity for the Councils to consider discussions around potential “asks” of government. These might include:

- **Retaining Stamp Duty Land Tax (and a range of other property taxes / fiscal devolution)** – this mechanism is not currently available to Councils but is one being considered/ sought by a number of other local authorities / devolved areas, as well as in London (via the Greater London Authority). Given the emphasis on incremental / additional residential development (i.e. there are currently no taxes being levied as the properties do not exist), there may be scope for the Councils to articulate a request to government that allows them to retain a proportion of SDLT receipts over the life of the proposed developments. Whilst it would require a major change from government (and therefore is unlikely to be an easy “ask to deliver”) it could provide the LDVs with a reasonably regular flow of income that could be used to support the overall viability of the scheme. Further work would need to be undertaken to assess what this reform could yield and what benefit it could bring;
- **National Productivity Investment Fund** – the Government has identified housing as a key target for increasing national productivity. Of the £23 billion new spending announced in the Autumn Statement (2016), to be invested between 2017/18 and 2021/22, £7.2 billion has been allocated to support the construction of new homes. The primary purpose of this fund is to provide financial resources

to invest in infrastructure targeted at unlocking new private house building in areas where housing need is greatest. The overall aim is to support the delivery of 100,000 homes. Allocation of funds will be done via a competitive process. Given the alignment of interests between what the Government is trying to achieve and what the Councils are seeking to deliver, then subject to the supporting detail being worked up, the Councils could seek to prepare a strong case for investment ahead of what is likely to be a launch in April 2017;

- **New Homes Bonus** – New Homes Bonus has been one lever utilized by the Government to incentivize the delivery of new homes through providing match funding equivalent to six years of the Council Tax raised on each new home built. Reforms to the New Homes Bonus have been proposed, including reducing the period over which match funding will be provided (i.e. fewer than six years). While this could prove a useful tool “as is”, there may be potential for the Councils to frame an “ask” to government which, given the extent of housing that could be delivered, seeks match funding equivalent to a longer time frame. In addition, if long term certainty over this source of funding could be provided over the life of the projects then this could provide a valuable source of income for the Councils;
- **Options around interest payments** – given the potential interest costs that the Councils could incur should they borrow to on-lend to the LDVs, options for managing this interest cost – and the impact it could have on their revenue budgets – would be of substantial help. This is an increasingly common, and complex, consideration for other local authorities undertaking similar large scale regeneration projects.

Based on the information currently available, it is not possible to ascertain what the potential revenue costs for each Council might be. It is recommended that further modelling is undertaken to understand this more clearly. Once this position is more clearly understood, the Councils will be in a position to review their current Capitalisation of Interest policies to determine whether or not there is scope for them to use a lever already available to them to manage the potential revenue impacts associated with financing the deal. To the extent that this is not possible, there may be scope to engage with government around how an alternative revenue and / or accounting solution could be agreed such that this does not impact adversely on the Councils ability to bring forward these schemes.

The practicalities of delivering each of the above would need to be worked through in greater detail at the next stage as part of the broader discussion around project viability, risk allocation and return profiles. Clearly, options that require a change in policy, law and/or set a precedent for other Councils are likely to be challenging to secure, particularly in a timeframe to support upfront viability.

A strong evidence base underpinned by robust analysis will however help put the Councils in a position to articulate any “ask” of government in a way that can be framed as an “offer and ask” deal – i.e. government understands what it will receive in return for investment.

In terms of timeliness, the National Productivity Investment Fund is an option that the Councils may wish to consider and explore as a priority.

5. Conclusions

Conclusions

Based on the information provided it is clear that the Councils have made significant progress over the past twelve months to shape an approach to delivering three large scale, public sector-led residential development opportunities.

In accordance with the scope of the high-level review undertaken and the findings set out in this report, our conclusions and observations are summarized below:

- **Proposed delivery structure –**
 - **High-level commercial and financial review of framework**
 - **Initial support** - Considerable progress has been made in terms of aligning each of the Councils to a shared vision and set of underlying principles which will guide the delivery of the prospective Garden Settlements. This provides the Councils with a strong basis upon which to continue to develop their proposals and to engage with the market, and is consistent with the approach that others have taken for similar, multiple stakeholder schemes;
 - **Delivery mechanism** - A proposed “land trading” delivery mechanism has been articulated. This mechanism, through the creation of NEGC, recognizes the need of the public sector to provide confidence to the market for schemes of this magnitude. The proposal to create subsidiary LDVs which are limited by shares also provides an appropriate risk mitigation mechanism for the Councils. The attractiveness of the proposed mechanisms will however depend on the viability of the schemes and should additional private sector investment prove necessary, the proposed structure may need to be refined; and,

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

○ ***Project financial model -***

- ***Functionality and key formulae*** – the model developed broadly adheres to best practice and the application of formulae exhibits the expected level of consistency within worksheets. However, a review of sample model formulae identified a number of calculation errors that will need to be updated in subsequent iterations of the modelling.
- ***Commercial review of the model*** – the model produced does provide some information that it is useful for the Councils to consider from a commercial perspective. For example, information on peak funding requirements, and payback periods are included.

However, given the magnitude and complexity of the investment that is required for this project, further work is required on better defining the peak funding requirement, the project IRRs, the structuring of debt and equity and respective returns, and taxation impacts. The latter two in particular are completely absent from the model and will need to be incorporated as the project develops and further decisions around potential investment are made.

- ***Identifying “pinch points”*** – a number of pinch-points in the business plan have been identified, including that significant upfront funding is required, the projects do not reach a cash positive position for an extended period of time, and that there is considerable uncertainty around the quantum and timing of all cash flows. The model is not currently developed in a way that is conducive to extensive sensitivity analysis to test these key pinch points. Such sensitivities may include the impact of cost overruns, revenue shortfalls, and delays to the programme.

○ [REDACTED]

○ ***Potential financing and funding options -***

- [REDACTED]
- It is understood that each Council is currently in the process of securing an “agreement in principle” to be a long term funder for the project. This approach recognizes that the Councils are likely to have some role in funding / financing the deal, at least in the early years of each scheme, to help de-risk them with a view to potentially leveraging in private finance at a later date.
- **Potential approaches to financing** - to support the Councils in understanding how each scheme could be financed this report has identified and considered two broad approaches – (i) the Councils borrowing (either via PWLB, municipal bonds, or other source) and on-lending to the LDV in a state aid compliant manner and (ii) the Councils providing a guarantee to the LDVs to allow them to leverage in private finance directly.
- **Potential asks of government** – drawing upon experience elsewhere, and particularly in the context of devolution deals and the imminent Housing White Paper, a number of potential asks of government have been identified, including retention of SDLT (and other property taxes), the National Productivity Fund, and New Homes Bonus. Further work is required by the Councils to articulate any “ask” that is made of government. This “ask” must be able to demonstrate a “something for something” that is both credible and deliverable, and supported by robust analysis and a strong evidence-base.

