SUSTAINABILITY APPRAISAL OF THE BABERGH & MID SUFFOLK JOINT LOCAL PLAN

ADVICE NOTE

SUMMARY

1. This Advice Note provides a summary response to the Opinion dated 28 September 2021 by Mr Scott Stemp and Ms Thea Osmund-Smith ("the Opinion"). It is prepared as a summary response due to the shortness of time: the Opinion was provided to Babergh District Council and Mid Suffolk District Council ("the Councils") on 11 October 2021 and the matters it discusses are due to be considered by the Examination into the Babergh & Mid Suffolk Joint Local Plan ("the JLP") at hearings on 19 and 20 October 2021. As the Councils will know, I have been instructed by the Councils to provide them with legal advice and support prior to and during the JLP Examination.

2. In essence the Opinion contends (at para 55) that the Sustainability Appraisal ("SA") of the JLP fails to meet regulatory requirements and relevant guidance such that the JLP *"cannot be said to be an appropriate strategy for the purposes of"* para 35 of the NPPF (which identifies, as a matter of policy rather than law, factors that the Government considers would constitute whether a development plan is *"sound"* (or not)). The Opinion also contends (at para 58) that *"The defects in the SA… appear not to be capable of remedy by subsequent work"*, leading to the Opinion concluding (at para 59) that the JLP *"cannot properly be found to be sound on the basis of the information presently available".*

3. I do not agree that any of these contentions are correct as a matter of law. Moreover, even if it were to be concluded, as a matter of planning judgment,

that there were shortcomings in the SA, there is no principle of law that such shortcomings would be incapable of remedy. It is a striking omission from the Opinion that nowhere does it identify (let alone discuss) the considerable body of case law that addresses precisely that issue.

4. It is also to be noted that, despite claiming regulatory non-compliance, nowhere does the Opinion identify any specific breach of any specific regulatory requirement. Instead, the Opinion focuses on the question of whether the JLP can be found *"sound".* Whilst this is a legal concept, as set out in s.20(5)(b) Planning & Compulsory Purchase Act 2004, it is one that involves the exercise of planning judgment to the facts in question and a wide range of judgments may be legitimately open to a decision maker. As was stated by Carnwath LJ in Barratt Development Ltd v City of Wakefield MDC [2010] EWCA Civ 897 (at para 33):

   "soundness was a matter to be judged by the Inspector and the Council and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law".

5. Clearly, at the present stage of the Examination process, whilst the hearings are still in train, the Inspectors are not in a position to reach definitive conclusions on the issue of soundness. Whilst it is open to parties engaged in the Examination to express their views on that issue, with a view to assisting the Inspectors when forming their ultimate conclusions, it is hard to see any legal basis for the dogmatic contention in the Opinion that the JLP *"cannot properly be found sound".* The qualification to that statement (*"on the basis of the information presently available"*) serves to undermine it completely, because the Examination process is continuing and it is absolutely in the discretion of the Inspectors to request the provision of further information should they require it in order to reach their conclusions on soundness.

THE ROLE OF SUSTAINABILITY APPRAISAL IN PLAN-MAKING

6. Holgate J provided a recent summary of the role of SA in plan-making in Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin):

"25. Section 19(5) provides that:-
"The local planning authority must also-
(a) carry out an appraisal of the sustainability of the proposals in each development plan document;
(b) prepare a report of the findings of the appraisal."
In this case the Local Plan is a "development plan document" (s.37(3) and s.38(3)).

