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Bradford Local Plan

Core Strategy Examination Session Day One

Matter 1: Legal & Procedural Requirements

Further Statement on Legal Compliance of the Appropriate Assessment

Date: 4th March 2015

Venue: Victoria Hall, Saltaire

1.1 This statement considers the legal compliance issues raised with regards to the Appropriate Assessment in the statement responding to matter 1 submitted by NLP on behalf of their client CEG. The Councils legal opinion is contained in the two appendices to this statement.

1.2 The response in Appendix 1 responds to the legal compliance issues in relation to the Appropriate Assessment

1.3 The response in Appendix 2 responds to the legal compliance of the ‘Breeding bird assemblage’.

1.4 A separate further statement will deal with the technical issues raised by NLP/CEG with regards to the methodology and evidence.

Appendix 1

Legal opinion in relation to the Appropriate Assessment

INITIAL RESPONSE OF BRADFORD COUNCIL TO THE CLAIM BY CEG THAT THE DECEMBER 2014 APPROPRIATE ASSESSMENT IS AN UNLAWFUL DOCUMENT

1. CEG criticise the December 2014 Appropriate Assessment ("the December 2014 AA") from two standpoints. The first relates to its lawfulness. The second relates to its reliability as a piece of work informing (a) the judgment to be made whether there would be an adverse effect on the integrity of any European site (under regulation 102(4) of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations")[1] and (b) Core Strategy policies relating to the settlement hierarchy (SC4), housing distribution (HO3) and protection of the South Pennine Moors (SC8). It is no part of CEG's case to say that there would be an adverse effect on the integrity of the South Pennine Moors SPA Phase II or South Pennine Moors SAC contrary to regulation 102(4) of the Habitats Regulations. Their essential case is that no such effect would occur even if the Core Strategy were to revert to its earlier policy of designating Burley in Wharfedale a local growth centre and making provision there for 500 as opposed to 200 houses. At bottom they argue not that the flaw in the December 2014 AA and the associated policy response is that they do not go far enough but that they go too far and rule out development which could be accommodated without any adverse effect on European site integrity. It is said, in effect, that the restrictive approach sanctioned in the December 2014 AA and embodied in the Core Strategy is unnecessary. Something that is unnecessary is not, on that score alone, unlawful.

2. The Council has no quibble with the notion that the examination must consider the reliability of the December 2014 AA as a document which shapes and supports policy in the Core Strategy and feeds into the ultimate conclusion which must be reached under regulation 102(4) of the Habitats Regulations. That is something which is routine. However, in circumstances where the objection raised is not that there would be any breach of regulation 102(4) but that more development could take place without any such breach occurring, the Council does not consider that it is helpful to characterise the arguments in terms of the lawfulness of the December 2014 AA.

[1] Regulation 102(4) provides that *"in the light of the conclusions of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority … must give effect to the land use plan only after having ascertained that it will not adversely affect the integrity of the European site …"*

3. First, caution should be applied in approaching matters in this way because it is not part of the statutory task of the examination to reach conclusions on the lawfulness of the December 2014 AA. This is not an aspect of the requirement of assessing legal compliance under the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Section 20(5)(a) of the 2004 Act provides that *"the purpose of an independent examination is to determine in respect of the development plan document whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents"*. The need to carry out an appropriate assessment is not a requirement of section 19 or section 24(1) of the 2004 Act or of the Town and Country Planning (Local Planning) (England) Regulations 2012 (made under sections 17(7) and 36 of the 2004 Act). Reaching conclusions on the lawfulness of an appropriate assessment is not therefore part of the statutory requirement of assessing legal compliance under the 2004 Act.

4. Secondly, the requirement for an appropriate assessment is found in the Habitats Regulations. Regulation 102 provides as follows:
   "(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."
   There is nothing in regulation 102 or elsewhere in the Habitats Regulations which prescribes any role for plan examination in assessing the lawfulness of an appropriate assessment.

5. Thirdly, the examination should be slow to reach conclusions expressed in terms of the lawfulness of the December 2014 AA because conclusions of that nature would be a matter for a court performing the role of judicial review. This point is reinforced by the decision of the Inner House of the Court of Session in *Cairngorms Campaign and*

others v Cairngorms National Park Authority[2] where it was held that the question of whether an appropriate assessment was unlawful was whether it was *Wednesbury* unreasonable, that is, one which no reasonable authority would have produced. A judgment of that nature is plainly a matter for a court rather than a planning inspector.

6. Fourthly, none of this curtails examination of any of the matters which CEG wishes to pursue in relation to the December 2014 AA. All matters can all be dealt with by considering the December 2014 AA in its own terms. Much of what is said by CEG, although sometimes clothed in legal garb, amounts to methodological criticisms of the December 2014 AA which can be approached simply, and without any disadvantage to the examination process, in terms of conventional notions of soundness, reliability of evidence and appropriate weighting of material without any recourse to the overlay of the law.

7. For the avoidance of doubt, the Council should make it plain that it does not in any event accept that there are legal deficiencies in the December 2014 AA. A separate response addresses the breeding bird assemblage point which is CEG's headline submission on lawfulness (the allegation – which is disputed – being that the December 2014 AA has addressed itself wrongly to that which is no longer a qualifying feature).

[2] [2013] CSIH 65. There is understood to be a pending appeal to the Supreme Court.

Appendix 2

Legal Opinion on compliance of the ‘Breeding bird assemblage’.

