BIRMINGHAM CITY COUNCIL

BIRMINGHAM DEVELOPMENT PLAN EXAMINATION

NOTE TO INSPECTOR

CONCERNING THE CONSEQUENCES OF A FINDING THAT THE SA/SEA WORK UNDERTAKEN TO DATE FOR THE BDP WAS NOT FULLY COMPLIANT WITH RELEVANT LEGAL REQUIREMENTS

the SEA process, when setting out the effects of the various alternatives considered, inter alia, gives “an outline of the reasons for selecting the alternatives dealt with” (ie assessed). This is contained with an extensive list of technical requirements relating to the content of the assessments. It is does not require that the SEA itself at this stage should promote reasons for choosing one alternative over another. This is consistent with the (extant) ODPM Practical Guide to the SEA Directive September 2005 which notes that “it is not the purposes of the SEA to decide the alternative to be chosen for the plan or programme. This is the role of the decision –makers who have to make choices on the plan or programme to be adopted. The SEA simply provides information on the relative environmental performance of alternatives, and can make the decision-making process more transparent.” Thus, at the Pre-Submission consultation stage, the role of the SA is to provide a context for the alternative(s) which the Council has chosen to pursue in the BDP.

5. At the end of the process, when a plan is adopted, Article 9 provides that a statement shall be prepared which shall include “the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with”. Plainly the BDP has yet to be adopted and an Article 9 Statement has yet to be prepared.
6. Turleys in their response to EXAM 59 continue to complain that there is no clear explanation or summary text in SUB3 or SUB5 giving reasons why Areas A and/or B were not taken forward in the Pre-Submission Draft BDP. However, they are clearly well aware of the Green Belt Options Assessment

paper (PG1) which is referenced in both documents and which contains a detailed appraisal of the GB alternatives: see EXAM 59, para 2.5.

7. Notwithstanding the disagreements which the Council has as to the interpretation of the requirements of the SEA Directive and Regulations at this stage in the process, the Council does not want to see the key proposals in the BDP “held up” by a legal challenge brought on the basis advanced by Turleys – however misconceived that challenge may be.
8. Accordingly, the Council is prepared to re-issue its SA or prepare and Addendum to the existing SA for further consultation (perhaps in association with consultation on any Modifications) and include in the text of the SA a summary of any reasoning that the promoters of Area B say is missing or which can only be found by reference to other documents. This would be without prejudice to the Council’s view that this course is not necessary or required at this stage by the SEA Directive or Regulations. Representations on this re-consultation could then be considered by the Council and the Inspector, with the opportunity for the Examination to be re-opened if the Inspector considered this a desirable course.
9. Cogent Land v. Rochford DC [2012] EWHC 2542 allows this course to be taken prior to the completion of the final SA (on adoption), so that extensive plan preparation work is not rendered abortive: see paras 108-127 of the judgment of Singh J.
10. The Council would welcome the Inspector’s views on this approach.

conclusion of a section 106 agreement and the imposition of appropriate conditions. I was

16 In July 2011 the defendant published an Addendum to its SA and SEA in respect of the submission draft Core Strategy.

17 On 27 July 2011 the claimant requested the inspector to suspend the examination until December that year. On 11 August 2011 the inspector refused to suspend the examination.

18 On 27 October 2011 the inspector submitted her report to the Secretary of State.

19 On 13 December 2011 the defendant resolved to adopt the RCS, incorporating changes recommended by the inspector, and on the same date did adopt the RCS. That is now the subject of the present challenge.

The development of the RCS in more detail

20 In its Draft Core Strategy (Regulation 25 version) of September 2006 the defendant set out options that it considered to be realistic to shape the development of its District in the period until 2021 and beyond. Options for development were presented in tables and listed in two categories of “possible” or “probable”.

21 At para. 4.6.2 this document said:

> “The council will allocate land in locations that are considered sustainable and such locations will be tested through the Strategic Environmental Assessment/Sustainability Appraisal process. The council will not allocate sites which are considered sensitive due

a severe constraint on traffic movements."