26. PCPA 2004 does not say any more about what a sustainability appraisal and report ("SA") is required to address. The Act received Royal Assent on 13 May 2004. The 2004 Regulations were made on 28 June 2004 and came into force on 20 July 2004. I agree with Ouseley J in Heard v Broadland District Council [2012] Env.L.R. 23 at [11] that s. 19(5) integrates the requirements of the Directive and the 2004 Regulations with the statutory process for the preparation and examination of development plan documents. This solution is authorised by Article 4(2) of the Directive. In practice the sustainability appraisal produced for s 19(5) must satisfy the requirements in the 2004 Regulations for an "environmental report".
…
36. It follows from this analysis of the 2004 Act, that ***if the Inspector decides that it would not be reasonable to conclude that the requirements of s.19(5) have been satisfied, which in effect refers to the SEA requirements in the 2004 Regulations, he must recommend that the local plan is not adopted, unless he is asked by the authority to recommend main modifications which would satisfy the relevant requirements. This procedure reflects the general principle in the case law that SEA is an iterative process, which may allow a defect at one stage to be cured by steps taken subsequently*** *(see e.g. Cogent Land LLP v Rochford District Council [2003] 1 P & CR 11; No Adastral New Town Limited v Suffolk Coastal*

District Council [2015] 1 Env LR 551; R (Plan B Earth) v Secretary of State for Transport [2020] PTSR 1446 at [144]).”

(emphasis added)

7. Holgate J also identified an examining Inspector’s responsibilities in a case where it is reasonable to conclude that there has been compliance with the duty to co-operate (at para 31):

“31. If the examining Inspector considers that the authority has complied with the duty under s.33A of PCPA 2004 to co-operate with other planning authorities and the requirements referred to in s.20(5)(a) and that the plan is “sound”, he must recommend that the document be adopted by the authority (s.20(7)). ***Where he considers that one or more of those requirements is not satisfied, he must recommend to the authority that the plan is not adopted (s.20(7A)). However, subject to being satisfied that the authority has complied with the duty to co-operate under s.33A, the Inspector must recommend “main modifications” to the draft plan so as to make it “sound” or otherwise compliant, if requested to do so by the plan-making authority (s.20(7B) and (7C)).”***

(emphasis added)

8. In Flaxby Holgate J also summarised the relevant legal principles where there is a public law challenge to SA/SEA and their handling of *“reasonable alternatives”*:

“128. In Plan B Earth the Court of Appeal held that the court’s role in ensuring that an authority has complied with the requirement of Article 5 and Annex 1 when preparing an environmental report must reflect the breadth of the discretion given to it to decide what information “may reasonably be required”, taking into account current knowledge and methods of assessment, the contents and level of detail in the plan, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at other levels in that process in order to avoid duplication of

assessment. ***The authority is left with a wide range of autonomous judgment on the adequacy of the information provided*** *([136]) :-*

> *"**The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind.** This, in our view, indicates a conventional "Wednesbury" standard of review – as adopted, for example, in Blewett. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court." (referring to R (Blewett) v Derbyshire County Council [2004] Env. L.R. 29).*

129. ***In Spurrier the Divisional Court drew a distinction between the failure by an authority to give any consideration at all to a matter which it is expressly required by the 2004 Regulations to address, namely whether there are reasonable alternatives to a proposed policy, which may amount to a breach of those regulations, as opposed to issues about the non-inclusion of information on a particular topic, or the nature or level of detail of the information provided to or sought by the authority, or the nature or extent of the analysis carried out. All those latter matters go to the quality of the SEA undertaken and are for the judgment of the authority, which may only be challenged on grounds of irrationality*** *(see Plan B Earth at [130] and [141]-[144]; R (Khatun v Newham London Borough Council [2005] QB 37 [35] and Flintshire County Council v Jayes [2018] EWCA Civ 1089; [2018] E.L.R. 416).*

130. The consideration of alternatives under the SEA Directive is to be contrasted with the way in which that subject is treated under the Habitats Directive (92/43/EEC). In the latter case the tests in the legislation operate to determine the outcome of a proposal. There, the rules regarding alternatives are substantive in nature. But as the Divisional Court pointed out in Spurrier at [322] :-

> *"……**the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature.** Thus, the requirement to address "reasonable alternatives" in the environmental report (or AoS under section 5(3) of the PA 2008) is intended to facilitate the consultation process under article 6 (and section 7 of the PA 2008). The operator of Gatwick and other parties preferring expansion at that location would be expected to advance representations as to why the hub objective should have less weight than that attributed to it by the Secretary of State or that, contrary to his provisional view, the Gatwick 2R Scheme could satisfy that objective. **The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process"***

