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

AND IN THE MATTER OF CAUSE

SECOND FURTHER OPINION

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1. I have been instructed by CAUSE to provide a Second Further Opinion with regard to certain matters arising out of the Joint Strategic (Section 1) Plan Examination which the examining inspector has "paused" pending further work being undertaken by the NEA.

2. By way of background, I last provided a written opinion on 12 April 2018. Subsequently the inspector wrote a lengthy letter to the NEA on 8 June 2018 setting out "the further steps that I consider are necessary in order for the Section 1 Plan to be made sound and legally-compliant". In preparing this Opinion I have examined numerous additional background documents and, more particularly, the letters from the inspector (IED011-014), the letters from the NEA in response including the latest letter dated 4 January 2019, a Freedom of Information Act letter from CAUSE dated 20 December 2018 and the response from BDC on behalf of the NEA dated 21 January 2019 and a letter from Lightwood to the Programme Officer dated 24 October 2018 ("the Lightwood letter") which appears to me to contain factually important material.

3. I should add at this stage that there is a particular feature of this Plan which may well be unique. The case law that has developed in recent years in relation to statutory challenges to the preparation of local plans under the Planning and Compulsory Purchase Act 2004 predominantly concern challenges to plans following adoption and based on alleged failings on the part of the examining

inspector which the local planning authority subsequently adopt. However, with regard to this Plan, the concerns have not been raised by one of the participating parties at the end of the examination process but by the examining inspector himself in the early stages of the examination. Furthermore, as the FoI response letter from BDC indicates, the NEAs appear intent on disregarding the concerns of, and clear guidance from, the inspector. This is a matter of public record. Inevitably, should there be any subsequent statutory challenge to the Plan, the response of the NEAs to the inspector's concerns will form a part of the crucial factual background. Some of those concerns involve important matters of public administrative law which it would appear the NEAs have disregarded for whatever reason.

4. I have also considered the written opinion of Mr Christopher Lockhart-Mummery QC dated 8 August 2018. In CAUSE's FoI request confirmation was sought as to whether the NEA had sought and obtained any other legal opinion. In the letter of response dated 21 January 2019 Ms Emma Goodings (Head of Planning Policy and Economic Development) at BDC stated: "With respect to the request for further legal advice we can confirm that no information is held further to regulation 5. If such advice is subsequently taken and in line with the Planning Inspectors request, this will be sent to the Inspector and published on the examination website where it would be available to the general public." It follows that the written opinion from Mr Lockhart-Mummery QC is the only legal advice or opinion obtained by the NEA following the inspector's letter IED011. I shall return to the relevance of this legal opinion later in this Opinion.

5. The need for an independent legal opinion stems from the inspector's letter of 8 June 2018 (IED011). That letter identified the need for "significant further work on the part of the NEAs" – para 2 – and that "further main modifications will need to be made in order for the Plan to be capable of adoption. All the main modifications that are eventually proposed will of course be subject to full public consultation, and I will consider all the consultation responses before I produce my report"- para 4. (For the purpose of this Opinion I shall leave to one side the

observation by the inspector in paras 26 & 27 regarding any possible implications arising from the ECJ decision in *People over Wind*).

6. Other legal concerns of the inspector were set out by him at paragraphs 93-96 concerning the sustainability appraisal and these were then expanded upon at paragraphs 97-129.

7. Of particular significance is the inspector's observation on the chronology of the SA and his comment at para 95 that: "It may be that the NEAs had decided, before the 2016 report was complete, which GCs they wished to include in the Preferred Options version of the Plan. That in itself is not unlawful, provided that the SA is approached with an open mind, and that its results and the consultation responses on it are taken into account in the ongoing preparation of the Plan. Similarly, the fact that the spatial strategy and the three allocated GCs remained unchanged between the Preferred Options and the submitted versions of the plan is not necessarily evidence of a closed-mind approach to plan preparation. The important question is whether the SA and the related plan preparation were carried out lawfully and with due regard to national policy and guidance."

