

IN THE MATTER OF:

NORTH ESSEX AUTHORITIES

**SUSTAINABILITY APPRAISAL WORK IN CONNECTION
WITH SECTION 1 LOCAL PLAN**

OPINION

Introduction

1. The purpose of this Opinion is to comment on the Second Further Opinion dated 29 January 2019 by Martin Edwards, on behalf of CAUSE. The relevant background is extensive – in terms of time and material – but I seek to distil its essential elements as follows.

Background

2. The NEA's (Braintree District Council, Colchester Borough Council and Tendring District Council) are promoting their emerging local plans. They have been working together to plan for strategic cross-boundary issues across the North Essex area. On 9 October 2017 the NEA individually submitted draft local plans to the Planning Inspectorate for examination. Each of the draft local plans contains two sections:
 - (a) Section 1 which includes policies on strategic cross-boundary issues including infrastructure, housing numbers and proposals for three new Garden Communities (GC's). The drafting of Section 1 is common to all three local plans.

(b) Section 2 which includes individual site allocations and development management policies which are specific to the relevant authority. Section 1 has been, and remains subject to a joint examination by a single Inspector, Mr Roger Clews.

3. Following examination hearing sessions, the Inspector issued a letter dated 8 June 2018, Advice on the Next Steps in the Examination. He expressed himself satisfied as to legal compliance aspects: paragraphs 6-28. The bulk of his letter is devoted to Part 1 Chapter 8, the proposed GC's. He found evidence lacking in relation to transport infrastructure; he expressed concerns in relation to the delivery of market and affordable housing, and also in relation to employment aspects, viability and delivery mechanisms. He also raised concerns in relation to Sustainability Appraisal (SA) aspects: paragraphs 93-129. Specifically, paragraphs 97-103 raised concerns as to the objectivity of the SA assessment. In relation to this point, and in the context of potential further SA work, paragraph 128 advised that "...it might be advisable to consider appointing different consultants from those who conducted the 2016 and 2017 SA reports. This would help ensure that the further work is free from any earlier influence and is therefore fully objective".

4. Paragraph 157 concluded that:

"...I hope it will be appreciated that my findings do not necessarily represent a rejection of their commendable ambitions for high-quality, strategic-scale development in North Essex. Equally, however, the scale of those ambitions, and the long time scale over which any GC proposals would come forward, require that adequate time and care are taken now to ensure that any proposals are realistic and robust".

5. On 27 June 2018 the Inspector issued a further letter in relation to housing requirements, not relevant for present purposes.

6. By letter dated 20 July 2018 the NEA's sought clarification in relation to the Inspector's letters. That led to the Inspector's letter of clarification dated 2 August 2018.

7. By letter dated 19 October 2018 the NEA's set out their views to the Inspector as to the way in which they wish to take forward the examination. In that letter the NEA's:
 - (a) advised that they remained committed to using garden communities principles to secure future housing requirements;
 - (b) noted the concerns regarding the simultaneous bringing forward of the three GC's of the scale proposed and that the updated evidence base will show that any Colchester Braintree Borders Garden Community will be delivered later in the plan period than previously proposed;
 - (c) enclosed a work programme which identified the additional evidence base material that they believe to be required, and a timetable for the provision of that material;
 - (d) advised the Inspector that new independent consultants, LUC, had been appointed to carry out the further SA work;
 - (e) enclosed a proposed scope for the further SA work (termed the Section 1 Additional Sustainability Appraisal Method Scoping Statement); and
 - (f) invited the Inspector's confirmation of the proposed scope and programme for the proposed SA work.

The letter also proposed a monthly report to the Inspector on the work programme.

8. I note that paragraphs 2.15-2.20 of the Method Scoping Statement (October 2018) referred to the CAUSE Metro Town alternative, and indicated a range of measures by which to ensure that such proposal "is fully understood".