Overall, the Councils have undertaken a significant amount of work to create a strong basis upon which to continue to develop their proposition and engage with the market. The conclusions drawn above acknowledge this work, and the usefulness of the tools and approaches used to arrive at the current position, whilst recognizing that the Councils are now entering a phase which requires further detail to be developed and a robust evidence base that can inform the future direction of the deal – including engagement with landowners, understanding the financial implications of the deal for all parties, and framing potential asks for government – to be created.

¹² It is noted that the Councils are considering the broader non-financial benefits that the scheme could deliver, with a view to factoring this into a broader value for money assessment of the proposed deal, as necessary.

6. Next steps

Next steps

To deliver successful outcomes the Councils will need to:

- Fully understand the objectives, risk appetite, constraints and level of financial and non-financial resources each Council is able to commit to the scheme;
- Undertake more detailed viability assessment supported, where appropriate, by due diligence on key assumptions. Such analysis should be supported by a financial model for the scheme that provides greater flexibility to test risk and should also provide individual Councils with a clearer view of what their individual investment and risk exposure is expected to be. This more detailed analysis will also support further development of potential structuring and financing solution(s) for the deals as well as underpinning any potential asks to government; and,
- Engage with the market to understand further (informed by a more detailed understanding of viability and Councils investment appetite) the extent to which current delivery and risk / reward sharing arrangements are appropriate for a) landowners and b) any potential third party investors that are to be targeted; and,
- Consider the implications of the above steps on the delivery of each individual scheme.

Building on the progress made to date, and with the above next steps, we believe the Councils can move forward with the objectives of:

- **building stakeholder confidence, clarity and support;**
- **refining and testing delivery proposals to demonstrate deliverability; and**
- **Building momentum into delivery.**

To support you to meet these objectives we have set out more specific suggestions around next steps under the following headings:

- **Further market engagement and testing with key stakeholders;**
- **Understanding of viability and overall deliverability; and**
- **[REDACTED]**

Further market engagement and testing with key stakeholders

- **Target outcome** – understanding what each party is seeking to achieve from the deal, what they are able to commit, and for what level of risk and return. Having this understanding, early on in the process, is regarded as best practice for all complex transactions.
- It is noted that each local authority is seeking approval for an “agreement in principle” to be a long term funder for the project, subject to further analysis. As part of that further analysis, it is recommended that the following key themes are explored with each Council, both individually and collectively:
 - **Affordability** - what can each stakeholder make available to the project and over what period;
 - **Returns** – what level of return does each stakeholder require, and how does it need that return to be extracted from the deal (e.g. as capital or revenue);

- **Risk** - what level of risk is each stakeholder prepared to accept as part of its investment;
- **“Red lines”** – does the stakeholder have any “must haves” and “must nots” that could be deal-breakers for the proposed transaction (note these could be financial or non-financial); and,
- **Value for Money and Options Assessment** - what analysis does each stakeholder need to be provided to support its business case development and demonstrate that the proposed investment is an appropriate use of public funds etc.

-

[REDACTED]

-

[REDACTED]

-

[REDACTED]

Understanding of viability and overall deliverability

Target outcome – provide the Councils with greater confidence in the viability, deliverability and risks involved with potential schemes and a clearer understanding of their own investment and risk commitment. Key to providing that analysis will be development of robust financial analysis that accurately reflect the emerging details of the schemes and proposed transactions. This work will support:

- **Understanding viability** – based on current projections provided by the Councils the schemes may have viability challenges. The extent of any viability challenges need to be more fully understood and supported by accurate calculations and best practice financial modelling;
- **Developing a robust evidence base** – the Councils have started work to collate assumptions. However, a more formalized assumptions book should be created so that each and every assumption used is logged and explained, with a view given as to the likely levels of robustness and sensitivity. Due diligence on key assumptions should then be undertaken;
- **Transparency around financing cash flows** – given the level of investment that is potentially being requested, much greater transparency around financing cash flows, for a range of financial instruments, for a range of potential investors, is required. Only once this information is available will it be possible to understand the extent to which the schemes are deliverable in the context of the outcomes from the further engagement identified above;
- **Risk assessment** – the financial model should be developed in such a way that a range of risks (including cost overruns, revenue shortfalls, and delays) can be modelled accurately and reliably. The level of analysis that can be provided will support the Councils in building confidence in the proposed schemes;
- **Readiness to fully explore financing options** – having a robust financial model that provides a detailed level of understanding of the LDV’s financing cash flows and how those cash flows perform under a range of risk scenarios will provide the Councils with a much stronger set of information with which to more accurately appraise the costs and benefits of a range of potential financing options, as well as support it more broadly in negotiations with those potential providers of finance; and,
- **Councils’ positions (Capital and Revenue implications)** – from the Councils’ perspectives it will be necessary to understand what the potential capital and revenue

implications for each Council of the proposed deals could be. This will support the Councils in building the confidence of their internal stakeholders also.

[Redacted]

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

[Redacted]

[Redacted]

[Redacted]

Appendix A. - Scope of services

A.1. Scope of services

The following is an extract taken from our Engagement Letter with Colchester Borough Council that sets out the agreed scope of services.

- A high-level review of the proposed delivery structure. Our services will include:
 - Attending a half day meeting with you and your legal advisors to understand the key details of how the Local Delivery Vehicles (“LDVs”) are being established and how they are proposed to interact with landowners and other potential counterparties to the deals;
 - Performing an initial high-level commercial and financial review of the framework and key principles covered by the Heads of Terms that your legal advisors have prepared and which landowners have provided initial feedback on; and,
 - Support you in identifying the key commercial and financial risks and implications of the proposed approach, including viability considerations, as well as propose a number of potential mitigations that you may wish to consider to help manage those risks.
- A high-level commercial review of the project model that you have prepared. Our services will include:
 - A high-level review of the model’s functionality, including a check of key formulae in the model for arithmetic accuracy and internal model consistency;
 - Undertaking a commercial review of the model output with a view to providing advice on the extent to which it provides the information required to support an investment decision. For example, such information might include details on peak funding requirement, structuring of debt and equity and respective returns, taxation, and payback periods;
 - Working with you to identify funding “pinch points” in the business plans – that is, aspects in those financial plans where there may be risks around the amount of financing required and / or the level and timing of receipts to the Local Development Vehicles or Councils. In addition, we will work with you to suggest a range of sensitivities to be performed by you to assist you to understand the potential impacts of key risk factors; and,
 - Working with you to identify other key financial and commercial risks based on the information provided in the project model.
- High-level review of potential financing and funding options. We will work with you to:
 - Identify and agree with a shortlist of potential financing and funding options for the Councils and / or the vehicle;
 - For each option, present high-level analysis in relation to the relative advantages and disadvantages, as well as relevant wider commercial considerations. Details on quantum of financing required will be drawn from your financial model;
 - Consider, at a high-level, the key capital and revenue implications of each option from a local government financing perspective;
 - Hold a half day workshop to discuss the outcome from the tasks set out above with the Councils to understand the respective appetites towards these financing options, as well as the suitability given the specifics of each site; and,

- Based on the above, identify and describe, at a high level, what, if any, changes to current local authority financing conditions might be required to support the delivery of your proposed Garden Settlements (that is, what might the “financing ask” of HM Treasury be).
- You will be responsible for providing timely access to key stakeholders and any documentation required for us to complete our proposed services.