32 Para 4.6.21 stated:

"There are environmental designations on the West side of Ashingdon north of the railway line and Rochford town centre is a conservation area and its setting must be protected. There are some opportunities for expansion, though road infrastructure will need to be carefully considered."

36 At page 28 of the 2008 document there appeared draft policy H2 on “General locations and phasing – preferred option”, which set out in a table the number of units envisaged to be allocated to various areas by 2015 and also the number of units envisaged to be allocated to each area between 2015 and 2021. In respect of West Rochford it was envisaged that there would be 300 units by 2015 and 100 units thereafter. In respect of East Ashingdon there would 120 units by 2015 and none thereafter. In respect of South East Ashingdon there would 120 units by 2015 and none thereafter.

37 At page 30 of the 2008 draft, in the discussion of alternative options under policy H2 there was a reference to East Rochford as an alternative to other Rochford locations and in answer to the question “Why is it not preferred?” there was stated the following:

> “It is considered that West Rochford is a more suitable location given its proximity to the train station, town centre and its relationship with areas of significant employment growth potential at London Southend airport and its environs. Traffic flows from new development to the East of Rochford would be predominantly through the centre of the town centre resulting in significant congestion.”

38 The next relevant document is the SA/SEA non-technical summary in respect of the Rochford Core Strategy preferred options document of October 2008.

39 At about the same time, in November 2008, there was published the technical Report in

> "As illustrated above, the Council has considered the results of the SA of issues and options (alternatives) in its selection and rejection of alternatives for plan-making. The Sustainability Appraisal considered a range of issues considered to be of key importance to the development of the Core Strategy. This included consideration of housing numbers and general locations for development (strategic options 4 and 5). The SA found that option E, the allocation of housing to the top and second tier settlements to gain a smaller number of large sites would have the most positive effects of all the options."

51 Para. 3.2 stated:

> "In light of the Forest Heath Ruling, it was decided to further develop this appraisal, considering the more detailed locations for development within individual top and second tier settlements. The recent publication (in February 2010) of the LDF Allocations DPD Discussion and Consultation Document has also enabled a further consideration of the realistic locations for development, as it incorporates the findings of the Call for Sites process and Strategic Housing Land Availability Assessment (SHLAA)."

52 Para. 3.3 stated:

> "Detailed appraisal of housing locations were undertaken for each of the top and second tier settlements and Canewdon, with full details provided in Appendix 1. …"

53 Table 3.1 then set out over several pages the Housing Development Options for Rochford District: Reasons for selection/rejection. In this table location 1 was West Rochford and location 3 was East Rochford. Under the heading "Reasoning for Progressing or Rejecting the options in plan making" it was stated in respect of location 1 that this:

> "was selected as it is a sustainable location, particularly in terms of accessibility, economy and employment, and balanced communities. In addition, the location relates well to London Southend airport and proposed employment growth there, is not subject to significant environmental constraints which would inhibit development, and is of a scale capable of accommodating other infrastructure, including a new primary school which would have wider community benefits. The location performs well to the proposed balanced strategy, and, due to its location in relation to Southend and the highway network, would avoid generating traffic on local networks for non local reasons. The location is unlikely to enable infrastructure improvements to King Edmund School, but is nevertheless selected for the aforementioned reasons."

54 It should be mentioned that the table also said that location 5 (South East Ashingdon) and location 6 (East Ashingdon) were selected as they are well located in relation to King Edmund Secondary School.