9. The Inspector replied to the above letter on 21 November 2018. Among other matters, the Inspector stated (paragraph 11) that he had considered the Method Scoping Statement, and set out certain limited comments on it in a table at page 8 (inviting a response to each of them).
10. The NEA's responded on 30 November 2018. Among other matters, the letter confirmed the extent of intended consultation.
11. The Inspector responded by letter dated 10 December 2018. He confirmed that the amendments that had been made to the Method Scoping Statement (now the December 2018 version) dealt appropriately with his points. He thanked the NEA's for confirming that the proposed consultation on the Statement will include consultation on the proposed revised assessment criteria, and will involve all those who took part in the examination hearings held in January and May 2018. He stated that now all the NEA's proposals for further work on the evidence base and SA have been clarified, it was appropriate to announce a pause in the examination while that further work takes place.
12. As promised, the NEA's have provided monthly programme updates to the Inspector from January 2019 onwards.
13. Meanwhile, Lightwood Strategic (Lightwood) had written to the programme officer on 24 October 2018 raising "a couple of points" (actually, rather more than a couple of points). The letter stated that Lightwood was seeking the advice of Leading Counsel on the points being raised, although no such advice has been provided to the NEA's. So far as immediately relevant, the letter raised two points of alleged bias, on which CAUSE relies.

14. First, reference is made to a meeting held on 17 July 2018, at which representatives of NEGC Limited were present. NEGC Limited is a company wholly owned by the NEA's (i.e. a separate legal entity, which was formed for the purpose of taking forward proposals for the three GC's as a corporate delivery vehicle). The seemingly comprehensive minutes of the meeting show that it was attended by two representatives from Braintree District Council, three representatives from NEGC Limited, and three representatives from LUC. It seems hardly surprising that representatives of the corporate delivery vehicle attended this meeting. I have already noted that the Inspector's concerns in the letter of 8 June 2018 raised significant concerns in relation to viability, transport and deliverability. Despite the prospect of evidence from the delivery vehicle on these topics, the minutes actually record (page 3) that "LUC do not anticipate using this evidence directly as part of the SA process, as the SA will rely on the evidence provided that the alternatives are viable (i.e. deliverable) in order for them to be reasonable".

The minutes later record:

"It was clarified that NEGC's only role in the context of the SA would be to provide evidence to the Council. LUC will communicate only with the Council and not with NEGC directly in order to ensure objectivity".

In relation to the previously noted suggestion of engagement with CAUSE to understand their proposals, a meeting was mooted. The minutes record that a representative of LUC stated "...that we should be careful about giving any particular group special access outside of the formal consultation processes, in order to ensure consistency and objectivity, so this may require further consideration with the NEA's before commencing and a suitable approach agreed with the Inspector".

15. In my opinion, these minutes show a highly professional and objective approach by LUC (and indeed by Braintree District Council). They could not be the subject of any fair criticism on the grounds of pre-determination or bias (in which I include the appearance of bias). They amply support the terms of paragraph 2.6 of both the October 2018 and December 2018 versions of the Method Scoping Statement, as follows:

“A meeting was held with the North Essex Authorities on 17th July 2018 to introduce the LUC team, and to ensure expectations of both parties are clearly understood from the outset and discuss further details of the additional SA work. This meeting provided an opportunity to:

- Discuss the background to the additional SA work to ensure that it is clearly understood.
- Reflect upon the SA process undertaken to date, and any lessons learned.
- Discuss the evidence sources that are available.
- Discuss the nature of the spatial strategy options requiring appraisal, including work awaited from consultants on reasonable options for each of the proposed Garden Communities and whether urban extensions need to be considered as a separate option.
- Agree any changes to the LUC proposed method if necessary.
- Discuss stakeholder and public consultation arrangements.
- Confirm the project programme and initial deadlines and discuss risks to the timetable, including inputs to the SA and when these are required from other pieces of evidence.
- Confirm project management, contractual and invoicing arrangements”.

16. The second allegation of impropriety in the Lightwood letter relates to marketing material presented at a MIPIM meeting on 17 October 2018. I refer to this further below.

The CAUSE Opinion

17. The CAUSE Opinion makes a number of assertions (many of which are drawn from the Lightwood letter). They can be grouped under the following headings.