Deliverables

- We will provide you with a short report which collates and summarises our conclusions from the above scope of services.

Services outside the scope of this letter

We are not providing any services other than the services set out above.

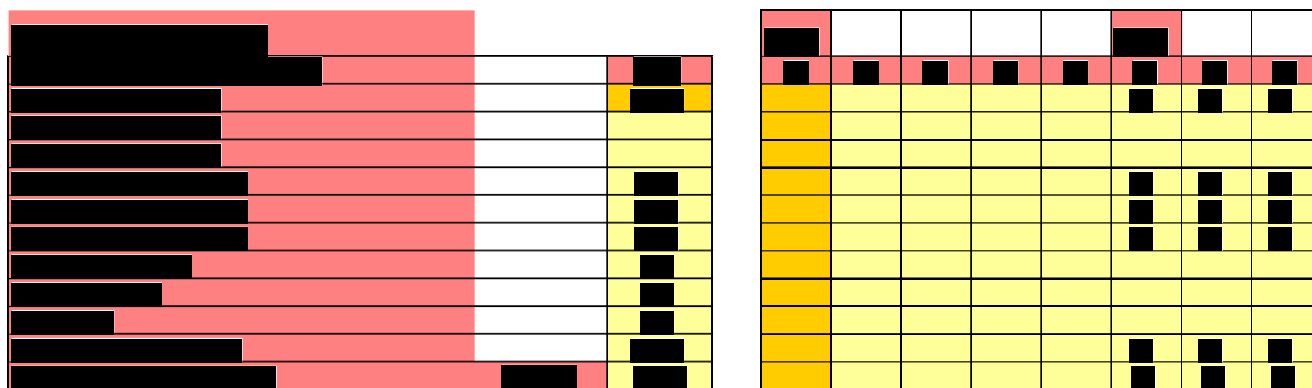
Appendix B. - Financial model review

B.1. Extract from financial model review

To test the extent to which the model demonstrates internal consistency and “integrity”, as well as has been constructed in accordance with principles of best practice, we have used specialist spreadsheet analysis software (Operis Analysis Kit) to help identify the following in the model:

- Any inconsistencies in formulae replication across worksheets;
- Hidden assumptions which are embedded as hard codes within formulas;
- Unused or redundant inputs; and,
- Cells with potential formula errors.

The illustration below shows an example of the analysis we have conducted on the model, which shows results from our high-level review of the “7. Baseline Appraisal” sheet in the model. This sheet consolidates the LDV’s total cash inflows and outflows to calculate the project’s internal rate of return and net present values, and the screen grab bellows reflects the total land sale and returns of the LDV component of that worksheet:



A well-constructed model should exhibit the pattern of colours seen above, namely where each unique formulae (dark yellow colour code) is copied in one or two directions (in light yellow colour coding), and there are no anomalies throughout the calculations (purple or pink colour codes, which denotes numbers or text respectively).

We have tested each worksheet accordingly and can confirm that, based on this high-level review, each exhibits a similar pattern. As such, we have not noted any inconsistencies in formula replication across worksheets.

We have also reviewed the model structure to understand the interdependencies between the inputs, calculation sheets, and the output sheets of the model. It appears that the model seems to be working correctly, that is, formulas in the calculation sheets are built upon inputs that have been entered manually into the model’s input sheets, and the output sheets consolidates the various calculations that have been done in the calculation sheets to reflect key financial indicators, such as project revenues and costs.

This document has been prepared only for Colchester Borough Council and solely for the purpose and on the terms agreed with Colchester Borough Council. We accept no liability (including for negligence) to anyone else in connection with this document, and it may not be provided to anyone else.

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North Essex
Garden Communities



HCA Garden Town Capacity Funding Submission 2017-18



Dear Minister,

Thank you for giving North Essex Garden Communities the opportunity to submit this further bid for Garden Town capacity funding, which will enable us to build on work undertaken to date.

In the next few lines I want to explain why you should support this request and make the North Essex Garden Communities a priority for your department.

We are looking to create up to three communities comprising 45,000 houses
- with the emphasis on communities.

While they will support economic growth across Stansted, Colchester and Harwich, the aim will be to create significant employment opportunities within the communities themselves.

By directly investing in land acquisition, the councils involved will be able to exert greater control and extract greater value, ensuring quality design, sustainability, and full infrastructure development contemporaneous with, rather than subsequent to, the housing.

This venture is forged by a remarkable partnership of councils with different political hues. In money terms they have already contributed £1m but a far greater sum in the uncosted work of many officers.

North Essex Garden Communities has the potential to re-write the relationship between the private and public sector when it comes to creating new housing. Lord Kerslake recently described this undertaking as being "of national significance", and our ambition is to be recognised as one of the Government's top locations.

This investment is well worthy of your support and engagement.

Yours Faithfully

A handwritten signature in black ink, appearing to read 'John Spence', with a horizontal line underneath.

John Spence CBE,
Chairman, North Essex Garden Communities

Bid Information

1 Name of local authority & key contact details in relation to this bid

Chris Outtersides, Head of Programme (North Essex Garden Communities), Colchester Borough Council.
(Chris.Outtersides@colchester.gov.uk
07867 578548)

2 Name of garden town project

North Essex Garden Communities, comprising of three separate new stand-alone communities which sit within an overall Multi-Authority long term growth strategy.

The individual sites & communities are:

- Tendring/Colchester Borders - a garden community of up to 9,000 homes;
- Colchester/Braintree Borders - a garden community of up to 24,000 homes; and
- West of Braintree in Braintree - a garden community of up to 10,000 homes (excluding potential additional development to come forward within Uttlesford District Council of circa 2,000 additional homes).

The programme overall will therefore deliver up to 43,000 new homes within three new Garden Communities alongside transformational new infrastructure, substantial employment, significant open space, social and leisure uses.

3 Original milestones for delivery of the garden town set out in the original Expression of Interest submission for garden town status (this should include as a minimum key local plan & planning application milestones; anticipated start on site; anticipated first housing completions)

The original bid was dated October 2015. At that stage the Councils had not yet confirmed the locations or scales of development (before Preferred Options stage) and were considering two sites (east and west of Colchester) for a combined total of 21,000 units. The following milestones were set out in the original bid:

- Issue Preferred Option Local Plans - *Early 2016*
- Submit Plans for Examination - *Late 2016*
- Adopt Plans - *Mid 2017*
- Prepare Joint Plans / Masterplans - *2015-2017*

- Adopt Joint Plans - *Mid 2018*
 - Determine planning applications - *2018/19*
 - Start on site initial phases - *2020/21*
-

4 Current milestones for delivery of garden town to implementation stage. If there has been slippage of more than 6 months from the original milestones, please explain the reasons why?