55 Turning to location 3, East Rochford, the table said that this was not selected:

> "as it was not considered as sustainable a location as West Rochford. There are greater environmental constraints to the East of Rochford, including Natura 2000 and Ramsar sites. Development to the East of Rochford has the potential to be affected by noise from London Southend airport, given its relationship to the existing runway. Whilst a small quantum of development may be accommodated within this general location avoiding land subject to physical constraints, such an approach is less likely to deliver community benefits, and would necessitate the identification of additional land, diluting the concentration of development and thus reducing the sustainability benefits of focussing development on larger sites. Location 3 is also unlikely to aid the delivery of improvements to King Edmund School. Furthermore, it would generate traffic on local networks for non local reasons, i.e. traffic to Southend would be likely to be directed

63 It was common ground before me that:

(1) the Regulations are the relevant source of law in this country, since the Directive, unlike an EU Regulation, is not directly applicable;

(2) the Regulations should be interpreted so far as possible in a way which is compatible with the Directive; and

(3) if an interpretation of the Regulations is incompatible with the Directive and no other

particular the text of Table 3.1 in the Addendum, noted that location 5 (South East Ashingdon)

> Addendum (July 2011) provides a more detailed appraisal of the alternative locations considered, and was subject to public consultation. I have taken into account criticisms that the Addendum was produced after the submission draft plan, but sustainability appraisal is an iterative process"

99 At para. 32 she further stated:

> "Overall, there is no compelling reason to question the integrity of the SA as a whole, and no convincing evidence to dispute the conclusion of the SA that the chosen locations are the most sustainable, and therefore the CS is sound in relation to this issue"

100 Further, the inspector concluded at para. 62, in respect of legal requirements, that the SA/SEA is adequate.

101 Following receipt of the inspector's report, the defendant prepared an SA/SEA Adoption Statement. The SA/SEA Adoption Statement also incorporates an SA/SEA Compliance Review and Quality Assurance, produced by Enfusion. The Compliance Review concludes:

> "Having undertaken this review, it is our professional opinion that the SA/SEA of the Rochford Core Strategy (incorporating the Addendum reports of September 2010 and July 2011) is compliant with the SEA Directive and requirements and PPS 12 requirements for Sustainability Appraisal" (para.1.4).

102 On the evidence before the Court, I therefore reject the claimant's contention that the Addendum was an "ex post facto justification" or a "bolt-on consideration of an already chosen preference" to justify a decision which had already been taken.

103 Furthermore, I reject the contention that the Addendum did not adequately carry out an assessment on a "comparable" basis. I have earlier set out relevant passages from the Addendum. It is clear from the Addendum, in my judgement, that:

> (1) the 2009 SA/SEA had incorporated comments and representations received during public consultation on earlier iterations of the draft RCS and the sustainability appraisal undertaken throughout the plan-making process, since Issues and Options stage (para. 1.1);

> (2) it " … provides a summary of the alternatives considered throughout the production of the plan setting out the reasons for selecting/rejecting those alternatives. It also includes consideration of more detailed housing locations … " (para. 1.3);

> of the decision-maker. In the present case, if and so far as the claimant considered that the Addendum was wrong not to refer to the Statement of Common Ground and other material presented at the Coombes Farm planning appeal, it was open to it to draw the inspector's attention to this material in the EiP process. In fact, the claimant had already done this long before the Addendum was produced. This information was again drawn to the inspector's attention by a letter of 24 June 2011. Further detailed submissions were made on 8 July 2011. In the circumstances, there is no basis for the suggestion that the inspector was not properly informed of this matter.

107 Accordingly, I reject the claimant's ground (3) and conclude that, on the facts of the present case, the Addendum was adequate.

The claimant's ground (4)

108 The claimant submits that, even if as a matter of fact, the Addendum did comply with the requirements of the Regulations and the Directive, as a matter of law it was incapable of curing the defects in the earlier stages of the process.

109 Both the defendant and Bellway observe, as a preliminary point, that this is not the position which the claimant took when it first wrote to the defendant, drawing its attention to the decision in Forest Heath . Rather, the letter sent on its behalf on 7 April 2011 asked for only a suspension of the process. It stated:

> “We would urge you to suspend any decision to adopt the Core Strategy until such time was the Council has conducted a fully objective and transparent assessment of the effects of the broad housing locations and their consideration against all reasonable alternatives.”