Disregarding the Inspector's comments (paragraphs 2 and 29)

- (1) As noted above, the NEA's have been in dialogue with the Inspector to make sure that the procedure and approach being adopted meet his requirements. Acknowledging the ambition and complexity of the local plan proposals in this case, I have not experienced such a degree of methodical engagement with an examining Inspector's guidance as is happening in the present instance. The engagement has included:
 - (a) providing the Inspector with the SA Method Statement;
 - (b) modifying the SA Method Statement to address the Inspector's comments;
 - (c) consulting on the SA Method Statement;
 - (d) meeting with stakeholders to understand more fully their proposals; and
 - (e) providing monthly updates to the Inspector on the progress of the SA work.

Pre-determination (paragraphs 7, 9, 11, 12, 13, 22, 23 and 28)

- (2) I have already referred to this in some detail. The marketing activity at MIPIM was carried out by NEGC Limited, not the NEA's. While NEGC Limited have a vested interest in the matter, this is not evidence of any level of pre-determination or bias by the NEA's, let alone by LUC. The NEA's remain committed to using garden community principles to secure future housing requirements in their area. In my view, it is quite inappropriate to suggest that the NEA's or NEGC Limited, as their corporate delivery vehicle, cannot issue material that reflects that strategy.

Viability (paragraphs 27, 28)

- (3) The CAUSE Opinion suggests that the GC's may not be viable (paragraphs 11 and 28). This is hardly a new contention. It was extensively debated at the examination hearings. The Inspector expressed detailed concerns on this count in the letter of 8 June 2018. It will be incumbent on the NEA's to produce further evidence of viability, and that evidence will doubtless be rigorously tested in due course. The evidence will be reviewed by the NEA's, published for consultation and be the subject of scrutiny in the examination.

Transport (paragraphs 24, 25)

- (4) The CAUSE Opinion suggests that the Department for Transport letter (undated) does not demonstrate the necessary commitment to the A120 widening. It seems to me that the letter is cautiously encouraging. It recognises that although no investment decisions have yet been taken in relation to RIS2, the scheme is more developed than most other competing proposals. That letter was shared with the Inspector, and put into the public domain, as part of the January 2019 progress report. It will ultimately be for the Inspector to decide whether the strategic infrastructure is sufficiently committed for Section 1 to be found sound. This is plainly a soundness point, and not related to the SA process.

Rapid Transport System (RTS) (paragraph 26)

- (5) This, again, raises no legal issue. The NEA's will doubtless have to submit evidence to the Inspector to seek to demonstrate that RTS can

be delivered (physically and financially) and will achieve the desired modal shares. Again, this is a question of soundness, i.e. planning judgment.

Inadequate consultation (paragraphs 13-23)

- (6) It is important to note what is being said - and not said - in these paragraphs. It is not being contended that there is any breach of any statutory requirement relating to the preparation of a local plan. The Opinion merely notes the requirement under section 19(3) of the Planning and Compulsory Purchase Act 2004 and general principles relating to consultation processes. The Opinion cites extensively from well known authorities. The contentions all revolve around the alleged “closed mind” approach. I have addressed these points above, and see no need for repetition.

It is also important to note that the ongoing consultation relates to the new SA review process, not to changes to Section 1. Depending on the outcome of the SA process there may need to be further consultation on Section 1 changes. There will also be consultation on the additional evidence that is being prepared in response to the Inspector’s findings. I assume that such consultation will be carried out in accordance with each authority’s Statement of Community Involvement. That material will then be the subject of scrutiny at a re-opened examination.

Legal Opinion (paragraph 5, paragraph 8 in relation to the definition of schemes in the SA; paragraph 11 in relation to SA issues, paragraph 28)

- (7) The Opinion suggests that the NEA’s require an “independent legal opinion”. It raises the “prospect” that there are technical legal issues

that have been overlooked (see paragraph 12). No further details are given. As noted above, there is no claim of any breach of any statutory requirement. I have already addressed matters relating to “closed mind”. The NEA’s have throughout had the benefit of specialist legal advice, and have acted in accordance with such advice.

Conclusion

18. For the above reasons, it is my view that there is nothing in the CAUSE Opinion which should lead the NEA’s to change their present course, and intended course, in the promotion of the local plans.

Landmark Chambers
180 Fleet Street
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21st March 2019

C. LOCKHART-MUMMERY QC

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CONNECTION WITH SECTION 1 LOCAL PLAN**

OPINION

**Dentons
(KSES/SJA)**

Our Ref: CLM-