Current milestones for the delivery of the three Garden Communities are:

- Issue Preferred Option Local Plans - *Complete*
- Submit Plans for Examination - *Autumn 2017*
- Adopt Plans - *Autumn 2018*
- Prepare Joint Plans / Masterplans - *Started 2017*
- Adopt Joint Plans - *Spring 2019*
- Determine planning applications - *2018/19*
- Start on site initial phases - *2020/21*

Before setting out factors that have influenced the work programme it is important to recognise that, since the original bid, **a third Garden Community has been drawn into the programme and the overall scale of ambition has more than doubled** (from 21,000 homes in 2015 to now up to 45,000). The programme has also evolved considerably since its inception driven by bold and ambitious local leadership and a strong cross authority partnership to ensure that the long term growth potential for North Essex fully addresses the Garden City agenda and realises its maximum potential. This renders a like for like comparison to the original bid difficult.

It should also be noted that whilst there have been changes to the Local Plan process, these have not necessarily impacted upon the anticipated start on site. The three sites are geographically distinct and provide flexibility on delivery timescales. A key tenet of further support would be to consider and implement opportunities to bring forward early interventions and phases of development on each site to accelerate the programme of development and set high quality benchmarks for the future. **Some key factors influencing the timescale since the original bid include:**

- The Councils commissioned an independent review of the programme led by Lord Kerslake in October 2016. This team consisted of Lord Kerslake, Lord Jamie Borwick, Trudi Elliott CBE, Malcolm Sharp MBE, Graham Hughes and Eugene Dreyer. Reporting in January 2017 they made a number of recommendations. Of relevance to this submission, the review recommended

further work on the delivery strategy for each site, the exploration of potential development and finance partners, the creation of a 'Strategic Narrative' and to 'resource up' the programme team. A link to the Kerslake report can be found here.

- North Essex is influenced by proposals to upgrade the strategic transport network (relating to the A12 and options for upgrading the A120). Whilst two of the sites are spatially unaffected, progression of the Local Plans needs to consider these other initiatives;
- The Councils have invested time in the land negotiation process to build positive relationships. This has to a degree been reliant on the responsiveness of land owners and their advisors;
- Aligned to the above, the Councils have been drawn further into the consideration of other delivery mechanisms, and have thus been following and actively supporting legislative changes relating to New Towns Powers and Compulsory Purchase, both of which have recently evolved further via the Neighbourhood Planning Act.

Finally, it should also be noted that the original bid recognised this to be an ambitious work programme, and without adequate support and resourcing it would be at risk of slippage. This was also raised by Lord Kerslake as part of his review. Previous DCLG support has been crucial in maintaining momentum and enabling the Councils to initiate and bring forward necessary workstreams. However, due to the understandably limited amount of DCLG funding available, capacity support has never been able to match the full set of requirements. Whilst the Councils have also contributed monies to ensure that this ambitious programme continues at pace, having adequate funding is crucial to maintain momentum.

5 Describe how previous garden town capacity funding has been / is being used & the impact it has had on the following. Include information on how the funding has been allocated to specific tasks, resources or commissions & the outcomes/outputs achieved in respect of moving the project towards delivery.

- achieving original milestones highlighting where it has accelerated delivery in terms of time or housing numbers;
- improving the place-making & design qualities of the garden town;
- developing innovation in the garden town;

- implementing anticipated transformational & distinctive aspects of the garden town identified in the original submission;
- delivery of housing units (please attach a copy of the original and current housing delivery trajectories);
- delivering government housing priorities as set out in the 2016 prospectus, e.g. mix of housing such as Custom & self build, use of SME builders

The Councils have been taking forward a range of key workstreams to take the programme forward. Much of it has benefitted from previous DCLG capacity funding. Capacity funding expenditure to date has focussed on:

- **Concept feasibility, viability & infrastructure planning** - to ensure that each of the proposed Garden Communities are grounded by a thorough understanding of infrastructure requirements, viability and deliverability;
- **Vision, design & concept development** to ensure that the projects are founded by a clear and unequivocal ambition and set of objectives, challenging traditional thinking and setting a clear basis to deliver on true garden city principles;
- Ensuring that the Councils have a **robust Local Plan process** in place including a robust evidence base and strong legal basis to decision making;
- Evolving a **strong delivery model** - to put in place an appropriate innovative delivery structure including the formation of 'North Essex Garden Communities Ltd' and three individual site specific subsidiary companies to act as focussed Local Delivery Vehicles;
- Direct **negotiations with landowners** - to evolve appropriate legal frameworks to bind the necessary land into the delivery structure;
- Ensuring the programme has appropriate **skills & dedicated resources** with a full time Head of Programme, Programme Manager, Communications Manager and project support. In addition, recruitment is currently underway for a Group Managing Director position. Additional internal and consultancy support has been provided to ensure the planning and financial workstreams have continued to programme.

With respect to specific actions and outcomes:

Achieving Milestones & Acceleration of Housing

- The overall scale of housing has doubled from the original bid with an additional Garden Community identified and included in the programme;
- Three Preferred Option Local Plans have been issued and taken through consultation;

- Three Submission Local Plans have been finalised and are currently progressing through local committees in May and June 2017;
- Three site specific DPDs have been initiated;
- Acceleration of housing delivery is a realistic prospect (early start and faster rate) leading to potentially 2,500 additional homes within each Garden Community within the Local Plan periods up to 2032/33 (overall total of 7,500 homes);
- Formal approval (in principle) has been obtained for scheme financing;
- North Essex Garden Communities Ltd (NEGC) has been formally established. Company Directors representing all four Councils have been appointed and the first two Board meetings have been held;
- Site specific local delivery vehicles (three separate companies) have been legally established and constituted;
- The Kerslake Peer review concluded that “considerable progress has been made in the space of two years and a significant amount of detailed analysis has been done for all areas”.

Improving Placemaking & design

- A North Essex Garden Communities Charter was published in June 2016;
- NEGC Ltd was established with a core purpose to deliver Garden Communities to a defined standard (as defined and set out in the Articles);
- The placemaking ambition is clearly set out in three separate Local Plans with specific policy guidance for the Garden Communities;
- Concept Frameworks have been prepared for each Garden Community. It is intended that this work will lead to the creation of three DPD’s, one for each Garden Community, where the placemaking ambitions, garden city principles and high standards of design will be embedded in planning policy;
- The Kerslake review recognised that “the Councils ambition is impressive” stating that there are few comparable projects putting such aspirations into practice, and concluding that “This is placemaking in its widest sense”.

Developing Innovation, including aspects of transformation & distinction

- The programme is focussed upon delivering on the three garden city principles that make the NEGC project stand out from the ordinary – **local leadership** through the innovative delivery structure; **local stewardship of assets** through the establishment of a local body to own and manage local assets; and **land value capture** through agreements with landowners (or use of interventionist powers);
- This is in addition to establishing strong garden city placemaking principles in the Charter, Local Plan and Concept Frameworks; evolving new ideas on sustainable transport including consideration of light/heavy rail alongside or other rapid transit North Essex ‘Express’ system);
- The programme also benefits from innovation in collaborative working with the Kerslake review stating that “This is an excellent example of cooperation between Councils”.

Wider Government priorities.

