

IN THE MATTER OF THE CANTERBURY LOCAL PLAN

ADVICE

1. I am instructed to advise the Herne and Broomfield Parish Council upon the compliance of the current Canterbury District Local Plan process with the Strategic Environment Assessment regime in the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”), which derives from the SEA Directive. I also look at the related topic of Appropriate Assessment under the Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”) as a standalone issue and in relation to the SEA.
2. For the reasons set out below, the process is in breach of the SEA and Habitats regimes.

Strategic Environmental Assessment

3. Strategic Environmental Assessment requires the production of an Environmental Report (here subsumed in the Sustainability Appraisal) by the plan-making authority, public consultation upon it and a reasoned decision having regard to the consultation responses and the Report. The Environmental Report must provide a comparable level of assessment of the reasonable alternatives to the proposals in the plan.
4. Whilst the SEA Regulations are drafted as if there is simply one stage in a plan making process, the Local Plan regime often involves several stages. The approach to SEA in such a case needs to accommodate the progression of a plan through various steps. This was considered by Mr Justice Ouseley in *Heard v Broadland District Council* [2012] EWHC 344 (Admin), [2012] Env. L.R. 23:

“12 To avoid duplication in this process, art.5(2) permits the decision as to what information is reasonably required to take account of “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 different levels in that process...” This is reflected in reg.12 of the domestic Regulations. Mr Harwood for the claimant submitted, and I accept, that while options can be rejected as the plan moves through successive stages, and do not necessarily require to be re-

examined at each stage, a description of what alternatives were examined and why had to be available for consideration at each stage, even if only by reference back to earlier documents, so long as the reasons there given remained sound. But the earlier documents had to be organised and presented in such a way that they could readily be ascertained and no paper chase was required to find out what had been considered and why it had been rejected; see *Save Historic Newmarket Ltd v Forest Heath DC* [2011] EWHC 606 (Admin) per Collins J. at [17] and [40].

13 At [40], he said, and it provides a useful summary of the test:

“40. In my judgment, 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 for the Directive and so relief must be given to the claimants.””

5. Broadly I share the concerns expressed in CPRE Kent’s 3rd September 2014 letter to Canterbury City Council about the SEA process. A multi-stage process is permissible but it needs to address the proposals and alternatives in the plan which is finally produced, to have an Environmental Report in accordance with the SEA Directive and have been subject to public consultation at the relevant stages.
6. In this case the spatial strategy was consulted upon in the 2010 Core Strategy Options Report. This set out nine different spatial options and a consultation option which was the preferred option containing elements of four of the options. The options showed possible locations (some indicative) and in broad terms the amount of housing in those locations. A sustainability appraisal was produced and consulted upon. This exercise is relied upon in the 2014 sustainability appraisal to justify the spatial approach (see para 2.5.1, 3.3, 3.3.1).
7. However, these options were for 10,200 dwellings up to 2026 at a rate of 510 dwellings per annum. The later work and the submission draft Local Plan provides

for 15,600 dwellings up to 2031, at 780 per annum. The quantum of development has been dramatically increased, both in terms of timescale and annual development. There has been no assessment of the appropriate spatial approach for that level of development or of alternatives to it. The change must make a difference, given the explicit figures in the Council's 2010 consultation option, but that has either not been assessed, or if it has, the exercise is not in the sustainability appraisals.

8. The increase in the housing numbers derives from the January 2012 Canterbury Development Requirements Study. Ten scenarios were considered, including the 'preferred scenario' E. Scenario E was based on providing for 6,500 additional jobs and identified a 780 dwellings per annum requirement.
9. A 'Sustainability Appraisal of Development Scenarios: Technical Note' was produced in June 2012 by AMEC to consider the Development Requirements Study. The Sustainability Appraisal said it was a 'non-statutory Sustainability Appraisal' which was 'not intended to comply with the requirements of the SEA Directive itself'. The Note would 'form the basis for the chapter that will address consideration of reasonable alternatives within the formal Sustainability Appraisal which will accompany the draft Local Plan document.' (see box 1 page 9). However that chapter was never written in the later sustainability appraisals. The 2014 Sustainability Appraisal says (para 2.5.1):

"The draft Local Plan presents the preferred development option for the District, identifying the quantum of growth to be accommodated [sic] in the District to 2031 and the key housing and employment land allocations to meet this requirement. The alternatives to this preferred development option have been appraised through the completion of the SA of development scenarios contained in the Development Requirements Study, the sites contained in the SHLAA and the Preferred Option Draft Local Plan. It is not proposed to repeat this appraisal; however, the findings are summarised in **Section 3.3.**"

10. The 2013 Preferred Options Local Plan Sustainability Appraisal also relied upon the 2012 appraisal to justify the scenario E housing numbers and to consider alternatives.¹ Consequently the 2013 and 2014 Sustainability Appraisals summarise the 2012 Sustainability Appraisal without appreciating that it was explicitly not in compliance

¹ See the 2013 SA, para 2.5.

with the SEA regime. Additionally the 2012 Technical Note was not the subject of public consultation. It follows that no Strategic Environmental Assessment was carried out of the housing requirement.

