



Bradford Local Plan Core Strategy Examination - Hearing Statement

Representations on behalf of CEG Land Promotions Ltd (CEG)

Representor Reference: 495
Date: February 2015

Matter 1: Legal Requirements & Procedural Matters

Question 1.1: Has the Plan had regard to and been prepared in accordance with the current Local Development Scheme, Statement of Community Involvement, Sustainable Community Strategy, Local Development Regulations and national planning policy, including the National Planning Policy Framework (NPPF)? Are there any outstanding issues relating to the consultation arrangements?

- 1.1 CEG consider that there are a number of areas where the Core Strategy fails to accord with the National Planning Policy Framework (the Framework). These have been highlighted in the previous representations to the consultation on the Publication Draft of the plan and in the relevant hearing statements.
- 1.2 The Core Strategy fails to comply with the statutory requirements set out in section 20 of the Planning and Compulsory Purchase Act 2004 ("the PCPA 2004"), particularly the requirement that the plan be sound.
- 1.3 Additionally, the Core Strategy's approach to and application of the HRA fails to comply with the statutory requirement enshrined within section 39 (2) of the PCPA 2004; i.e. that it "be prepared with the objective of contributing to the achievement of sustainable development"
- 1.4 CEG currently considers that the plan is capable of being made sound and legally compliant but only by way of a number of significant modifications without which the plan will be legally non-compliant and inherently unsound. Proposed modifications directed at securing soundness are set out within the hearing statements, but CEG reserves the right to comment further during the course of the examination hearings as necessary.
- 1.5 CEG has fundamental concerns about how the direction of the Core Strategy has been distorted by the misconceived conclusions in the purported Habitats Regulation Assessment (as addressed in CEG's response to question 1.2b). Changes will require the HRA to be revisited. However, CEG has identified a number of additional issues about the absence of justification by the Council as to how the proposed strategy can be delivered with any certainty and the need

to amend that strategy to meet the requisite needs of the area. This is particularly the case in respect of the proposed housing requirement (Policy HO3) (addressed in CEG's representation to Matter 4c).

- 1.6 The need for fundamental changes is reinforced by the problems over certainty of deliverability created by the way the plan is being brought forward through this Core Strategy, followed later by Development Plan Documents, including the Site Allocations Plan, Area Action Plan and Waste Management Plan. In the case of the Site Allocations Plan, work has yet to commence on the preparation of this document. It is not anticipated to be adopted until the end of 2017 at the earliest. However the timescales for achieving this date as set out in the Local Development Scheme have now already slipped.

Question 1.2 Has the Plan been subject to Sustainability Appraisal, including a final report on the published plan, and Habitat Regulations Assessment?

a. Is it clear how the Sustainability Appraisal influenced the final plan and dealt with mitigation measures?

- 1.1 CEG has a number of key concerns about the Sustainability Appraisal (SA) of the Core Strategy. First, it is evident that the SA is itself inherently affected by the flaws in the Habitats Regulations Assessment (HRA). It is therefore subject to the same key legal and substantive defects that have been identified for the HRA and dealt with in CEG's response to Question 1.2b below and throughout the other hearing statements. Secondly, it is evident that the SA and HRA have not been carried out in the correct manner for the reasons set out in more detail in the assessment of the HRA. Thirdly, neither the HRA nor the SA deals properly with assessing impacts, nor considering alternatives and, in particular, the use of mitigation measures to provide alternative strategies. Both documents appear to adopt an approach which inexplicably ignores the use of mitigation measures and they incorrectly assumes effects which are both unevenced and unjustified. The consequence is that the strategy proposed is unsustainable and it has not been properly assessed in the SA because of the failure to deal with this inherent unsustainability and a failure to consider proper alternatives.
- 1.2 Finally, as alluded to above, the issue of sustainability is fundamental to any proper SA. Sustainability has not been properly assessed for all the reasons dealt with through out CEG's submissions, and in particular the approach to the distribution of the housing requirement and the settlement hierarchy.

b. Are there any outstanding issues arising from the evidence and approach of the HRA, including from Natural England, RSPB and other parties and, if so, how will these be resolved?

- 1.3 CEG has, in the short time available to it, reviewed the Council's most recent iteration of its appropriate assessment, namely "Habitats Regulations

Assessment: Appropriate Assessment Report for the Publication Draft Document (February 2014)” dated December 2014 (“**AA Dec 2014**”).

