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CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL CORE STRATEGY EXAMINATION

COMMENTS FROM CEG LAND PROMOTIONS LTD ON HOMEWORK ITEM 41: DOCUMENT PS/F072

1. Homework item 41 states: "*Council to finalise wording of Policy EN2 agreed with NE and NLP/CEG*". The Council has submitted document PS/F072 to the Inspector. This does not complete the homework because the document put forward by the Council is not yet agreed with NLP/CEG ("**CEG**"), in that some further changes to the wording of Policy EN2 are required.
2. CEG anticipates that the Council should be able to agree to these further changes as (a) Natural England ("**NE**") has already agreed that they are content with the changes put forward by CEG; and (b) the changes are made in order to ensure that Policy EN2 is consistent with national policy and to make the plan sound. In the absence of the Council confirming that these changes will be made, the Inspector is respectfully requested to recommend to the Council that the changes should be made.
3. By way of brief background, in the days prior to the Council's submission of document PS/F072, CEG was in ongoing communication with the Council and NE on some further changes. PS/F072 was submitted without agreement with CEG in the interim and before changes to paragraphs D and E of Policy EN2 had been finalised. This is clear from the Council's introductory paragraph of PS/F072.
4. Following the submission of PS/F072, CEG wrote to the Council explaining the further final amendments required to ensure paragraphs D and E of Policy EN2 are sound. CEG's position is set out in a letter sent by Freeths LLP (on behalf of CEG) to Andrew Marshall of the Council on 9 April 2015 (Annex A).
5. The letter was written after NE had confirmed to Freeths LLP by telephone on 1 April 2015 that they had no issue with CEG's proposed changes. NE agreed, on the telephone, that CEG's changes "served to clarify matters". NE's position was then confirmed in writing by email dated 2 April 2015 to the Council (this email is attached to CEG's letter at Annex A).
6. CEG's letter and amendments to EN2 should therefore now be capable of agreement by the Council and CEG looks forward to the Council's confirmation of this.
7. It would clearly be preferable for the Council to provide such confirmation in advance of the Inspector considering all amendments to Policy EN2. In any event, CEG invites the Inspector to review the letter and enclosures at Annex A. The contents are incorporated but not repeated in this note.
8. The letter at Annex A sets out in full CEG's position as to five remaining elements of deficiency in paragraphs D and E of Policy EN2 and the straightforward changes required to make the policy sound.
9. So far as the Council has only responded to CEG's letter through the email dated 13 April 2015 from Andrew Marshall (Annex B). It is disappointing, given NE's acceptance of the proposed amendments, that the Council has not yet had time to confirm that CEG's changes should be made. However the Council clearly regards this matter as "work in progress" since Mr Marshall recommended that CEG formally submit its amendments to the Programme

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Officer as a response to document PS/F072 and that the Council would further review CEG's changes.

10. We therefore look forward to the Council's review and acceptance of what is proposed. As explained in CEG's letter, the changes are principally necessary to ensure that Policy EN2 complies with national policy (in particular that set out in the NPPF) and is consistent with Policy SC8 and CEG is not aware of any reason why the changes should not be made.
11. CEG's proposed amendments are straightforward, logical, and reflective of the National Planning Policy Framework and necessary to cure the remaining elements of unsoundness in Policy EN2.
12. If for any reason the Council does not confirm these changes will be made, CEG respectfully invites the Inspector to recommend that they be adopted. With these important but modest changes, the Inspector can be reassured that Policy EN2 is sound.

21 April 2015

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Annex A

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09 April 2015

Our Ref: PAS/1776/2024678/2

Dear Andrew

BRADFORD CORE STRATEGY: POLICY EN2

Introduction

I refer to the email and telephone discussions as between me and you / Jane Scott last week, in which we were seeking to agree the wording of Policy EN2.

On the morning of Thursday 2 April 2015 I responded to Jane's further request for comments on the Council's latest draft of EN2 and I tried to speak to Jane twice that morning to reach final agreement with the Council. Unfortunately she did not return my calls and emailed me to apologise and to say that she was submitting, as Homework, Policy EN2 in an unagreed form. She invited CEG to make comments to the Inspector on this over the next 2 weeks.

The Homework item (number 41) relevant to Policy EN2 states "Council to finalise wording of Policy EN2 agreed with NE and NLP / CEG". The document submitted to the Examination by the Council in response to this Homework item (PSF072) does not meet this requirement as the form of EN2 presented in the document is not agreed as between NLP/CEG and the Council.