Breeding bird assemblage

1. The advice provided by Natural England on this matter in its letter to the Council of 1st August 2014 was as follows. *"The HRA's assessment of effects upon the Special Protection Area (SPA) Phase 2 did not recognise the site's assemblage of breeding birds as an interest feature. This was not made clear by Natural England within our previous letter. In light of this oversight, Natural England would like the following advice taken into consideration. The breeding bird assemblage was included within the SPA data form, its citation and conservation objectives. The conservation objectives have been reviewed and were updated on the 30 July 2014. Both the citation and updated objectives are available to view at … In addition to the named qualifying features (dunlin, European golden plover and merlin), the breeding bird assemblage is also an interest feature. The citation lists the assemblage as lapwing, snipe, curlew, redshank, common sandpiper, short-eared owl, whinchat, wheatear, ring ouzel and twite. The HRA should therefore consider whether the distribution of housing and subsequent settlement targets can be delivered without adversely affecting the assemblage of these birds."* The advice provided orally to Urban Edge was to the same effect: that the species listed on the SPA citation should be used in the assessment (paragraphs 3.1.4 and 3.1.6 of the December 2014 Appropriate Assessment). And Natural England's letter to the Council of 8th December 2014 confirmed that their earlier letter of 1st August 2014 had *"advised that the HRA should examine whether housing targets in Policy HO3 would result, at the allocations stage, in the loss of functionally linked land used by the breeding bird assemblage (either through direct loss of habitat or indirect disturbance)."* Natural England specifically refer to this letter in their examination statements on matters 1 (legal and procedural requirements and 3 (strategic core policies).

2. A plan-making authority such as the Council should not be held to have acted unlawfully by following the advice of the appropriate nature conservation body, Natural England. By regulation 102(2) of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations") the plan-making authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by it. In the case of *No Adastral New Town Ltd v*

Suffolk Coastal DC[1] it was specifically stated by the court (in the context of a legal challenge to quash part of a local plan on the basis that an appropriate assessment was not carried out at a sufficiently early stage to inform the defendant about the potential impact of residential development)[2] that the views of Natural England, as the appropriate nature conservation body, should be given *"great weight"* and that a departure from their views required *"cogent and compelling reasons"*.[3]

3. Moreover, it is plainly not the case that the JNCC regard the matter as clear cut, notwithstanding the 2001 review. Thus the JNCC website states, under the heading *"Review of the SPA Network"* that *"the SPA Review revised our understanding of the UK SPA network, both in terms of the number of sites selected and the species that qualify within these sites. The review presents site accounts that may differ from the currently classified SPA citation and Natura 2000 Standard Data Form. These accounts are effectively lists of potential qualifying species and as such, according to government policy, these species are fully protected in the SPA or pSPA. As a result of the review <u>the legal documents for many classified SPAs in the UK network now require amending</u> to incorporate changes to qualifying species; this process will take some time to complete."* [Emphasis added] The underlined reference to *"the legal documents"* is significant. That is referred to further below.

4. The JNCC website then provides *"important information"* on the status of qualifying species on individual SPAs. In that respect it states the following: *"<u>the legal list</u> of qualifying species, for which a Special Protection Area (SPA) has been selected and is managed, is given on the relevant SPA citation (available from the country agency concerned). A review of the UK network of SPAs was co-ordinated by JNCC in the late 1990s. Following formal submission to, and agreement by, relevant Ministers, the results were published in 2001. However, it is taking some time to revise all the relevant SPA citations in light of the review. Where there is a mismatch between species listed in extant citations and listed in the 2001 Review for the same sites, there has been confusion as to the 'correct' list of qualifying species to be used at any site*

[1] [2014] EWHC 223 (Admin).

[2] This ground of challenge was rejected and it was held that it was sufficient if the appropriate assessment was carried out before the plan took effect. The decision has been upheld by the Court of Appeal; see [2015] EWCA Civ 88.

[3] At paragraph 138.

for purposes of management, assessment and development control. At sites where there remain differences between species listed in the 2001 Review and the extant site citation, then the relevant country agency should be contacted for further guidance." [Emphasis added]. Again, it is important to note the reference to *"the legal list"*. That is further picked up below.

5. It is to be noted that what occurred in this case was precisely what was contemplated, that is, there was reference to the relevant country agency, Natural England, for further guidance. Natural England's advice was to consider the species listed on the original citation. That advice was followed. It must carry great weight.

6. Natural England's advice was, in any event, correct. The references on the JNCC website to *"the legal documents"* and the *"the legal list"* are telling. Under the Habitats Regulations there is an obligation on the Secretary of State to compile and maintain a register of European sites: see regulation 13(1). This is what is referred to on the JNCC website. The Secretary of State may amend entries on the register: regulation 13(3). But, if an amendment is to be made, there must be notification of that fact to Natural England (under regulation 14) which, having received any such notification, must then notify landowners concerned and others (including the relevant local planning authority): regulation 15. None of this has occurred in the present case. It is necessarily implicit in these provisions that, in the absence of the any such amendment and the consequent notification procedures, the un-amended register entry stands. Hence Natural England's advice. Hence also the fact that JNCC's Natura 2000 Standard Data Form in relation to the South Pennine Moors SPA Phase II refers to the breeding bird assemblage, including curlew and lapwing.

7. Accordingly, it was not unlawful for the appropriate assessment to consider the breeding bird assemblage. On the contrary, to have done otherwise would have risked unlawfulness.