- 1.4 As a preliminary point, however, CEG is disappointed that the Council has not conducted any public consultation on the AA Dec 2014. Moreover, although the Council submitted the Core Strategy to the Secretary of State on 12 December 2014, the accompanying AA Dec 2014 was only made available to CEG one month later, on 12 January 2015.
- 1.5 The AA Dec 2014 is a long and technical document. It is underpinned by a large number of reports and data which have not been published by the Council but which CEG and its professional advisers have nevertheless obtained from the Council through an “access to environmental information” request. This information was needed so as to understand more fully the work undertaken by the Council to produce the AA Dec 2014. The request was made on 26 November 2014 but the majority of the information was received only on 30 January 2015. Further data was received from the Council’s ecologists as late as the week commencing 9 February 2015. As such, CEG and its professional advisers have had very little time to review complex information and to prepare these submissions.
- 1.6 CEG’s professional team is continuing to review the data and information provided by the Council and, as such, reserves the right to make further submissions at the Examination if necessary.
- 1.7 The above notwithstanding, a detailed critique of the AA Dec 2014 is contained at **Appendix 1** to this statement, which includes an opinion from Stephen Tromans QC.
- 1.8 This critique has unequivocally demonstrated that the AA Dec 2014 is legally flawed and Policies SC8, HO3 and SC4 of the Core Strategy Publication Draft are fundamentally unsound. The key issues are as follows:
- 1 The Council has adopted an unlawful approach to its assessment of impacts of the Core Strategy on the South Pennine Moors Special Protection Area (“**SPA**”) / Special Area of Conservation (“**SAC**”) in AA Dec 2014. The approach is in contravention of the requirements of the EU Habitats Directive and associated case law (as implemented in England by regulation 102 the Conservation of Habitats and Species Regulations 2010). If the Core Strategy is adopted on the basis of the AA Dec 2014, the Core Strategy will not be legally compliant.
 - 2 The flawed approach to the AA Dec 2014 is the key factor behind restrictive Policy SC8. It is also at the heart of the flawed methodology behind the change in status of settlements in current Policy PSC4 and the reduction and redistribution of housing targets in current Policy HO3 (and the Council acknowledges that it is the “main driver” for the Wharfedale housing target reductions). As such these policies in their

current form are unsound. They are not evidenced, and cannot be justified, by reference to the AA Dec 2014.

- 3 Policy HO3 (relating to housing number reductions and redistribution) and SC4 (relating to change of settlement status) are in any event unsound because the change to the revised housing targets and the settlement status cannot be explained or justified by reference to the Council's own stated methodology for reduction and redistribution of housing targets. Policy SC8 is further unsound because the evidence does not require it and it prevents reliance by developers on mitigation measures to offset any impacts on "important areas" for birds between 400m and 2.5km from the boundary of the SPA and SAC, even where such mitigation were required, notwithstanding that such mitigation would likely to be successful and even though this is in contravention of the Habitats Directive and case law.

Details of the legal deficiencies in the AA Dec 2014

- 1.9 There have been three iterations of the Council's "appropriate assessment" in May 2013, February 2014 and December 2014. The Council itself acknowledged that the May 2013 assessment was deficient due to insufficient information. Nevertheless it purported to make "preliminary recommendations" as to possible avoidance and mitigation measures to avoid potential adverse effects on the SPA and SAC. These measures were, however, of course entirely speculative since they were made on the basis of deficient information and without sufficient evidence for adverse effects. Despite all this, it is these measures which are nonetheless still to be found in the restrictive parts of Policy SC8 and in Policies HO3 and SC4.
- 1.10 The later two iterations (AA Feb 2014 and AA Dec 2014) now seek to take into account further evidence. However they are both legally flawed and deficient in a number of basic respects.
- 1.11 The Council has failed to undertake a full, proper and lawful assessment of the impacts of the Core Strategy on the SPA / SAC in accordance with the requirements of the Habitats Directive. It should have done so in order to assess such impacts and so to identify, based on that assessment, appropriate mitigation or avoidance measures which address the impacts and which can thereby be shown to be necessary and justified.
- 1.12 Instead the Council has remained wedded to the avoidance and mitigation measures originally set out speculatively in its May 2013 assessment which were not based on any meaningful evidence. Consequently, in an apparent attempt to justify these measures after the event, the Council has now had to assume the existence of impacts on the SPA and SAC, without evidence or proper assessment where such impacts do not arise on what the evidence disclosures. The Council has therefore used the appropriate assessment process as a means of justifying restrictive policies, rather than (as is required)

considering carefully whether those restrictive policies are in fact necessary and justified. The result is that the current form of Policies HO3, SC4 and SC8 are unsound.