110 They also observe that the claimant's argument that the process on which the defendant embarked was inadequate was not advanced until 13 June 2011, *after* the draft Addendum had been published for consultation. No such argument was advanced when the defendant first announced its intention to review the SA in light of recent developments in the field of sustainability appraisals on 11 May 2011.

111 Under ground (4) the claimant relies, first, upon the language of Regulation 13 , which requires “every draft plan… and its accompanying environmental report” (prepared in accordance with the Regulations) to be made available for the purposes of consultation by informing the public “as soon as reasonably practicable” of where the documents may be viewed. However, in my judgement, this does not have the effect contended for by the claimant, that the Addendum was incapable as a matter of law of curing any earlier defects in the process. It means simply that the draft plan, and any accompanying environmental report there happens to be, must be available for public consultation as soon as reasonably practicable. This is a timing provision. It does not prescribe the content of the report. Still less does it have the effect that if, for some reason, the accompanying report is not wholly adequate at that time, it cannot be supplemented or improved later before adoption of the plan, for example by way of the Addendum in the present case.

112 I prefer the submissions that were made by the defendant and Bellway. First, it should be noted that “Strategic Environmental Assessment” is not a single document, still less is it the same thing as the Environmental Report: it is a *process* , in the course of which the Directive and the Regulations require production of an “Environmental Report”. Hence, Article 2(b) of the SEA Directive defines “environmental assessment” as:

> “the preparation of the environmental report, carrying out consultations, the taking into account of the environmental report and the results of the consultations in the decision making and the provision of information on the decision in accordance with Articles 4 to 9”.

113 Furthermore, although Articles 4 and 8 of the Directive require an “environmental assessment” to be carried out and taken into account “during the preparation of the plan”, neither Article stipulates when in the process this must occur, other than to say that it must be “before [the plan's] adoption”. Similarly, while Article 6(2) requires the public to be given an “early and effective opportunity … to express their opinion on the draft plan or programme and the accompanying environmental report”, Article 6(2) does not prescribe what is meant by “early”, other than to stipulate that it must be before adoption of the plan. The Regulations are to similar effect: Regulation 8 provides that a plan shall not be adopted before account has been taken of the environmental report for the plan and the consultation responses.

114 The claimant relied upon several authorities said to support its submissions under ground (4).

115 The first case is a decision of the High Court in Northern Ireland, Re Seaport Investments Limited [2008] Env LR 23 , a decision of Weatherup J on equivalent regulations in Northern Ireland which implemented, or purported to implement, the SEA Directive . The applicants in that case contended that the regulations had failed to transpose the Directive correctly in a number of respects. The applicants also contended that there had been a breach of the Regulations and the Directive on the facts of the case.

116 Weatherup J accepted the applicants' argument in relation to what he called the second transposition issue: see paras. 19 – 23 of the judgment. He then turned to whether there had been a failure to comply with the requirements of the Regulations and Directive.

117 At para. 47 he said:

> “The schseme of the Directive and the Regulations clearly envisages the *parallel development* of the Environmental report and the draft plan with the former impacting on the development of the latter throughout the periods before, during and after the public consultation. In the period before public consultation the developing Environmental Report will influence the developing plan and there will be engagement with the consultation body on the contents of the report. Where the latter becomes largely settled, even though as a draft plan, before the development of the former, then the fulfilment of the scheme of the Directive and the Regulations *may* be placed in jeopardy. The later public consultation on the Environmental Report and draft plan *may* not be capable of exerting the appropriate influence on the contents of the draft plan.” [Emphasis added]

118 The claimant emphasised in particular the phrase “parallel development.” However, it is important to read the passage as a whole, in particular the words I have emphasised towards the

Articles 4 and 6 of the Directive and the Regulations." [Emphasis added]

121 I accept the defendant's submission that, in Seaport , Weatherup J confirmed that as regards the requirement for a ER to "accompany" a draft plan, the Directive and Regulations do not require "simultaneous" publication of a draft plan and the ER.