It is unhelpful for the Inspector / the Examination not to have before it an agreed form of EN2 as per the Homework requirement. For that reason I write again now to seek agreement with the Council on Policy EN2, in advance of the deadline for comments being Tuesday 21 April 2015. This letter is written without prejudice to our right to respond to PSF072 by that deadline.

Policy EN2

Paragraphs A, B and C of Policy EN2 have been agreed. There are however a number of issues outstanding on Paragraphs D and E of Policy EN2, affecting the soundness of this Policy, which need to be agreed. These are set out below. Please bear in mind that Natural England ("NE") has confirmed by telephone to me on Wednesday 1 April 2015 that they have no issue with these

amendments which serve to clarify matters and indeed they confirmed their contentment with CEG's proposed changes to Policy EN2 in their email to the Council (enclosed) on 2 April 2015.

Paragraph D of Policy EN2: Habitats and Species outside Designated Sites

1. The Council's present draft of paragraph D of Policy EN2 (see PSF072) reads:

"Habitats and Species outside Designated Sites

D. Proposals that may have an adverse impact on important habitats and species outside designated sites need to be assessed according to the following criteria:-

- 1. The potential for adverse impact on important/priority habitats that occur outside designated sites;*
- 2. The potential for adverse impact on species of international, national and local importance;*
- 3. The extent to which appropriate measures to mitigate any potentially harmful impacts can be identified and carried out.*

The assessment needs to take account of:

West Yorkshire Local Site Selection Criteria; and

Where relevant developers will be expected to submit (European) Protected Species surveys and other ecological assessment related information with their application.

Development which would cause serious fragmentation of habitats, wildlife corridors or have a significantly adverse impact on biodiversity networks or connectivity will be resisted."

2. There are two key issues here:

2.1. There is no recognition of the distinction between mitigation and compensatory measures or of the role that compensatory measures play in offsetting impacts.

2.1.1. This is in contravention of paragraph 118 (first bullet) NPPF which clearly recognises the relevance and role of compensatory measures *"if significant harm resulting from development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused"*.

2.1.2. This is in conflict with agreed Paragraph C of Policy EN2 where, following our comments, the Council has now accepted that a distinction between mitigation and compensatory measures must be made.

2.1.3. This is in conflict with the legal regime protecting European Protected Species (EPS) as found in Part 3 Conservation of Habitats and Species Regulations 2010. Under this regime compensatory measures are relevant to allow a developer to meet the "favourable conservation status" test of regulation 53(9)(b) so as to obtain a licence from NE to derogate in certain circumstances from the protection which EPS otherwise enjoy. The Council has a duty under regulation 9(3) Conservation of Habitats and Species

Regulations 2010 to, in the exercise of its functions, have regard to the Habitats Directive (from where the "favourable conservation test" derives). Therefore in adopting Policy EN2 the Council is required to reflect these requirements including the relevance of compensatory measures.

2.2. There is no recognition of the principle that development interests may in certain circumstances need to override nature conservation interests.

2.2.1. This is in conflict with agreed Paragraphs A, B and C of Policy EN2. All these paragraphs reflect the need in certain circumstances for development interests to override nature conservation interests. Paragraph A deals with the most protected Natura 2000 sites and recognises the derogation tests in Article 6(4) Habitats Directive which allow the conservation interests of Natura 2000 sites to be overridden in limited circumstances. Paragraph B deals with SSSIs and Paragraph C deals with Locally Designated Sites and both recognise the need in certain circumstances for development interests to override conservation interests. However Paragraph D, which deals with areas *outside* designated sites (which are therefore in general of less value from a nature conservation point of view), perversely does not recognise this.

2.2.2. Given our comments in the paragraph above, we conclude that Paragraph D is at odds with paragraph 113 NPPF which requires criteria based policies reflecting the hierarchy of sites.

3. Amendments to Paragraph D should therefore be made as follows:

"Habitats and Species outside Designated Sites

D. *Proposals that may have an adverse impact on important habitats and species outside designated sites need to be assessed according to the following criteria:-*

1. *The potential for adverse impact on important/priority habitats that occur outside designated sites;*
2. *The potential for adverse impact on species of international, national and local importance;*
3. *The extent to which appropriate measures to mitigate any potentially harmful impacts can be identified and carried out.*
4. *The extent to which appropriate measures to compensate as a last resort any potentially harmful impacts can be identified and carried out.*

The assessment needs to take account of:

West Yorkshire Local Site Selection Criteria; and

Where relevant developers will be expected to submit (European) Protected Species surveys and other ecological assessment related information with their application.