- The preferred delivery model will bring land into public ownership to secure control and provide the opportunity for multiple programme delivery, including multiple housing tenures (direct commissioning, custom build, starter homes etc.);
 - The scale of development enables the creation healthy well designed neighbourhoods addressing the needs of all occupiers including an ageing population;
 - The ambition to enhance build rates is significantly above current market rates via a fully funded infrastructure first approach, strong public sector role in delivery, and plot availability for multi-tenures;
 - In terms of infrastructure, the projects can directly align to Government growth related funding initiatives delivered through LEPs and the HCA (i.e. enabling/transport works). It also enables alignment of cross departmental funding to deliver housing growth (such as investment in A12 & A120).
-

6 Describe the role of the local authority in leading the process of delivering the garden town project (please attach a copy of the project governance structure if available). Define what added value this has brought to the delivery process and in securing / embedding good garden town principles/ambitions in the project and with the developers/promoters. Describe what resources the local authority has allocated to this project for 2017/18. Provide details of any other investment secured or applied for to help deliver the project.

- The Councils have implemented an innovative public sector led delivery structure which has included the establishment of NEGC Ltd and separate Local Delivery Vehicles for each of the Garden Communities. These have senior representation from all four Councils and are already operational with Company Directors appointed and Board meetings being held every two months;
 - The Councils have all agreed in principle to take a lead role in scheme financing and funding, as both a commercial proposition and a mechanism to secure delivery to the necessary quality and pace required;
 - At an operational level, there is a programme Steering Group and working groups covering Land, Finance, Planning, Economic Development, Transport and Communications;
 - The Councils have committed sizeable sums from stretched local revenue budgets towards the projects (a total commitment of £1m) as match funding to DCLG capacity monies secured to date;
 - Dedicated NEGC resources are in post to lead and manage the programme;
 - In addition, the Councils have committed considerable wider in-house resources to help advance the project involving corporate leadership, planning, finance and legal time across all four Councils. This has been calculated to equate to approximately 120 days per month of existing senior staff time across the four authorities.
-

7 Using the current milestones for delivery set out in your response to question 4 above, please itemise how much capacity funding you are seeking to help deliver these milestones, what it will be used on & when it will be used (if helpful, attach a summary of your project plan setting this out). What demonstrable added value will this bring to the project in respect of place-making & quality &/or accelerated delivery? For the purpose of this bid, the emphasis is on project capacity needs for 2017/18, but if you consider there will be a demonstrable need for further capacity funding beyond 2017/18, please provide details on a separate page.

The project seeks to deliver three Garden Communities. This bid is seeking capacity funding to help maintain the project's positive progress and address the following critical workstreams and areas. Clearly the project involves other workstreams and activities which are also important:

Legal & delivery vehicle support

- To continue to negotiate with landowners to a point of being able to enter into binding agreements, or if this is not possible to establish a strong alternative basis to delivery via other control mechanisms - potentially via the use of locally led new town powers and CPOs. Legal and commercial support is in place, but requires sufficient budget. Funding requirement **£125,000** (legals), **£75,000** (commercial negotiation). By the end of 2017/18 the Councils will have a clear business plan and delivery model to take forward the schemes.
Total £200,000

Corporate Finance support

- It is estimated that to deliver the three Garden Communities will cost approximately £3bn with a **peak debt of approximately £400 - £500m**. One of the key recommendations of the Kerslake Review was for the programme to consider financial partners. As a result of this, further work is required to undertake market testing to identify and confirm the most appropriate approach to scheme financing and risk management, and develop formal business cases and commercial terms with external funding and delivery partners. By the end of 2017/18 the Councils will have a clear funding strategy in place including appropriate business cases alongside a formal partner procurement process.
Total: £150,000

Placemaking & design

- As recommended by the Kerslake Review, to include further scheme design and the creation of a strong and compelling North Essex 'strategic narrative' (**£50,000**) to communicate the ambition to a broad audience, and evolution of design guidance to be integrated into (and accelerate the delivery of) the three site specific DPDs (**£35,000 x 3**). By the end of 2017/18 the strategic narrative will be in place and clear design guidance set out in site specific DPDs.
Total £155,000

Accelerated delivery

- To include design work relating to early potential infrastructure interventions (**£100,000**) and design & feasibility testing for early phase/exemplar development proposals (**£30,000 x 3**). By the end of 2017/18 initial design work for upfront infrastructure interventions will be in place and opportunities for early phase/exemplar development will be identified. This will also include evolving the current financial model into a wider scheme model and the upgrading work that will require.
Total £190,000

Innovation

- To include further development of sustainable transit options and initial business case development - funding requirement **£75,000**; option appraisal & business planning for local stewardship model (**£35,000**); consideration of area wide sustainable energy & resources management (**£50,000**); evolution of economic development strategy and opportunities afforded by the smart cities agenda (**£35,000**). By the end of 2016/17, studies will be complete and findings integrated into planning policy and operational business plans.
Total £195,000

The total HCA funding requirement for the critical aspects identified above is £890,000.

Going beyond 2017/18, requirements will be heavily dependent upon the nature of the finalised delivery model and structure. For example the role of private sector funding partners and existing landowners/developers, or conversely the potential evolution of the current delivery model into a locally led new town development corporation. Given the scale of ambition, resource needs will quickly escalate.

8 Why will the capacity funding sought not be provided by the local authority or developers?

The Councils have already committed sizeable sums from stretched local revenue budgets towards the projects (a total commitment of £1m to date).

In addition to this, the Councils have committed considerable in-house resources to help advance the project. This has been calculated to equate to approximately 120 days per month and amounts to approximately £800,000 of officer time to date (£400,000 per year). The Councils are committed to maintaining this resource moving forward.

To support this, the Councils are currently preparing a short term business plan which will establish a 3-5 year budgetary position (to be available by Autumn 2017). This is likely to deliver a further commitment of £1m of additional match funding support across the partnership for areas of the project that aren't highlighted in this bid. However, this is not guaranteed and it is not considered feasible to address total needs through local funding sources alone.

What is clear, however, is that the scale of the endeavour will be far greater than the Councils can address through current revenue budgets and therefore work is also underway as to how such funding can be addressed with minimal impact on Council financing structures.

Given the nature of delivery and ambition for land value capture, the current focus is on demonstrating strong local leadership to ensure that high quality outcomes can be realised. It is not considered appropriate at this stage to rely on individual promoter funding as the sites have not yet been confirmed in adopted plans, and any private sector funding may dilute the strong and effective approach taken to date.

Over time it will become clearer as to how the individual projects will be funded, potentially via existing landowners/promoters/developers, or via the introduction of external funding/delivery partners.