8. In paragraph 96 he stated that his concerns were threefold: "first, the objectivity of the assessment of the chosen spatial strategy and the alternatives to it, secondly, the clarity of the description of those alternatives and of the reasons for selecting them, and thirdly, the selection of alternative GCs and combinations of GCs for assessment." I note that at paragraph 109 he states: "I consider that the lack of clarity I have identified in the descriptions of some of the alternatives to the chosen spatial strategy, and in the reasons for selecting them, is likely to breach the legal requirements for the SA to provide an outline of the reasons for selecting the alternatives dealt with, and for the public to be given an effective opportunity to express their opinion on the report before the plan is adopted."

9. As if to reinforce his misgivings on the issue of a "closed mind"/lack of objectivity, the inspector advises in para 128 that: "While it is for the NEAs to decide who should carry out the further SA work, 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."

10. Finally, at paras 146-148 the inspector noted: "The Section 1 Plan was not prepared as a joint local development document under section 28 of the 2004 Act. Instead, each of the NEAs submitted a separate Local Plan, containing a section 1 and a Section 2, for examination – albeit the content of Section 1 is identical in each Local Plan. I can see nothing in the relevant legislation that would allow part of a submitted Local Plan to be adopted separately from the rest of it. However, I am not qualified to give a legal opinion on the point, and moreover section 23 of the 2004 Act makes it clear that the decision whether or not to adopt a Local Plan is one that the LPAs must make themselves. I would therefore recommend that the NEAs seek their own legal advice on this question." It is in this restricted context alone, that the written opinion of Mr Lockhart-Mummery QC was obtained – see the Introduction paragraph of his written opinion.

11. The examining inspector's letter of 2 August 2018 (IED013) makes it clear at paras 5-7 that the current garden communities proposals are not adequately justified and had not been shown to have a reasonable prospect of being viably developed. Therefore, they are unsound. His subsequent letter of 21 November 2018 (IED014) repeats his earlier concerns about the SA and the need to have an appropriately open mind and without preconceptions as to the outcome if the further work is to be carried out successfully. He also comments on the Lightwood letter and highlighted in para 17 that it would be prudent for the NEA to obtain a legal opinion on the SA. He also set out in the Annex on page 8 a number of his concerns about objectivity – see his reference to paras 2.45-2.46 & 2.49.

12. It is unclear what documents were before Mr Lockhart-Mummery QC. However, it is clear that he was not asked to provide an opinion on the wider legal issues regarding the SA. The inspector has repeatedly made the point to the NEAs that

they need to address these issues– see IED014 at paras 11-18 and IED015 at paras 5 & 6. It is also clear from the FoI response of 21 January 2019 that the NEAs have failed to address these points at all. This is all the more surprising given the content of the Lightwood letter which the inspector makes lengthy reference to in IED014. This raises the prospect that not only are there important technical legal issues regarding the SA preparation process left unaddressed by the NEAs but also much wider public administrative law issues have been overlooked by the NEAs, especially bearing in mind that the inspector clearly raised these types of issue in his letter of 8 June 2018 (IED011 and his warnings regarding the need for the NEAs to avoid a "closed mind" and the lack of objectivity). A "closed mind" (otherwise known as pre-determination and/or apparent bias) is a well-established concept in public administrative law and there is a recognised body of case law dealing with it. As the case law below demonstrates, it undoubtedly applies to the development plan preparation process.

13. The inspector's concerns over a "closed mind" gains added currency from the matters set out in the Lightwood letter which calls into question whether any public consultation carried out so far is nothing more than a superficial exercise designed to distract from a "closed mind" approach. If so then this raises a substantive statutory legal issue. Section 19(3) requires the Council (for the purpose of this Opinion BDC but the same holds true of the other councils of the NEA) to also comply with its Statement of Community Involvement. ("SCI") adopted in 2013. It forms part of the Local Development Framework. At paragraph 3.5 of the Local Development Scheme discusses the role of the SCI and states that it: "sets out the standards and approach to involving the community and stakeholders in the production of the local development framework and in the Development Management process".