(see also the Court of Appeal in Plan B Earth at [109]-[113] and Hickinbottom J (as he then was) in R (Friends of the Earth England, Wales and Northern Ireland Limited) v The Welsh Ministers [2016] Env. LR 1 at [88(i)]). ***Furthermore, the process of SEA is iterative. It is not confined to a single environmental report. There may well be several iterations as work on the plan progresses*** *(Cogent Land LLP v Rochford District Council [2013] 1 P & CR 11).*

131. The identification and treatment of reasonable alternatives is a matter of "evaluative assessment" for the authority (Friends of the Earth at [87]-[89] and Ashdown Forest Economic Development LLP v Wealden District Council [2016] PTSR 78 at [42] subject to review only on public law grounds. An enhanced margin of appreciation should be given to decisions which involve, for example, the expert evaluation of a wide variety of complex technical matters or scientific, technical, or predictive assessments (see [126] above).

132. Accordingly, ***the identification of reasonable alternatives and the nature of the assessment to be carried out are matters of judgment for***

the local planning authority, and in due course for the Inspector who conducts the examination of the draft local plan. *It is in this context that the principle of equal or comparable treatment as between alternative options needs to be considered. As Ouseley J recognised in Heard at [71] the principle is not explicitly stated in the Directive, or in the Regulations. He said that although there may be a case for the examination of a preferred option in greater detail, the aim of the directive would more obviously be met by, and best interpreted as requiring, "an equal examination of the alternatives which it is reasonable to select for examination". But it should be noted that the lack of equivalence in that case was fundamental. It related to the absence of any reasons for the authority's selection of its preferred option and rejection of alternatives (see [68]-[71] and Spurrier at [426]).*

…

135. From a review of the authorities ***I do not consider that the equal or comparable treatment of alternatives is a hard-edged question for the court to determine for itself. It goes to the quality of an SEA. In so far as this subject is a matter for judicial review, the test is whether the approach taken by the plan-making authority is irrational or can be impugned on public law grounds.*** *That is the approach which the courts take to a challenge to an authority's decision on which options to treat as "reasonable alternatives" (see e.g. Friends of the Earth at [88(iv)] and there is no logical justification for taking any different approach to an issue about comparable treatment of such alternatives."*

(emphasis added)

9. In referring to *"the quality of an SEA"* (which is challengeable only on conventional public law grounds), Holgate J was echoing the distinction made by Weatherup J in Re Seaport Investment's Application for Judicial Review [2008] Env LR 23 where Weatherup J stated (at para 26):

"The responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for

environmental reports. ***The Court will not examine the fine detail of the contents but seek to establish whether there has been substantial compliance with the information required by Sch.2 . It is proposed to consider whether the specified matters have been addressed rather than considering the quality of the address****."*

(emphasis added)

10. Holgate J in Flaxby referred to the decision in Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin) as confirming the iterative nature of the SA process, and the consequent scope for earlier deficiencies to be addressed by later SA work. The applicable legal principles were summarised by Hickinbottom LJ in R (Spurrier) v Secretary of State for Transport [2019] EWHC 1070 (Admin) at para 397:

"In Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin): [2013] 1 P&CR 2, Singh J (as he then was) held that ***a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material*** *(see [111]-[126]). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that* ***SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced*** *(see [112]). The Court of Appeal endorsed this analysis in No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88; [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see [48]-[54])."*

(emphasis added)

11. The *"previous authorities"* reviewed by Singh J in Cogent Land included Seaport Investments Ltd[1] (as referred to in the Opinion at para 10), Save Historic Newmarket v Forest Heath DC[2] and Heard v Broadland DC[3] (as referred to in the Richard Brown Planning Ltd Hearing Statement on Matter 1a (I.110) and the supporting Appendix A1 from Jam Consulting. As noted above, the Opinion does not address Cogent Land or the subsequent authorities which confirm the principles it establishes. This is a surprising omission, given the conclusions reached in the Opinion.