9 What impact will an absence of additional capacity funding for 2017/18 have on the project? Please be as specific as possible in terms of impact on key milestones for delivery & qualitative aspects of the garden town

Impacts will include:

- Opportunities to accelerate delivery of housing and other elements of the Garden Communities would be lost;
- Risk of slippage to Local Plan & DPD progress & slower pace design evolution of site specific masterplans;
- Infrastructure not adequately thought through or planned for leading to delay in start on-site. 'Oven ready' interventions not worked up to be ready to link in to wider Government initiatives.
- Private sector partners unable to deliver viable development, scaling back on obligations and undermining local public and political support leading to refusals of planning applications and delay.
- Less public sector control & influence over scheme design which could result in ambitions not being realised – (revert back to the 'norm');
- Inadequate evidence base putting adoption of planning documents (Local Plans & DPDs) at greater risk of external legal challenge;
- Scale back of activity to fit available budgets;

**IN THE MATTER OF THE NORTH ESSEX AUTHORITIES
Joint Strategic (Section 1) Plan Examination**

AND IN THE MATTER OF CAUSE

**FURTHER
OPINION**

Introduction

1. I have been asked to provide a Further Opinion in relation to some of the Inspector's questions for the Additional Hearing Session for Matter 1 as set out in the Inspector's Agenda. This additional session has been necessitated by concerns regarding the handling by one of the NEAs (Braintree DC) of "duly-made representations at the Regulation 19 consultation stage" from Lightwood Strategic. As a general observation, it is incumbent on, and imperative that, Braintree DC (and ultimately the inspector) can demonstrate that, notwithstanding this failure by Braintree DC, the whole planning-making process is still legally sound. In my opinion it is not. Whilst the Plan is being promoted by the NEA, the reality is that the Additional Hearing Session has been necessitated by the failure of just one of the authorities (Braintree DC). Therefore, this Further Opinion concentrates on the actions and omissions of Braintree DC although it must be recognised that, as a consequence, any illegality on Braintree DC's part will inevitably contaminate the Plan as a whole and therefore affects all the NEAs.
2. This Further Opinion begins by examining certain key events and also some features arising out of the selective chronology set out by the NEA in Appendix 1 to its written response dated 23 March 2018 to Lightwood Strategic Hearing Statement that either appear unclear or to have been omitted from

consideration (but noting that Appendix 1 only covers a period from March 2016 to May 2017) and only in the context of Lightwood Strategic's involvement.

3. Furthermore, given the failings of Braintree DC in relation to Lightwood Strategic, and the chronology set out below, there is a danger that these legal failings, if not adequately addressed at this stage, in the context of a Joint Strategic Local Plan that covers three separate local planning authority areas and the proposed scale of development proposed (including timeframe) which effectively stretches way beyond the Plan period), could set an undesirable precedent.

Relevant Chronology

4. The chronology set out in the NEA response including Appendix) provides only a partial and rather vague account of the key stages in the preparation of the Local Plan. It also fails to reflect the wider context which, in my opinion, is fundamental to the inspector's questions and which goes to the lawfulness of the Plan preparation process and, more significantly, the SA/SEA process.
5. In paragraph 4, the NEA states that all three councils began preparing individual Local Plans sometime in 2014 although no precise dates are provided. Furthermore, the first sentence of paragraph 5 states that "the Councils were working together but three separate processes were undertaken". No further detail is provided. However, this appears to sit uncomfortably with the contemporaneous documents. In October 2014 Braintree DC commissioned Land Use Consultants to provide a Sustainability Appraisal for the Braintree Local Plan and the report was produced in December 2014. The only reference in the report to Braintree DC "working together" appears to be in paragraph 2.6 which simply states: "The Council is also working with other local neighbouring authorities to ensure that any cross- boundary issues are dealt with appropriately and to ensure that growth across all authorities can be delivered effectively, with the necessary infrastructure improvements." Paragraph 3.76

notes that Braintree district is considered to be a single housing market area by the 2014 SHMA. Furthermore, there is no reference to neighbouring local plans (both existing and emerging) in Appendix 1 to the report. Subsequently, Braintree DC considered the report and other emerging Local Plan issues at its Local Plan Sub-Committee meeting on 12 January 2015. Other than the reference in paragraph 2.6 of the Land Use Consultants' report referred to above, there is no other reference to the NEA "working together" in the manner suggested in the NEA response, or at all. In particular, no reference is to be found in Agenda Item 5 – Local Plan Issues and Scoping, Item 6 – SA/SEA – Local Plan or Item 7 – the Local Development Scheme. Similarly, no mention of these matters is to be found in the minutes of that meeting. Moreover, there is no suggestion that there would be a Joint Core Strategy or that new garden communities would be created in North Essex.

6. Paragraphs 8 and 9 of the NEA response contain no meaningful details of these matters. It is unclear when in 2015 the NEA agreed "to formally work together" including when, between who agreement was reached and how this agreement was reached and whether it is duly minuted or otherwise recorded. Similarly, there is no information as to what is meant by "all relevant sites" nor is there any information about who the promoters of the largest sites to which reference is made were, when they had been invited to meetings and what was the outcome of those meetings. Paragraph 9 does not detail when and who "concluded that housing need, for the plan period and beyond, would be best met by the promotion of three garden communities" or how the locations were identified. This is crucial to the whole issue of the procedural fairness of the consultation process and to issues of pre-determination and apparent bias that arise out of a consideration of the Supreme Court's decision referred to in paragraphs 23 and 24 below. It could be said that this lack of detail and subsequent restricted choice of reasonable alternatives may have been intentional and designed to disguise a choice already made by Braintree DC (and the other NEA). If so, then this would be caught by paragraph 42 of the judgment of Lord Reed in that Supreme Court decision.

7. Notwithstanding paragraph 6 above, in December 2015 Braintree DC published its Local Plan Update 2 which contained no reference to, or suggestions of, the NEA “working together” or garden communities.
8. In June 2016 Braintree DC published its Local Plan Update 3. Once again it made no reference to the NEA “working together” although it identified seven of the biggest sites “we propose to allocate” which included 2,500 homes during the Local Plan period (with potential to rise after 2033) at West of Braintree New Garden Community and 1,500 homes (with potential to rise after 2033) at Marks Tey New Garden Community. Moreover, there was no suggestion, let alone reference, to the NEA “working together” which begs the question “why not?”
9. On 24 June 2016 Land Use Consultants produced its Main Report Sustainability Appraisal for the Braintree Local Plan. It contains a reference to new garden communities in an incongruous and short chapter 5 (comprising just two paragraphs) which notes at paragraph 5.2: “The Spatial Strategy section of the Draft Local Plan does not contain any policies. Instead, the strategy is implemented through the more detailed spatial policies of the Draft Local Plan, notably the New Garden Community policies of the Shared Strategic Plan, Policy LPP 1: Location of Employment Land, Policy LPP 8: Primary Shopping Areas, Policy LPP 9: District Centre, Policy LPP 16 Housing Provision and Delivery, and the Strategic Growth Location policies LPP17-LPP21. Each of these policies and the related site allocations is individually assessed in the following sections of this SA Report or by Place Services in their SA of the Shared Strategic Plan. In addition, an assessment of the cumulative effects of the Draft Local Plan is made in Chapter 10. As such, no separate assessment of the Spatial Strategy section of the Draft Local Plan is required.” More importantly, paragraph 10.3 on page 199 states: “The Garden Community Areas of Search are anticipated to deliver around 25% of the total dwelling requirement for Braintree over the Local Plan period, and therefore will make a significant contribution to overall housing need. **The potential effects of developing in these Areas of Search have been separately appraised by Place Services, although it should be noted**

that there is potential for cumulative effects with other proposed development in the Draft Local Plan, for example along the A120 corridor and the proposed strategic growth locations at Braintree itself, and along the A12 corridor and the proposed strategic growth locations at Feering and Witham, and also with development in neighbouring districts.” (my emphasis) It would appear, therefore, that there have been two separate appraisals and no evidence of co-ordination. These fleeting references to new garden communities also appears to sit uncomfortably alongside the consultation response submitted by Colchester BC LPISR12.