14. Paragraph 5.1 of the SCI states: "The NPPF highlights that there needs to be 'early and meaningful engagement and collaboration with neighbourhoods, local organisations and businesses." Paragraph 5.2 goes on to state: "The Council intends to maintain a process of ongoing community involvement and aims to

encourage early involvement in the preparation of each document so that everybody feels that they have had a chance to influence local policy decisions that are made. The Council intends to let people know about what it is doing, what stage it has reached in the preparation of documents, where documents can be inspected, how people can be involved and the results of consultations. This information will be continuously updated."

15. Section 19(3) of the 2004 Act provides: "In preparing their local development documents (other than their statement of community involvement) the authority must also comply with their statement of community involvement." This is a mandatory statutory requirement tantamount to a statutory duty.

16. In addition, there is the wider public administrative law issues to consider. The courts have held on numerous occasions that there is an overriding need for fairness in any consultation process – see the decisions of the Court of Appeal in *R (on the application of Edwards) v Environment Agency* [2006] EWCA Civ 877 and in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 per Lord Woolf M.R. at para 108: "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168*."

17. Whilst a duty to consult may fall short of a duty to comply with the consultees' wishes, it nevertheless imposes flexible but demanding procedural requirements: to communicate fully, to allow proper time to respond and to consider carefully any responses received – see *R (on the application of Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 (Admin). Furthermore, as Donaldson J held in *Agricultural, Horticultural and Forestry Industry Training*

Board v Aylesbury Mushrooms [1972] 1 WLR 190: "The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice…without communication and the consequent opportunity of responding, there can be no consultation." I would also draw attention to Lord Reed's judgment in the Supreme Court decision in *R (on the application of Moseley) v Haringey LBC* [2014] UKSC 54 to the effect that: "that whether or not there is a statutory obligation to consult, consultation must take place when proposals are still at a formative stage; it must include sufficient reasons for the proposals to enable consultees to consider them, and respond to them intelligently; enough time must be given for that; and the consultation responses must be taken conscientiously into account when the decision is taken. Lord Reed pointed out that statutory obligations to consult vary widely in content (at paragraph 36). The obligation to consult in that case was imposed, he said, not to ensure procedural fairness, but to 'ensure public participation in the local authority's decision-making process' (at paragraph 38). However, he went on to say, in order for consultation to achieve that objective, it must fulfil basic minimum requirements." For a searching analysis of what amounts to satisfactory consultation as a matter of public administrative law in the context of modern government see the decision of Sullivan J (as he then was) in *R (on the application of Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) where a decision of the government was declared unlawful as a result of it being based on a "procedurally unfair" consultation.

18. It is significant to this Plan that one of the purposes behind both SA and the SCI is to enable "community involvement" in public participation in the plan making process. The SEA Directive (2001/42/EC) (at article 5) requires that the likely significant environmental effects of a plan or programme "and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme are identified, described and evaluated." Those options must be subject to public consultation in the form of a report with the draft plan (article 6) and, before the adoption of the plan, the results of that consultation must be taken into account by the relevant authority (article 8) – see

Hickinbottom J (as he then was) in *R (on the application of Friends of the Earth) v Welsh Ministers* [2015] EWHC 776 (Admin) at para. 12.

19. It follows that the consultation process with regard to the SA is an integral requirement of the process of preparing the Plan. It is underpinned by statutory requirements, supplemented by the provisions of the SCI and bolstered by the overarching public administrative law principles governing legitimate expectations. Consequently, and based on the established case law summarised above, the consultation process must be genuine, procedurally fair and undertaken with a receptive mind (or, as the inspector has put it, without a "closed mind").