CRITICISMS OF THE SA

12. The Opinion advances various criticisms of the SA, drawing upon the comments made in the two Jam Consulting reports of June and September 2021. It is hard to distinguish between a criticism which raises a matter of law (which might properly be the subject of the Opinion) and a criticism on a matter of planning merits or planning judgment as regards the *"quality of address"* in the content of the JLP (which is not a matter of law unless irrational or otherwise outside of a plan-maker's lawful discretion). The Opinion appears written more as an exercise in advocacy than as an objective analysis of the legal position.

13. Many of the criticisms appear to involve a misreading or a misunderstanding of the SA and its role in plan-making. As noted above in the passage from Spurrier cited in Flaxby, the regulatory requirements for SA are procedural in nature, with the outputs from the process being taken into account by the decision maker but not dictating the outcome of the plan-making exercise. SA is a process to aid decision making, it is not a substitute for it.

14. A central criticism made in the Opinion is that the SA has *"considered only the impacts of delivery of 10,165 dwellings"* and has *"not assessed the impacts of delivery of any amount of housing beyond 10,165"* (paras 21 and 23).

[1] [2008] Env LR 23.
[2] [2011] EWHC 606 (Admin).
[3] [2012] EWHC 344 (Admin).

However, this central claim is incorrect and appears to be based on a misunderstanding of what has been assessed. The SA does include an assessment of JLP Policy SP01 (which sets out the housing requirement, which includes a requirement for 10,165 dwellings in the Mid Suffolk part of the JLP area). However, the SA also includes an assessment of Policy SP04, which sets out how the JLP proposes to deliver on that requirement by the provision of sites to accommodate some 12,616 dwellings in Mid Suffolk. As the SA explains (at para 7.79) a large proportion of this planned supply already has planning permission, and these sites *"are considered fixed as far as the spatial distribution goes".* Paras 7.115 to 7.150 then assess not only the impact of JLP distribution but also of identified alternatives (as explained at paras 7.79 to 7.83 and in Table 7.5). For Mid Suffolk the options assessed included different ways of distribution some 12,600 dwellings. Notwithstanding that the JLP does not have the ability to remove existing planning permissions, all of the allocated sites (including those with permission) are also individually assessed in the SA (with the detailed appraisals set out in Appendices E and F).

15. A related criticism in the Opinion (at paras 24 and 25) is that the SA only assessed the housing provision against the sustainability objective of meeting the housing requirement. This is also a misunderstanding of the SA. The assessment of Policy SP01 does address that policy only against the housing requirement policy because that policy simply sets the housing requirement. It is the delivery of housing to meet that requirement which may have environmental effects on other sustainability objectives, and consequently those effects are assessed in the SA in the context of the JLP policies that will deliver the required housing. Thus, Policy SP04 is assessed against all 16 sustainability objectives, as are the individual site allocations. This is an entirely legitimate approach. It does not mean that the effects of the JLP are not assessed, it means they are assessed by reference to the JLP policies that give rise to them.

16. The Opinion criticises the SA's assessment of spatial strategy options (at para 26) but the criticisms do not appear to have considered the explanation in the

SA (at paras 7.74 to 7.150) which sets out a narrative of how the 9 *"high level"* spatial distribution options (not *"baseline"* options as described in the Opinion) were refined to those which would be genuinely distinct and capable of delivery, bearing in mind the large stock of existing permissions. Whilst views may differ on the judgments made in this assessment work, such differences are concerned with the *"quality of address"* in the SA rather than with any matters of regulatory compliance. The same is true of the criticisms of the various percentages of housing as between different tiers in the settlement hierarchy as a result of the spatial distribution. These are matters of planning merits and not matters of law.

17. The Opinion makes various criticisms of the JLP site selection process. Only in one respect is there a potentially legitimate point made. This concerns the omission of the Stowmarket Road, Great Blakenham site in which Landbridge Property LLP ("Landbridge") now have an interest from the JLP site selection process due to an oversight by the Councils (as explained in the Council's letter dated 25 June 2021, G.03).

