Andrew Martin
Planning
Planning Design Development

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David Coleman
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16th March 2015

Dear David

Maldon District Local Development Plan

I write with regard to the Examination of the Maldon District Local Development Plan and to the outcome of the hearing session on day 2, concerning the matter of Legal Compliance.

You will recall that the Inspector has requested that all the reasonable alternative sites, and those considered not to be reasonable alternatives, should be included within a final SA by way of a "correcting addition."

At the hearing session and in statements prepared for them you are noted as stating that the final SA (SD03) does not include the reasons for not choosing alternative options and that this includes the 'reserve sites' and other reasonable alternatives. You state that the reasoning can be found elsewhere, eg committee reports, and that in any event the reasoning will be included in a further final SA that will be produced prior to adoption.

I had the opportunity at the hearing session on day 2 to make the claim that the SA had not influenced the plan, but had been carried out in retrofit. I stated that in preparing an addendum further public consultation should be undertaken and importantly the responses need to be considered. This then raises the concern that in doing so a different conclusion may result. I added that the final SA should not just patch up the shortcomings of the existing SA but should show how it has influenced the final outcome of the Plan.

In response the Inspector agreed that case law had established that the public should not be expected to follow a paper chase to try and understand the Council's reasons for rejecting alternative sites and clarified that there would be a need for further public consultation. The Inspector confirmed that the onus is on Maldon District Council to demonstrate all the evidence in rejecting omission sites and reserve sites. When the final SA is published at the end of the hearings, if there are fundamental flaws or something new arises then participants will be able to draw this to his attention. Finally the Inspector suggested that participants

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[redacted]

should liaise with you to agree those sites to be included in the addendum/correcting addition and the level of detail required.

On behalf of the owners of land at Lofts Farm (east of Broad Street Green Road) we have sought a legal opinion and, notwithstanding any additional work that is now agreed between us and henceforth undertaken by the Council, I confirm the view that:

- the SA to date has not influenced the Plan and there has been a failure to properly assess both the preferred options for growth and rejected alternative sites;

- in the absence of a complete SA there can be no proper consultation and accordingly the Council cannot have taken into account consultation responses;

- the SA has to be carried out not only before the adoption of the Plan, but also prior to its submission to the legislative procedure. The current EIP is an important step in the legislative procedure. It is here that objectors can promote alternative sites and it is therefore essential that a complete SA is available to the EIP and not something produced after the event; and

- on the basis of the above the Plan is not legally compliant.

We have been advised that whether a failure to provide adequate reasons for the selection and rejection of alternatives in a SA is capable of being corrected (by an addendum, for example) has been considered by the High Court in the case of *Cogent Land.* This case confirmed that defects in the SA process can be cured by a subsequent addendum. Crucially, however, if the reasoning process did not take place at each appropriate stage, thereby influencing the Plan, this cannot be "cured". The only thing that *can* be cured is the failure to include in the SA the documents showing that the legally adequate reasoning process did in fact occur.

In the case of *Heard,* it was suggested that in order to show they have followed the correct process Councils could do this "by reference to earlier documents' BUT ONLY "if the earlier documents had contained the required material" (paragraph 62).

To ensure that the documents in MDC's proposed addendum are "earlier" or "previous" documents (i.e. ones that influenced the process as opposed to ones prepared now, retrospectively, with the aim of justifying the final outcome, we would request that evidence be provided by the Council demonstrating:

a. When the documents containing the relevant reasoning/assessment were created.

b. How they *influenced* the process.

c. How, and when and to what extent they were introduced to the decision-makers, and how they consequently affected their decision-making on which sites would be taken forward or not (for example, minutes of meetings/committee reports).

d. The extent to which there was opportunity for public consultation *at the time* on this reasoning and those responses that have been considered.

e. If so, by what means this information was made available to the public.

In terms of the contents of the proposed addendum and level of detail required, the 2011 case, Save Historic Newmarket Ltd v Forest heath District Council (2011)EWHC 607 (Admin), Collins J at paragraph 40 suggests that if a final report refers to previous documents the final report should:

I. Sufficiently summarise the reports; and

II. Identify the relevant passages in the reports.

and…

III. In any event those previous reports themselves should "properly give the necessary explanations and reasons".

In addition we are advised that any SA addendum would furthermore have to do the things set out in *Heard* that established that Councils should:

1. Clearly outline reasons for selection of alternatives at <u>each</u> stage (and have this information readily available to the public).

2. Discuss in the final SA why the preferred option (s) came to be chosen.

3. Analyse on a comparable basis the preferred option and reasonable alternatives at each stage.

Appendix 6 of "A Practical Guide to the Strategic Environmental Assessment Directive" provides useful guidance on assessing alternative sites. It suggests a number of useful questions that should be asked. It advises a suitable form of presentation in the form of a table that could combine qualitative and quantitative assessment. Although this document is just guidance, not an official interpretation of the law, appendix 6 as referred to above offers useful advice on how exactly to assess, and would be useful in establishing a scope of work going forward. This document also emphasises the need for transparency in assessment.

Finally, as the Inspector has confirmed there is a need for the final SA Addendum to be consulted on for it to be legally compliant. We are advised that if the Council does not provide

sufficient time for the Addendum to be consulted on, this would be a breach of the Regulations and mean that the Addendum was not legally compliant. The Addendum should demonstrate how the Directive has been complied with

On the basis of the above, that clearly suggests that a great deal of work is now required to correct the SA, we request that the Council set out an outline of the proposed form and contents of an Addendum, bearing in mind the case law that we have highlighted in this letter and the Inspector's comments.

If you wish to discuss this letter in more detail please do not hesitate to contact me or my colleague – Julie Cross.

Yours sincerely