122 The claimant also relied upon the decisions of Ouseley J in Heard (to which I have already made reference) and Collins J in Save Historic Newmarket Limited and other v Forest Heath District Council , the case which prompted the production of the Addendum. At para. 7 Collins J said:

> "The challenge is brought on two grounds. First it is said that there was a failure to comply with the relevant EU Directive and the Regulations made to implement it that the Strategic Environmental Assessment (SEA) did not contain all that it should have contained. This if established would render the policy made in breach unlawful whether or not the omission could in fact have made any difference. That, as is common ground, is made clear by the decision of the House of Lords in Berkeley …. Although Berkeley concerned an EIA, the same principle applies to a SEA. To uphold a planning permission granted contrary to the provisions of that Directive would be inconsistent with the Courts obligations under European Law to enforce Community Rights. The same would apply to policies in a plan."

123 However, it is important to note what the actual decision in that case was, and the basis for it. At para. 40, Collins J, in accepting the claimant's first ground of challenge in that case, said:

> "In my judgement, Mr Elvin is correct to submit that *the final report* accompanying the proposed Core Strategy *to be put to the inspector* was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified *in the final report* . There was thus a failure to comply with the requirements of the Directive …" [Emphasis added]

124 I accept Bellway's submission that the claimant's primary argument seeks to extend the principles in Forest Heath and Heard beyond their proper limit. Those were both cases where the Court was satisfied that *no* adequate assessment of alternatives had been produced prior to *adoption* of the plans in those cases. Although they comment (understandably) on the desirability of producing an Environmental Report in tandem with the draft plan, as does Seaport , neither is authority for the proposition that alleged defects in an Environmental Report cannot be cured by a later document.

125 I also consider, in agreement with the submissions by both the defendant and Bellway, that the claimant's approach would lead to absurdity, because a defect in the development plan process could never be cured. The absurdity of the claimant's position is illustrated by considering what would now happen if the present application were to succeed, with the result that policies H1, H2 and H3 were to be quashed. In those circumstances, if the claimant is correct, it is difficult to see how the defendant could *ever* proceed with a Core Strategy which preferred West Rochford over East. Even if the defendant were to turn the clock back four years to the Preferred Options stage, and support a new Preferred Options Draft the

> “unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain ‘the full information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may be deficient, and make provision through the publicity and and consultation processes that the issue of hearing for 1. any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between.”

See Sullivan J. in R(Blewett) v. Derbyshire County Council [2004] Env LR 29 at para. 41, approved by the House of Lords in R (Edwards) v. Environment Agency [2008] Env LR 34 at paras. 38 and 61.

127 Accordingly, I reject the claimant's ground (4) and conclude that the Addendum was capable, as a matter of law, of curing any defects in the earlier stages of the process.

The claimant's ground (5)

128 Under its final ground of challenge, the claimant submits that the inspector unfairly failed to re-open the public hearings on the issue of the Addendum. It observes that it was entitled to appear at all relevant stages of the EiP becaBT 1 tTi4 (ah925 l 0.714 w 25 l 0.714ma7.3 (it) l 0.71q37.3 (issue) -2A

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135 As I have already said, the inspector confirmed that she was prepared to consider additional hearing sessions if necessary.

136 On 10 June 2011 the defendant stated:

> "We are mindful that the public consultation period set out in the scenario 2 timetable represents an opportunity to consult not only on any changes that may be required as a result of the SA review, but also on adjustments to extend the Plan period to 15 years."

137 All material arising in connection with the additional SA/SEA work carried out was published on the defendant's website, which included all correspondence between the defendant and the inspector about the process being undertaken. The claimant's representatives were perfectly aware of the timetable being followed and that all documents were being published online, and indicated their satisfaction with this process.

138 The defendant also points out that the claimant did not request a re-opening of the hearings at the time.

139 It is clear on the evidence before the Court that the inspector's considered view was that such hearings were not, as events turned out, necessary. I do not regard that view as one that