11. The Sustainability Assessment also relies on the Habitats Regulations report's conclusion that the Local Plan is not likely to result in significant effects on European Sites. That conclusion is legally incorrect for the reasons set out below – the report itself finds that there are likely significant effects. They should therefore have been considered in the Sustainability Appraisal under the SEA regime. This is a further error in the SEA process.

Habitats

12. By regulation 102(1) of the Habitats Regulations:

“(1) Where a land use plan—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives.”

13. For the submission draft of the Local Plan the City Council's consultants, AMEC, produced a report entitled ‘Habitats Regulations Assessment of draft Local Plan: Report to Inform Screening for Appropriate Assessment’, dated June 2014. The report is to inform the City Council ‘in determining whether the draft Local Plan is likely to result in significant effects on any European Sites and hence whether an Appropriate Assessment is required’.² The report concluded that:³

“Based on the current policy wording, the Local Plan is not likely to result in significant effects on European Sites.”

14. In reaching this conclusion, the report relied heavily on policy SP7 which as now proposed reads:

² 2014 Habitats Report, Executive Summary, page i.

³ Executive Summary, page iii.

“No development will be permitted which may have an adverse effect on the integrity of an SAC, SPA or Ramsar Site, alone, or in combination with other plans or projects, and where it cannot be demonstrated that there would be no adverse effect on the integrity of the sites. The strategic development sites identified in the Plan would therefore be required to fund, in perpetuity, the following mitigation measures:

(1) Wardening of sensitive international wildlife sites, and increased education, to be funded by the development in perpetuity;

(2) Ongoing monitoring and surveys of sensitive sites in the district to be funded via the wardening programme;

(3) Consideration of other measures as required; for example, access management;

and

(4) The provision of open space on new sites, as set out in the Council’s Development Contributions SPD.

Contributions will be made in accordance with the guidance prepared by the Council.”

15. The Habitats report relied upon an earlier version of the policy, which began:

“Permission will not be granted for any development that, either alone, or in combination with other plans or projects

- Is likely to have a significant effect on European sites; and
- Where it cannot be demonstrated that there will be no adverse effect on the integrity of the sites.”

16. This earlier policy requires strategic sites to fund mitigation measures, but says that they could include the listed items (1) to (4), rather than requiring those particular measures.

17. The report then repeatedly says that site allocation and other development policies could affect European Sites but that ‘This is covered by the details provided in Policy SP7’: see HD3-10, EMP1-10, 13-15, TCL1-7, 9, 11-12, T1, TV1-2, 4-8, CC1-3, CC9 and others at pages 29 to 37 of the report. It is then acknowledged that other policies

require further analysis in the screening process including the quantum of development (SP2) and the allocation of strategic sites (SP3). The report refers to potential impacts on the European sites and then says that planning applications for these proposals should be subject to Habitats Regulation Assessment. A few possible measures are suggested to reduce impacts, although these are not required by proposed policies. The analysis of the individual policies then concludes:

“The policy wording provided in SP7 is deemed to provide sufficient protection to European sites with respect to these potential significant effects and as such, no further amendments are considered necessary.”

18. The conclusion of the report that the plan is not likely to result in significant effects on European sites, however it has identified many potential significant effects. Policy SP7 is relied upon extensively, but that expressly permits likely significant effects on the environment – what it seeks to prevent are adverse effects on integrity.
19. The draft Local Plan says that ‘all housing sites in the district are likely to have some effect on the international wildlife sites’ and so contributions will be required.⁴ Paragraph 1.84 of the submission draft Local Plan says:

“On this basis, Natural England and the City Council are of the view that an Appropriate Assessment of the draft Canterbury District Local Plan under the Habitat Regulations is not required.”

20. The recommendation that appropriate assessment of the plan is not required rests upon two legal errors:
 - (a) A misunderstanding of Policy SP7, believing that it prohibits any likely significant effects when it simply seeks to prevent adverse effects on the integrity of sites. The Plan explicitly allows likely significant effects on European sites and so Appropriate Assessment is required by regulation 102(1);
 - (b) Asserting that development management policies, including SP7, will be applied at the planning application stage does not mean that the plan’s proposals will not have a likely significant effect or indeed an adverse effect on the integrity of European sites. The quantum and location of a considerable amount of development is set out in the Plan. In deciding whether Appropriate Assessment

⁴ Para 1.82.

of the plan is required, the Council has to consider whether those proposals would be carried out without a likely significant effect (so triggering the need for such an assessment). In an Appropriate Assessment it would have to consider whether it was possible to be satisfied that there was no possibility of an adverse effect on the integrity of a European site or there was sufficient justification for the plan to proceed in any event. The report fails to ask or answer these questions. It does not conclude that there would no such effects if the proposals were carried out. Suggesting that planning permission would be refused if an adverse effect on integrity may result misses the point as the assumption must be that the 15,160 dwellings proposed are developed, including in the quanta and locations proposed for the strategic sites in policy SP3. Potential measures are suggested, but for the most part these are left as possibilities rather than recommendations. The changed Local Plan text contains more certainty whether these measures would be carried out but cannot say what their effect would be.

21. If any matters arise out of this advice, please do not hesitate to contact me in Chambers.



Thirty Nine Essex Street

London

WC2R 3AT

Richard Harwood QC

19th September 2014