20. The jurisprudence governing the application of the preparation of a SA for the purpose of preparing development plans is not substantially is straightforward. From the relevant case law. As Jay J held in *Calverton Parish Council v Nottingham City Council and others* [2015] EWHC 1078 (Admin) the following propositions emerge from the decisions of the High Court in *Save Historic Newmarket v Forest Heath District Council* [2011] JPL 1233 and *Heard v Broadland DC* [2012] Env LR 233:–

    (1) It is necessary to consider reasonable alternatives, and to report on those alternatives and the reasons for their rejection;
    (2) While options may be rejected as the Plan moves through various stages, and do not necessarily fall to be examined at each stage, a description of what alternatives were examined and why has to be available for consideration in the environmental report;
    (3) It is permissible for the environmental report to refer back to earlier documents, so long as the reasons in the earlier documents remain sound;
    (4) The earlier documents must be organised and presented in such a way that it may readily be ascertained, without any paper chase being required, what options were considered and why they had been rejected;
    (5) The reasons for rejecting earlier options must be summarised in the final report to meet the requirements of the SEA Directive;

(6) Alternatives must be subjected to the same level of analysis as the preferred option.

21. In *City and District of St Albans v SSCLG* [2009] EWHC 1280 (Admin) Mitting J quashed the relevant policies because reasonable alternatives to them were not identified, described and evaluated before the choice was made.

22. It is against this background that the contents of the Lightwood letter must be viewed. The first point raised concerns paragraphs 6 and 20 and paragraph 9 of the NEAs letter to the inspector dated 19 October 2018 (NEA005). I understand Lightwood's concerns and the point that they raise does call into question the genuineness of the revised SA work. Furthermore, the material distributed at MIPIM in London some two days earlier (I am familiar with the scope and nature of both MIPIM London and MIPIM Cannes and the very public nature of both events). I would go further than Lightwood. In my view the marketing material represents substantial *prima face* evidence of pre-determination. The scanned leaflet gives a clear impression that "five distinct and highly desirable new garden communities" are a foregone conclusion. This is reinforced by the text under the heading "The Opportunity" which states (without any qualification whatsoever): "Our already thriving region is set to be transformed by the North Essex Garden Communities which are unmatched in terms of scale and ambition in the UK – delivering 58,000 new homes and 58,000 new jobs in places people want to live, work and play. Five distinct and highly desirable new garden communities will be established whilst existing towns and villages will also be transformed with the infrastructure to support them, creating connected and more sustainable places where people can build their lives." On this basis alone, it is difficult to see how any further SA work and/or consultation on the Plan can be fair, genuine and done with an open or receptive mind. It must be borne in mind in cases of pre-determination, the courts do not require evidence of actual bias. All that is required is the appearance of bias. The obvious conclusion from the above is that the NEAs have had no real intention of considering abandoning their garden communities' proposals and that any further SA work and public

consultation is merely a token exercise devoid of any genuine and substantive purpose.

23. The other significant point made by Lightwood stems from the meeting with LUC on 17 July 2018. I do not intend to repeat their concerns on this aspect as I endorse their concerns unreservedly. It is my opinion that this evidence reinforces the points made above regarding pre-determination and the legality of the revised SA work and any consultation undertaken.

24. One of the key issues that affects the Plan and, more importantly, the garden communities proposal is that of transport infrastructure. The inspector included a lengthy analysis of the current shortcomings in the NEAs proposals in paras 32-47 and 65-58 of his letter of 8 June 2018 (IED011) and especially his comments at para 34 and his conclusion at para 37 regarding the A120 widening works where he stated: "greater certainty over the funding and alignment of the A120 dualling scheme and the feasibility of realigning the widened A12 at Marks Tey is necessary to demonstrate that the GC proposals are deliverable in full." I note the undated letter from the Michael Dnes at the Department of Transport to Essex County Council regarding the A120 improvement words that was annexed to the letter from the NEA to the inspector dated 4 January 2019. Pointedly this letter makes clear that "no investment decisions have yet been taken in relation to RIS2, and in formal terms no commitments can be made until the publication of the final RIS in 2019." Later it is stated: "We are not at a stage at which it is possible to talk about decisions or commitments in relation to RIS2; ahead of this point the most that I am able to say is that a proposal is competitive and will be seriously considered in the next RIS. Given the evidence presented so far, and the strong local consensus, I am certainly able to say this of the A120 (as I am for several competing proposals)." Finally, in the penultimate paragraph Mr Dnes states: "Any finding decisions in RIS2 (and future periods) are subject to available resources. As inclusion in RIS2 is no way guaranteed, I appreciate the continued effort to examine other potential sources of funding. This broad-based approach maximises the chances of the scheme coming forward in the near future."