- 1.13 There are 2 key areas where the AA Dec 2014 is legally flawed:
- 1 The approach adopted in purporting to identify SPA “functional land”, and potential impacts on the SPA by virtue of development on such functional land; and
 - 2 The misconceived assessment of urban edge / recreational effects on the SPA / SAC.
- 1.14 As to functional land, when assessing impacts on a SPA it is relevant to consider possible indirect impacts on the SPA arising from loss of land outside the SPA boundary. However, there must be proper evidence that the land in question is “functionally linked” to the SPA through use of that land by the SPA’s qualifying bird species. The AA Dec 2014 is legally non-compliant in its assessment of these matters because of any or all of the following:
- 1 First, an appropriate assessment must be made by reference to the qualifying features of the SPA. The Council has wrongly assumed that species of birds seen in its 2013 survey of land outside the SPA boundary (ie Curlew and Lapwing) are in fact birds that form part of the qualifying feature of the SPA itself, namely the “breeding bird assemblage” of the SPA. However the “breeding bird assemblage” is no longer a qualifying feature of this SPA. Therefore Curlew and Lapwing are not in fact relevant to an assessment of SPA functional habitat. The Council has therefore incorrectly assumed impacts on the SPA arising from loss of functional habitat, where the relevant birds seen on that land have no relevance to the SPA.
 - 2 Secondly, even if the “breeding bird assemblage” had remained a qualifying feature of the SPA (which we do not accept), the Council has made a number of key errors in its assessment:

- The Council has failed to appreciate or recognise the distinction between birds which breed within the SPA (and so may form part of the “breeding bird assemblage” qualifying feature) in contrast to those that breed outside the SPA (and therefore cannot form part of that assemblage). When seeking to identify SPA “functional land”, the Council has inexplicably assumed that any of the relevant type of birds that were seen in 2013 on land outside the SPA boundary within a certain distance from it are necessarily birds breeding within the SPA. But the Council has no evidence to support this assumption and indeed sometimes has positive evidence to the contrary. The Council has therefore necessarily skewed and exaggerated the potential for any impacts arising from potential loss of habitat outside the SPA by assuming it would affect the SPA “breeding bird assemblage”.
- When surveying habitats and birds outside the SPA for evidence of SPA functional habitat, the Council has only considered certain areas in and around its SHLAA sites. But this completely ignores other large areas of potential habitat around the whole of the SPA. Therefore it is misconceived to assume that there would be any material impact on the SPA from loss of SHLAA sites as habitat, as the availability of other habitat has been ignored and the numbers of birds potentially affected has not been considered against the population as a whole.
- The Council has failed to make any meaningful assessment as to whether loss of SHLAA sites to development could ever give rise to an “adverse effect on integrity of the SPA”, this being the relevant legal HRA test. Such an assessment would be required given the very small numbers of birds recorded on the SHLAA sites in 2013. The Council has failed to consider what impacts (if any) there are on the specific qualifying feature it has identified, namely the “breeding bird assemblage”. This would require some basic data such as identification of the total assemblage of breeding birds. Instead the Council appears to accord to birds such as Curlew and Lapwing within the assemblage the same status of a species (such as Golden Plover) which is in fact a qualifying species of the SPA in its own right. This is misconceived. In addition, due to the absence of proper assessment, the Council has not done what Natural England required, namely a proper exercise in considering and distinguishing between SHLAA sites which are a) unlikely to be deliverable (where significant bird numbers are recorded on-site or likely to be disturbed off-site and therefore should be avoided); b) deliverable with mitigation (either site specific or strategic mitigation), or c) deliverable without mitigation (unconstrained).

- The Council has made the flawed and unjustified assumption that development must be avoided on SHLAA sites with any bird sightings (whatever number or whatever use is taking place) or the presence of certain grassland types. A preliminary analysis of the information and data only recently disclosed by the Council demonstrates the unscientific nature and absurdity of this approach. Baker Consultants Ltd (on behalf of CEG) has found that only 26 of the 3,097 registrations of “breeding bird assemblage” type birds recorded in the 2013 surveys were actually seen on or near to SHLAA sites. Any impact on these bird populations from possible development on SHLAA sites is therefore tiny and would be completely insignificant from an SPA perspective. Contrary to the Council’s approach, there is therefore absolutely no justification for removal of SHLAAs as potential housing sites on this basis. Furthermore Baker Consultants Ltd has also shown that there is no scientific basis whatsoever for the Council’s assumption that SHLAAs should be removed from the potential housing supply due to the presence in them of certain grasslands.

