Andrew Martin
Planning
Planning Design Development

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30th March 2015

Dear Mr Vickery

Sustainability Appraisal of the Maldon District Development Plan

I respond to your letter of 17th March concerning the matter of the Sustainability Appraisal of the Maldon Local Plan and the two recent cases that address this issue, upon which you invite comments. I also comment upon a response to my letter of 16 March to David Coleman that has been prepared by Robert Jameson of Attwaters Jameson Hill Solicitors, advising the Council.

I begin by expressing my disappointment at the letter from Robert Jameson that clearly misses the point of the *need* for an Addendum to the SA as submitted by the Council to date. The need for an Addendum was I believe correctly identified by you in establishing the Matters, Issues and Questions for the Examination Hearings. Under Issue 1 to consider whether the Plan is legally compliant you queried whether the final SA (SD03) deals adequately with all the reasonable alternatives. You further stated that paragraph 7.1.2 of that document implied that this had not been done. You went on to provide a precautionary note that **"Legally the final SA must clearly set out the reasons for the selection of the Plan's proposals and then outline reasons why the other reasonable alternatives were not chosen during preparation."** You clarified that if this has not been done you will consider asking the Council to prepare a correcting addition to the final SA. In its statement to Matter 1 and in evidence at the Hearing the Council is noted as stating that the final SA does not include the reasons for not choosing alternative options and that this includes the 'reserve sites' and other reasonable alternatives. As you are aware, it is important to draw a distinction between SAs required and fit for purpose for strategic plans/policies and those that allocate specific sites. The submitted Maldon Local Plan does allocate sites and those and other alternatives have not been the subject of SA and therefore the Plan is not currently legally compliant. In the light of the above which clearly sets out what you consider to be the objective of an SA Addendum and agreement reached between the parties at the examination,

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it is unclear why the advice of Robert Jameson should seek to reopen or challenge the debate that an Addendum or 'correcting addition' to the SA is required.

Since agreement at the Hearings that this work will now be undertaken and your advice to the parties to agree those sites to be included in the Addendum and the level of detail required, we sought a legal opinion and carried out some extensive research into how such matters have been addressed in other local authority areas. My letter of the 16 March was an attempt to advise the Council of our findings particularly in terms of how an SA can be corrected or 'cured'. This did establish that a considerable amount of work needs to be undertaken in clearly outlining the reasons for selection of alternatives at each stage and demonstrating how the preferred options came to be chosen.

Robert Jameson's letter completely ignores the fundamental tenet of my argument that the assessment to date is of a broad-brush nature and considers the policies of the plan against sustainability criteria but fails to move on to assess both the preferred site options for growth and rejected alternative sites. In my opinion the SA as submitted, more appropriately aligns with the early stages of preparation of a Local Plan, akin to perhaps the 'Issues and Options' stage. In my involvement with other Local Plans being progressed in Essex (for example at Colchester) this assumption is borne out.

The flippant remarks of Robert Jameson that the agreed shortcomings of the SA can be addressed by way of a 'sweep up' once your main modifications are known, represents a flagrant disregard to the Strategic Environmental Assessment Directive, relevant case law and government guidance. The advice encourages the Council to continue in the same vein of glossing over the issues rather than 'curing' the current failures of the SA and producing the evidence to show that the legal adequate reasoning process did in fact occur. In addition the advice of Robert Jameson on the timing of this work would be in breach of the Regulations in respect of consultation required to be undertaken to ensure legal compliance.

I have the following comments to make on the two cases to which you refer in your letter of 17 March 2015.

No Adastral New Town Ltd v Suffolk Coastal District Council & Anor (2015)

The case is most useful in terms of its reference to others such as *Cogent Land* in establishing that an SA can be corrected. *NANT* is also useful in demonstrating that an SA addendum can take a variety of forms but I would add that what is important is that the defects in the SA <u>are</u> corrected by any subsequent document.

Crucially what we believe Maldon Council must now do, as established by *Heard*, is to demonstrate how the reasoning process took place at <u>each</u> appropriate stage, and how this influenced the plan. I maintain the view set out in my previous letter that 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 occur. On this basis my letter of 16 March then sought to establish - in sharing our legal advice and research into comparable cases - what now needs to be done to rectify the position.

In *Cogent Land* the SA Addendum only provided further details on the reasons for selection and rejection of alternatives (outline reasons having already been provided in the SA and technical report). The Addendum in the *Cogent Land* case had also been the subject of

consultation. Similarly in *NANT* it was found that an SA had considered all the options for growth in the Core Strategy for Suffolk k Coastal District and that this had been consulted upon. An addendum had addressed an increase in the size of a proposed allocation in terms of housing numbers. The judge found that this was acceptable because the environmental assessment of a plan should be an ongoing process. Prior to submission of the plan various deficiencies in the SA had been cured.

The Maldon situation differs from both *NANT* and *Cogent land* in that the reasons for selection and rejection of reasonable alternatives (including the preferred options) were never provided in the SA in the first place. The Maldon position is instead more akin to the Save Historic Newmarket and Heard cases in that the reasons for selection/rejection of alternatives are absent. As you will be aware in both the Save Historic Newmarket and Heard cases the SA was found to be unlawful.

As I stressed in my previous letter our fundamental premise remains that the plan is not legally compliant because the very failure to provide adequate reasons for the selection and rejection of reasonable alternatives means that there has been no proper consultation. If that reasoning had been consulted upon before submission of the Plan then the shortcomings of the assessment could have been pointed out by my client and land East of Broad Street Green Road (Lofts Farm) could have been properly included as a reasonable alternative and assessed at a point in the progression of the plan when it was possible to rectify matters.

The *NANT* case refers to the judgement of Singh J in the case of *Cogent Land*, on whether defects in the development plan process can be cured at later stages. Whilst he found that an environmental statement may not always contain the 'full information' about the environmental impact of a project, the Regulations recognize that through the publicity and consultation processes any such deficiencies can be identified and addressed. During the process of the emerging Plan for Maldon there has been no such consultation on the environmental implications of the alternative sites nor therefore any opportunity to respond and address any deficiencies.

Satnam Millenium Ltd v Warrington Borough Council (2015)

This case again confirms that it is acceptable in principle to undertake an additional SA, provided that it is not a 'bolt-on' justifying a predetermined strategy. In this case a challenge to the adoption of the Warrington Local Plan succeeded on two grounds including that there had been "substantial non-compliance" with SEA requirements, specifically schedule 2 of the 2004 Regulations. In considering the Maldon situation in the light of *Satnam* we would argue that the SA fails under Schedule 2 (8) to "Outline the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken...."

In summary these two cases show, in line with others quoted above, that an SA is capable of being corrected by an addendum. It then follows that if the SA in question has not followed the Regulations, there is nothing to cure in an Addendum to it. It remains for Maldon to demonstrate now in an Addendum that is has followed the correct process and to do so by reference to 'earlier' or 'previous' documents that have influenced the process and not ones that have been prepared now retrospectively, with the aim of justifying the final outcome.

As offered previously I am happy to meet and discuss the contents of my letters with the Council in more detail.

Yours sincerely

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