10. Three days later, on 27 June 2016, Braintree DC published for consultation its regulation 18 Local Plan Draft Document for Consultation 2016. Consultation closed on 19 August 2016. This draft refers, for the first time, to two new garden communities in Braintree in policy LPP16. It simply describes them as West of Braintree New Garden Community (with a minimum number of new homes in the plan period of 2,500 homes) and Marks Tey New Garden Community (1,150 new homes). There is no elaboration on, or justification for, these two garden communities other than that found in paragraph 6.70 which is a mere two sentences in length.

11. However, earlier in the year, Braintree DC Local Plan Sub-Committee at its meeting on Monday 14 March 2016 under Agenda Item 6 – Broad Spatial Strategy considered a short item on garden communities as set out in paragraphs 2.15 – 2.17 of the report. It is clear from paragraph 3.4 of that report that the concept of garden communities was still in embryonic form and it observes: “**If** garden communities are considered as an appropriate location for new growth they will be added to the spatial hierarchy at this point. Given the likely scale of these communities in the long term it is considered that these will be classified as ‘towns’.” (My emphasis)

12. Subsequently, on 25 May 2016 Braintree DC’s Local Plan Sub-Committee considered a report as Agenda Item 6 – Braintree Draft Local Plan – Garden Communities which recommended just two new garden communities West of

Braintree and at Marks Tey. The report also notes at paragraph 1.6 that: “The garden community approach is supported by central government. The Department for Communities and Local Government (DCLG) have awarded the four authorities funding to support this work and officer time through ATLAS (Advisory Team for Large Allocations). No further details of this have been provided.

13. In June 2016, Place Services of Essex County Council (one of the NEAs) produced its Sustainability Appraisal and Strategic Environmental Assessment for the NEA’s Common Strategic Part 1 for Local Plans. Thus, it follows that the decision to proceed with the garden communities in Braintree district was taken before the completion of either the Land Use Consultants or Place Services SA/SEA. It was also taken prior to the publication of the draft for consultation. In doing so it appears to have been encouraged by central government and it may also explain why Lightwood Strategic’s representations were mishandled by Braintree DC.
14. On 13 May 2016 AECOM produced its first draft of the North Essex Garden Communities Charter. A further draft was prepared on 16 June 2016 with a final draft prepared on 24 June 2016.
15. The above chronology also needs so to be considered alongside the timeline set out by Lightwood Strategic in its Matter 1 Hearing Statement and Appendices 1 and 2. It appears from this that AECOM were instructed in March 2016 to assess four garden community locations (not including Monks Wood) even though Monks Wood was made known to Braintree DC on 9 March 2016 with an estimated capacity of 5,000-6,000 dwellings. Curiously, on 11 March 2016, Braintree DC responded that Monks Wood would not be considered in the preparation of the Regulation 18 plan as an option. As Lightwood Strategic point out at paragraph 1.13 Denton’s timeline in NEA Appendix 1 suggests that communication between the NEAs and with Essex CC on 10 March 2016 cannot have included any meaningful assessment of Monks Wood.

16. Lightwood Strategic assert at paragraph 1.16 of its Hearing Statement that there is ‘further evidence of the premature dismissal of Monks Wood’ to be found in the Braintree DC Local Plan Sub-Committee meeting of 31 October 2016 and notes that AECOM were subsequently commissioned to consider Monks Wood only in December 2016. Paragraph 1.17 is also telling. What remains unanswered is why Braintree DC was so determined to prematurely dismiss Monks Wood. It could be said that the process is tainted by a marked lack of transparency.
17. In paragraph 1.19 of its Hearing Statement, Lightwood Strategic identify six powerful, if not incontrovertible, points regarding the failure of Braintree DC in relation to its duty to cooperate before concluding in paragraph 1.20 that it is not possible for the inspector to reasonably conclude that Braintree has complied with its duty and consequently the failure to comply with section 33A must bring progress with the Plan to an immediate end.
18. In February 2017 DCLG produced its Housing White Paper “Fixing our broken housing market” which discussed the idea of promoting ten new garden cities or towns and fourteen new garden villages – see paragraphs 1.35 and A.56-58 and Figure A1 which showed a location for a new garden town and North Essex (Colchester, Braintree, Tendring).

The Relevant Legal Framework

19. It is unnecessary for me to set out in any detail the relevant statutory provisions regarding the development plan preparation process and SA/SEA issues as this has been neatly summarised in a number of relevant judgments such as *Heard v Broadland District Council, South Norfolk District Council and Norwich City Council* [2012] EWHC 344 (Admin) per Ouseley J at paragraphs 6- 13 (and where the claimant succeeded in his challenge to a Joint Core Strategy on the basis of failings in the SA/SEA process). Another example can be found in the first instance decision of Patterson J in *No Adastral New Town Limited v Suffolk Coastal District Council and Secretary of State for Communities and Local*

Government [2014] EWHC 223 (Admin) and by the Court of Appeal in that case at [2015] EWCA Civ 88 at paragraphs 11- 14.

20. Whilst Lightwood Strategic have made reference in paragraph 2.3 of its Hearing Statement to certain cases regarding the “curing” of defects, it is necessary to sound a note of caution. Whilst there is relevant case law that concerns alleged and admitted failures by local planning authorities in relation to SA/SEA issues, none of the cases have involved, as a matter of fact and law, development of the scale, nature and extent being promoted by the NEA. The proposed garden cities involve development of a magnitude that is unprecedented and covers three separate local planning authority areas over a long timeframe where decisions taken now in relation to the Joint Strategic Plan will set in stone a framework for significant development in the wider area for many years beyond the plan period. Therefore, any comfort that the NEA and others may seek to draw from case law may well be unwarranted. For example, there is an echo (in paragraph 11 of the NEA response of 23 March 2018) of Singh J’s comments in paragraph 125 of his judgment in *Cogent Land LLP v Rochford DC and Bellway Homes Ltd* [2012] EWHC 2542 (Admin). However, it is clear from his judgment Singh J that it was highly fact sensitive. The circumstances in that case were significantly different from those under consideration by the NEA and the inspector. It involved only one local planning authority, not three. It involved just one site and in one general location and did not provide the framework for substantial new development that would take place over a period way in excess of the stated Plan period. A similar point can be made with regard to the decision of the Court of Appeal in *No Adastral New Town Ltd v Suffolk Coastal DC and others* [2015] EWCA Civ 88 where the main area of complaint was based on a proposed increase on one area from 1050 to 2000 houses.