Development which would cause serious fragmentation of habitats, wildlife corridors or have a significantly adverse impact on biodiversity networks or connectivity will be resisted unless it can be clearly demonstrated

that there are reasons for the proposal which outweigh the need to safeguard the substantive nature conservation value of the features of interest.”

Paragraph E Enhancement – final paragraph

4. The Council's present draft of the final paragraph of section E of Policy EN2 (see PSF072) reads:

“Where supported by evidence the Council will recognise the importance of foraging /commuting areas for protected and SPA/SSSI species and qualifying features outside the statutory designated area as a material consideration in the preparation of development plans and in the determination of planning applications. Where supported by evidence, foraging sites, currently outside the SPA/SAC and SSSI will be considered for designation as a Locally Designated Site.”

5. There are three key issues here:

- 5.1. The Council, NE and CEG have already agreed the correct approach to assessing the impacts of projects on the South Pennine Moors SPA and this is clearly set out in the agreed Policy SC8 (see PSFO66). This states that, for developments within 2.5km of the South Pennine Moor SPA boundary *“it will be considered, based on such evidence as may be reasonably required, whether land proposed for development affects foraging habitat for qualifying species of the SPA.”* The wording of the final paragraph of Policy EN2 is not consistent with this agreed approach – it makes no reference to the 2.5km zone and it refers to foraging and commuting areas. This creates confusion. It is essential that the final paragraph of EN2 is consistent with what has already been agreed as between NE, CEG and the Council in relation to assessing impacts on the South Pennine Moors SPA. NE has already confirmed that they are content with our amendment to this final paragraph (see below) which addresses this point.
- 5.2. The words “the importance of” must be deleted. It is incorrect as a matter of law to refer to “the importance of foraging / commuting areas” as a “material consideration”. It is the existence of a foraging / commuting area which is a material consideration. The importance of a foraging or commuting area is relevant instead to the weight to be afforded to that material consideration in the determination of the planning application.
- 5.3. It is wrong and duplicitous to refer to “SPA / SSSI species and qualifying features”. The correct phrase is simply “SPA/SSSI qualifying features.”

6. Amendments should therefore be made as follows:

“In accordance where relevant with Policy SC8 and where supported by evidence the Council will recognise the importance of foraging / commuting areas for protected and SPA/SSSI species and qualifying features outside the statutory designated area as a material consideration in the preparation of development plans and in the determination of planning applications. Where supported by evidence, foraging sites, currently outside the SPA/SAC and SSSI will be considered for designation as a Locally Designated Site.”

Timetable for review of Council's Appropriate Assessment

I note your email dated 2 April 2015 (copy enclosed) responding to CEG's suggested timetable for the Council's production and consultation with CEG on the revised Appropriate Assessment. I look forward to your substantive response expected this week.

Yours sincerely



Penny Simpson
Partner

Encs

1. Natural England (John King) email dated 2 April 2015
2. Council (Andrew Marshall) email dated 2 April 2015

cc By email Jane Scott, jane.scott@bradford.gov.uk

Lindsey Young

From: King, John J (NE) [John.King2@naturalengland.org.uk]
Sent: 02 April 2015 10:24
To: Jane Scott
Cc: Penny Simpson; Buddle, Zoe (NE); Keatley, Tom (NE)
Subject: CEG Amendments to Policy EN2

Dear Jane,

Having reviewed the amendments to policy EN2 by CEG (email dated 31/3/2015), Natural England advise Bradford MDC, as the plan making body, that they do not significantly alter the policy's environmental intentions or its soundness.

Regards

John King

John King
Lead Adviser

Sustainable Development and Marine

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Penny Simpson

From: Andrew Marshall [andrew.marshall@bradford.gov.uk]
Sent: 02 April 2015 13:58
To: Penny Simpson
Cc: Jane Scott; 'Chris Darley'; 'King, John J (NE)'; 'Nicholas Pincombe'; 'Jonathan Cox'; Danny Jackson
Subject: RE: Bradford Core Strategy: Suggested HRA review timetable for agreement

Penny

Thank you for your email with your suggested programme for the HRA review. We are still in the process of firming up the detailed programme with our consultants (who are also liaising with NE on the scope) and will be in touch with our programme in due course which will indicate key work streams and when we anticipate engaging informally with CEG representatives at key stages/milestones of that work. I would hope we will be able to share it with you later next week - though this may be impacted by Easter holiday commitments.