18. The summary position is that a different party (Harris Strategic Land) promoted a larger variant of the Landbridge site at the Regulation 18 consultation in summer 2019. That consultation response was received on the final day for representations and, unfortunately, whilst the representation was considered by the Councils, the site being promoted was not carried across to the work being undertaken on the SHELAA, so the site was not assessed in the SHELAA (either in its 2019 version or in its 2020 version). Since the sites that the SHELAA considered were then used to inform the SA, that omission meant that the site was not assessed in the SA either.

19. Subsequently, the Councils have assessed the site using the methodology of the SHELAA and its consultants, LUC, have assessed the site using the methodology of the SA, and the results of both assessments have been presented with the Councils' letter of 12 July 2021 (G.04). Due to a minor error the plan submitted with that letter has incorrectly transposed the notations for the larger site (as promoted at Regulation 18) and the smaller

site (as promoted at Regulation 19) but the assessments themselves are not affected by this. The SHELAA assessment shows that the site (both the larger site and the smaller site) is potentially suitable for residential development although there are constraints that would require further investigation. The SA assessment shows that the site (larger and smaller) has both positive and negative effects on various sustainability objectives.

20. Obviously, now that the JLP has been submitted, the Councils have no power to change its contents (save for non-material 'Additional Modifications'). Any substantive change can only be made as a 'Main Modification' if that is recommended by the Inspectors in order to address an issue of regulatory compliance or soundness in accordance with s.20(7C) PCPA 2004.

21. In the context of a plan which makes provision for some 22,300 dwellings (some 12,700 in Mid Suffolk) over the plan period, across some 190 individual sites (126 in Mid Suffolk) plus windfalls, I do not consider that the omission to assess an individual site with a capacity of no more than 250 dwellings at best (larger site) or 120 dwellings as now promoted (on the smaller site), could be said to raise an a matter of soundness. The scale of provision (about 1% or less of the JLP housing provision) is too small to allow it to be sensibly said that the question of whether the JLP put forward *"an appropriate strategy"* would turn on whether it did or did not consider the Landbridge site.

22. Nor do I consider that it could be sensibly said that the SA has failed to address the question of reasonable alternatives to the JLP and its spatial distribution of the housing provision by reason of the omission of assessment of one modestly sized site at one settlement in the JLP area. That omission goes to the *"quality of the address"* in the SA on the subject of reasonable alternatives rather than to *"substantial compliance"* with the regulatory requirement (the distinction drawn by Weatherup J in Seaport Investments). The SA assessed some 259 potential housing sites across the JLP area (para 6.10 of the SA), with 159 in Mid Suffolk (Table 6.2), including 2 reasonable alternative sites at Great Blakenham in the Ipswich Fringe (Appendix E).

23. However, accepting that these questions do involve matters of planning judgment (and are ultimately a matter for the Inspectors to determine), I deal briefly with the steps that could be taken, were the Inspectors to consider that a regulatory or soundness issue does (or may) arise.

24. Provided that there is a period for consultation, it would be open to the Inspectors to provisionally recommend a Main Modification in respect of some or all of the Landbridge site. That recommendation may, or may not, stand in the light of that consultation, the results of which would be considered by the Inspectors before making their final recommendations pursuant to s.20(7C) PCPA 2004. Whilst the timing of any such consultation would be a matter for the Inspectors' discretion, there would be practical merit in combining it with the expected consultation on other provisional Main Modifications. If the Inspectors consider that the recent SA work as presented by the Councils in G.04 is insufficient, they could also require further SA work to be undertaken. This would be entirely within the principles established by Cogent Land and the subsequent case law. This could also be combined with the SA work that is likely to be needed for the other provisional Main Modifications.

25. Thus, whether the Inspectors are satisfied with the JLP and the SA work as they stand, or they consider that a Main Modification and/or further SA work is required, there is no legal impediment to either outcome being achieved in the present Examination.

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