21. Of greater relevance to the facts (including the chronology) of the NEA Joint Strategic (Section 1) Plan and the handling of Lightwood Strategic’s representations are the decisions of Ouseley J in *Heard v Broadland District Council, South Norfolk District Council and Norwich City Council* [2012] EWHC 344 (Admin) at paragraphs 53 – 72 and Collins J in *Save Historic Newmarket Ltd*

v Forest Heath District Council [2011] EWHC 606 at paragraphs 17 and 40 and especially where Collins J said at paragraph 17: “It is clear from the terms of Article 5 of the Directive and the guidance from the Commission that the authority responsible for the adoption of the plan or programme as well as the authorities and public consulted must be presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option (See Commission Guidance Paragraphs 5.11 to 5.14). Equally, the environmental assessment and the draft plan must operate together so that consultees can consider each in the light of the other.”

22. A further relevant case is the decision of the Court of Appeal regarding the need for the assessment of reasonable alternatives under SEA Regulation 12 in *Ashdown Forest Economic Development LLP v Wealden District Council and South Downs National Park Authority* [2015] EWCA Civ 681 – see Richards LJ at paragraph 9.
23. There is a further legal consideration that is central to the inspector’s questions. Planning law is not a stand-alone area of law. In reality it is part of the wider body of public law and must be viewed in that context. Therefore, in addition to the legislation surrounding plan preparation and the SA/SEA the identified by the inspector, there are a number of highly relevant cases that establish that for, a public consultation such as those involved in the plan preparation process to be lawful, principles of fairness, the proper presentation and consideration of reasonable alternatives and adequacy of information provided to consultees are engaged – see the Supreme Court decision in *R (oao Moseley) v Haringey LBC* [2014] UKSC 56 (in particular paragraphs 35 – 42 from the judgment of Lord Reed) , *Devon County Council v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin) and *R (oao Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin). From these cases it can be seen that, in relation to this Joint Strategic (Section 1) Plan where SA/SEA are an integral part of the process and that where there is a clear statutory duty to consult, wider legal issues regarding public participation are crucial to the lawfulness of the plan making process, particularly given the requirements of

the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention) of which the UK is a signatory and which requires the Government to provide real and meaningful opportunities for public participation in the preparation of policies relating to the environment.

24. It is clear from the cases referred to in the paragraph above, that the local plan preparation process is governed by principles of procedural fairness, the provision of full information so that informed responses can be formulated and an absence of apparent bias. The last principle includes issues of pre-determination and, on the issue of reasonable alternatives, these should not be presented as if the garden communities were an inevitable consequence of meeting the increased housing need as it would be misleading to suggest that there were no other alternatives – see Lord Reed at paragraph 42 of *Moseley*.

The Inspector's Questions

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]?**

25. On the basis of the chronology of facts set to above, in my opinion Lightwood Strategic's view of the law as expressed in paragraph 1.5 and the conclusion in

paragraph 1.7 is correct. I therefore agree with Lightwood Strategic's view as expressed in paragraph 1.20 and that the failure to comply with the duty in section 33A means that the Plan should not be allowed to proceed.

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

26. In my opinion, bearing in mind the facts set out above and, in particular, the relevant case law, the whole Plan making process and the SA/SEA is fundamentally flawed. I do not agree with Lightwood Strategic that the Plan is capable of being cured as argued in paragraph 2.3 because the defects are too significant, and the *Cogent Land* and *No Adastral New Town Ltd* decisions are clearly distinguishable. Furthermore, in the light of the case law identified in paragraph 23 above, and the manner in which the garden communities concept has been advanced by the NEA, in my opinion the consultation process needs also to consider, in the light of the inclusion of Monks Wood, all reasonable alternatives to the garden communities concept, bearing in mind that originally the Braintree Local Plan was being promoted without any garden community being mooted.

27. In my view the approach of Collins J in *Save Historic Newmarket* and Ouseley J in *Heard* represents the correct legal approach to take and that the Plan preparation should be start all over again. However, I do agree with the submission in paragraph 2.4 that any permissible revisions must not fall into the trap of 'ex post facto' rationalisations and that this must apply to any new Plan.

28. I agree with the thrust of Lightwood Strategic's observations in paragraphs 2.6 – 2.23.

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

29. I see no reason to disagree with Lightwood Strategic's view as set out in paragraphs 7.1 – 7.8. I note that at paragraph 7.7 Lightwood Strategic recognise the clear prejudice suffered by CAUSE and others. However, I do not believe that this goes far enough.
30. For the reasons set out in paragraph 23 above, it would be wrong to simply limit considerations under this question to the relevant legislative requirements. Those requirements cannot be viewed in isolation but must be seen in the context of the relevant applicable case law relating to statutory duties to consult with the public and public participation in accordance with Aarhus Convention requirements.
31. It follows that for reasons that CAUSE have identified before, there are many deeply troubling aspects of the consultation process that appear to run counter to established case law and especially the judgment of the Supreme Court in *Moseley (supra)*. Therefore, the consultation process regarding the Plan does not meet the legislative requirements when the relevant case law is taken into consideration, as it must.

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

32. I agree with Lightwood Strategic's observations in paragraphs 9.1 – 9.3. I particularly agree with the description of "the vast scale of the Garden Communities, committing to 43,000 units now to deliver 7,500 units in the plan period." Paragraph 9.2 is highly relevant and to an extent echoes the observations that I made in my original Opinion.

33. It follows from the above that, in my opinion, the current Plan is fundamentally flawed and that these flaws cannot be cured by a simple *Cogent Land* sticking plaster approach. However, it is very important that the inspector is made aware of these concerns immediately because, if any statutory challenge under section 113 is subsequently mounted based on these concerns, the court will expect that these concerns were first raised with the inspector at the earliest opportunity and will demand to see evidence of this. If not, then it is likely that the court will dismiss the challenge on that basis alone.
34. Whilst it is not strictly necessary at this stage to consider this further point, it could be said that the relative haste in which these proposals emerged from central government raises questions as to whether the planning system in general, and the SA/SEA process in particular is being manipulated for reasons of political expediency. It also leads to concerns as to whether there are any identified legal difficulties in central government or the NEA seeking to utilise the New Towns Act 1981 and given that this legislation pre-dates the SEA Directive and its implementation in the UK and, therefore, may be incompatible with EU legislation in the absence of proper SA/SEA of the overall concept of new garden towns and villages in the 21st century.
35. The concept of new garden communities has been promoted actively by the Town and Country Planning Association since 2011 when it published its document “Re-imagining garden cities for the 21st century” which was followed by a suite of documents including “Land value capture and infrastructure delivery through SLICs” (Strategic Land and Infrastructure Contracts). The concept was also actively supported by the free-market think tanks Policy Exchange (2016) and the Centre for Policy Studies (2014.)
36. Given the above observations, and the fact that the NEA have admitted that there have been substantial discussions with, and encouragement from, central government regarding the NEA garden communities (which arguably is self-evident from the White Paper) then the nature and scope of central government’s involvement may well be a central issue in any section 113 legal

challenge and, if so, both the NEA and central government will be bound by the duty of candour to disclose to CAUSE, and to the court, full details of all contact (whether meetings, emails, correspondence and telephone discussions) between all those involved at the NEA and in central government (including ministers and senior officials) in order to establish whether the normal principles of planning law, and the public participation requirements of the Aarhus Convention, have not been circumvented or ignored.

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12 April 2018