25. It can be seen, therefore, that little, if any, real progress has been made by the NEAs in overcoming these funding difficulties with the result that the inspector's comment at para 34 is applicable and that an in-principle endorsement of the garden communities proposals as a whole cannot be given. On this basis alone, the garden communities proposals remain fundamentally flawed and any attempt to progress the garden communities in the absence of resolution of this critical funding issue which goes to the heart of the issue of viability can only lead to one conclusion i.e. that the Plan is legally unsound and cannot be adopted.

26. In addition to the above transport concerns, the inspector has raised significant concerns regarding the rapid transit system ("RTS") – see paragraphs 38-43 of his letter of 8 June 2018 (IED011). In paragraph 38 he states that the RTS is an integral part of the garden communities proposal and notes, in paragraph 39, that it is unlikely that "those extremely ambitious targets" would be achieved or even approached unless rapid transit services to key destinations are available in the early lifetime of the GCs." He also noted in paragraph 40 that the "planning of the proposed RTS has reached only a very early stage" and in the following paragraph he comments that "Further work is needed before it can be shown in both practical and financial terms that a RTS could be delivered." That further work is set out in paragraph 42. Without this further work it is impossible to see how the SA can proceed otherwise it may be assessing reasonable alternatives to proposals that may, in the end, never see the light of day.

27. Similarly, the inspector's clear concerns on viability set out in paragraphs 62-86 and culminating in his conclusion in paragraph 86 must be addressed. I have seen no evidence to suggest that this has been, or is being, done. If the NEAs are unable to demonstrate that the garden communities proposals are financially viable it is difficult to see how they could be progressed let alone be included in the relevant statutory development plans.

28. In conclusion, it is my opinion that the NEAs have ignored the inspector's clear indication of the need for an independent legal opinion to be obtained. In my

opinion this should have been done much earlier in the Plan preparation process. Instead the NEAs have continued to ignore the wider public administrative law issues and, more recently, in distributing to the public at large material at MIPIM London and attendance by NEGC at the initial meeting with LUC provided *prima facie* evidence that the SA revision (and any consultation regarding it) has been with a "closed mind" and in clear contravention of the inspector's repeated warnings. It follows that, as a consequence, the whole Plan process has been rendered flawed *ab initio*. Moreover, fundamental issues of viability remain unresolved and it is difficult to see how the SA process can be revised unless and until it is known whether funding for the necessary road improvement is or is not going to come forward.

29. All the above point to the NEAs having confused the objectives of the Plan with the means of delivery. The objective must be to provide, inter alia, enough land for new homes during the Plan period. That is what the original iterations of the individual draft local plans sought to achieve. However, that objective has been lost in the drive to advance proposals for new garden communities (i.e. as one of the means of delivering the objectives) to the extent that it gives the impression that the cart (the garden communities) has been placed in front of the horse (the Plan). At present the NEAs may be open to the accusation that they are devoting scarce public funds and resources, particularly in an age of austerity, in ploughing on with proposals that the independent inspector charged with the task of examining the Plan has highlighted, in very public documents (his letters), significant shortcomings and fundamental flaws. If so then it could be argued that, notwithstanding the matters raised above, by failing to address the inspector's concerns the NEAs are acting unlawfully in the sense that they are acting in a way that no reasonable authority would do in the circumstances i.e. that they are acting "unreasonably" – see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. This could provide the basis for either an independent judicial review or as grounds of a wider statutory challenge to the Plan should it ever come to be adopted.

30. In addition, the current attitude of the NEAs puts the inspector in a difficult position. He has made clear his severe misgivings. Unless the NEAs address those misgivings, and adequately satisfy the inspector on each and every one, it is difficult to see how the inspector could find the Plan legally sound.

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