- 3 The Council has also failed to assess in any detail the supposed impacts on breeding bird assemblage birds as against the conservation objectives of the SPA. This is also a central legal requirement that has not been met.

1.15 As to the Council’s misconceived assessment of urban edge / recreational effects on the South Pennines SPA / SAC, the Council’s documents reveal that it has rightly not used this as a purported basis for altering its housing distribution under HO3 (as there is no evidence to support what it has done); however it appears to underpin the approach to Policy SC8. In fact the Council’s assessment of potential impacts is misconceived and there is no evidenced link between the Policy SC8 and any purported impacts. CEG’s professional expert has identified the flaws in the approach. As such Policy SC8 is unnecessary, given the protection already afforded to the SPA through Policy EN2. However, if need for a further policy can be justified or is thought necessary, Policy SC8 must be revised.

1.16 As a matter of principle the Core Strategy could be sound if recreational impacts are not used as a basis for distorting housing distribution and if Policy SC8 (if justified and considered necessary) were to enable mitigation against possible recreational impacts (where they are established) through (i) the provision of natural greenspace and facilities to divert pressure from moorland habitats; and/or (ii) the implementation of access management measures; and/or (iii) a programme of habitat management, all of which can be of potential benefit to the SPAs in consequence of development. Whilst such measures have not in fact been properly evidenced as necessary through the

data presented in AA Dec 2014, this aspect of Policy SC8 would be acceptable in principle and potentially have the effect of negating any possible recreational impacts on the SAC/SPA.

Conclusions

- 1.17 Based on present information, the Core Strategy is unsound and its adoption on the basis of AA Dec 2014 would be legally non-compliant.
- 1.18 To remedy this situation, so as to allow the Core Strategy to meet both the legal compliance and soundness tests and so be adopted lawfully, the following must take place:
- 1 The Council's HRA must be thoroughly revised so as to present a proper and legally compliant assessment with evidenced and justified conclusions.
 - 2 Policy SC8 is unnecessary as a policy, given the protection already afforded to the SPA through Policy EN2. However, if need for a further policy can be justified or is thought necessary, Policy SC8 must be revised. CEG has suggested revised wording for Policy SC8 in its submissions under Matter 3.
 - 3 Policies HO3 and SC4 must be revised. The housing targets for settlements outside Bradford must be revisited. The status of Burley in Wharfedale as Local Growth Centre must be restored. A settlement such as Burley in Wharfedale should be allocated a target of at least 500 – 700 homes, given the land available which can be developed without any relevant impact on the SPA and in light of its sustainable location, which sustainability has been otherwise acknowledged by the Council. CEG's submissions on HO3 are dealt with in full in Matter 4C. CEG's submissions on SC4 are dealt with in full in Matter 3.2.

Question 1.3: Has the Plan been prepared in accordance with the Duty to Co-operate, particularly in terms of whether the Council has discharged its duty to maximise the effectiveness of the plan-making process and co-operated and engaged with neighbouring local authorities and prescribed bodies on an on-going basis with regard to strategic matters, including development and infrastructure requirements and other cross-boundary issues and strategic priorities and is the approach fully justified.

- 1.19 CEG is concerned that the Duty to Co-operate will not have been discharged if the CS were to be adopted in its current form without the changes being suggested. As identified in more detail in relation to the HRA, the Council has adopted a flawed approach to the SPA and this approach needs to be changed to render the plan sound. But if that approach were left unchanged, it is plain that the purported HRA assumptions that are said to cause the change in

housing distribution and settlement hierarchy (such as use of functional land around the SPA) raises strategic issues which have not been dealt with properly under the Duty to Cooperate. CEG therefore reserves its position on this issue.

Question 1.4: Has the Council reviewed the Plan and its preparation against the latest guidance in the PPG (March 2014 as updated), and are there any outstanding issues?

1.20 CEG's position that the Council has not reviewed its plan and preparation correctly against the Planning Practice Guidance is contained within the hearing statements on other matters upon which we are commenting upon (such as housing need).

Question 1.5: What is the latest position on any Proposed Changes that the Council wishes to make to the submitted Plan?

1.21 This question is a question principally posed to the Council. CEG's position is that there are a number of important changes required for the plan to be legally-compliant and to allow the plan to be considered sound. These are dealt with in the relevant CEG hearing statements.