As noted in other emails we have now closed out the further statements linked to the Inspectors home work and I anticipate the Programme officer inviting participants for further comments next week giving them 2 weeks from that date for any responses, followed by a further week for Council responses if required.

Regards

Andrew Marshall
Planning & Transport Strategy Manager

City of Bradford Metropolitan District Council Department of Regeneration and Culture

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From: Penny Simpson [mailto:Penny.Simpson@freeths.co.uk]
Sent: 01 April 2015 18:09
To: Jane Scott; Andrew Marshall
Cc: Christopher Darley (cdarley@nlplanning.com); 'Andrew Baker'; 'Steve McBurney'; 'King, John J (NE)'; 'Nicholas Pincombe'; 'Jonathan Cox'
Subject: Bradford Core Strategy: Suggested HRA review timetable for agreement

Dear Andrew and Jane

You will recall that in the "Note of principles agreed as between the Council, NE and CEG" dated 9 March 2015 (para 7) it was agreed that "the HRA Dec 2014 will require review and revision with input from and consultation with all parties to this Note". In the Council's "Further Statement on the programme for Review of the Habitats Regulations Assessment" dated 10 March 2015, the Council stated that the Phase 1 initial HRA review would be conducted between March and early May 2015.

Time is marching on and so it is important to put in place a timetable so as to secure delivery of the revised HRA by "early May", as per the Council's commitment. We suggest a timetable below. This reflects the need for close cooperation between the Council, CEG and NE throughout the HRA review process so as to deliver an appropriate and agreed revised HRA in the required timeframe.

1. By close of business Wed 8 April 2015: Production by the Council for CEG and NE of:

- (i) a skeleton of a revised HRA setting out the proposed chapter headings and subheadings and basic content of the proposed revised HRA, as per the Note of agreed principles; and
- (ii) a preliminary assessment of impacts on the South Pennine Moors SPA based on the NE 2014 baseline survey data.

2. By close of business Tuesday 14 April 2015: Provision by CEG of comments on 1. above to the Council, copied to NE. NE will no doubt provide their comments on 1. to the Council, copied to CEG, as soon as they are able.

3. By close of business Friday 24 April 2015: Production by the Council to CEG and NE of a first full revised draft HRA.

4. By close of business on Friday 1 May 2015: Provision by CEG of comments to the Council on 3. above. NE will no doubt provide their comments on 3. to the Council, copied to CEG, as soon as they are able.

5. By close of business on Friday 8 May 2015: Production by the Council of second full revised draft HRA.

6. By close of business on Friday 15 May 2015: Provision of any final comments by CEG to the Council on 5. above. NE will no doubt provide their comments on 5., copied to CEG, as soon as they are able.

We would be very grateful if you could confirm by close of business on Thursday 2 April that this timetable is acceptable, so that we can be assured that there is no need to raise this matter with the Inspector next week.

Regards

Penny Simpson

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Partner
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Annex B

Lindsey Young

From: Andrew Marshall [andrew.marshall@bradford.gov.uk]
Sent: 13 April 2015 12:23
To: Penny Simpson
Cc: Jane Scott
Subject: RE: Bradford Core Strategy: Policy EN2

Penny

Thank you for your letter on behalf of CEG setting out the further changes you are seeking to Policy NE2 together with your justification. I suggest you formally submit these suggested changes to the programme officer as a response to our further statement on Policy NE2 for the public record. The Council will review these changes and make a formal further response in due course as allowed for by the Inspector.

In terms of the HRA review programme we are still finalising the detailed programme and will be in touch ASAP.

Yours Sincerely

Andrew Marshall
Planning & Transport Strategy Manager

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From: Penny Simpson [mailto:Penny.Simpson@freeths.co.uk]
Sent: 09 April 2015 14:46
To: Andrew Marshall
Cc: Jane Scott
Subject: Bradford Core Strategy: Policy EN2

Dear Andrew

Please see my letter attached.

Yours sincerely

Penny Simpson
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Partner
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