

Appendix 5

Braintree District Council, Colchester Borough Council and Tendring District Council (NEA)

Section 1 Local Plan Examination

Summary of Advice from Leading Counsel

1. Dentons instructed Christopher Lockhart-Mummery QC to provide advice on four main issues arising out of the Local Plan Inspector's letters of the 8th June (**First Letter/FL**) and 2nd August (**Second Letter/SL**). Advice has been provided both in writing and orally.

Issue 1: Can Section 1 be adopted separately from, and ahead of, Section 2?

2. The Inspector's First Letter (FL146/147) suggested that the North Essex Authorities should seek their own legal advice on whether Section 1 can be adopted independently to and before the Section 2 examinations.
3. Counsel advised that this would be a lawful approach for the NEA to adopt.

Issue 2: If the Garden Communities are removed from Section 1 as proposed in the Inspector's Option 1 will the Sustainability Appraisal need to be updated to take account of the omission of the homes that would otherwise have been accommodated and, if so, are the Garden Communities a "reasonable alternative" that the SA has to consider?

4. Counsel advised that the SA would have to be updated to support a revised Section 1 under Option 1. That SA would have to reflect the omission of the homes and employment proposed in the Garden Communities, and would have to address the shortfall that that would leave compared with the OAN homes. The SA would be able to take account of the commitment to review Section 1 but would have to reflect the fact that the future Section 1 review might not support Garden Communities, either in their present form or at all.
5. Counsel advised that any Section 1 SA would have to treat the Garden Community options as a "reasonable alternative" for SA purposes.
6. Counsel advised that the Section 2 SA's would all have to be reviewed to reflect the absence of the Garden Communities and the potential consequences of the uncertainty about the potential outcome of the Section 1 review.

Issue 3: If the Garden Communities are removed from Section 1 is there a risk that the examination would have to be re-opened to hear objections, if made, from the promoters of the Garden Communities?

7. Counsel noted that examinations are re-opened only exceptionally to deal with proposed modifications.
8. Counsel advised that his view was that the omission of the Garden Communities would clearly be exceptional. If the examination was not re-opened he would expect a judicial review of that decision with consequential delays to the conclusion of the local plan process.

Issue 4: If the Garden Communities are removed from Section 1 would the Section 2 examinations need to consider alternative sites to make up the shortfall against OAN for each local plan?

9. Counsel advised that it would be for the Section 2 examiners to consider whether the Section 2 plans were sound.
10. If the OAN is not being met each examiner would have to consider whether the commitment to a review in Section 1 was sufficient for them to find the plan sound. This would be a decision to be taken on each Section 2 plan and would depend on factors such as the extent of any shortfall and the consequences of the Garden Communities not being the chosen option in any Section 1 review.

Dentons

3 September 2018