Bradford LDP Core Strategy

ADVICE

INTRODUCTION

1. I am asked to consider whether any further changes are required to the supporting text of Policy SC8 in the light of the points made on behalf of CEG in its further statement, in particular paragraph 1.10 [1].

2. I note that the text has been rewritten, as explained in the Council's statement[2].

A CORE STRATEGY POLICIES

3. I emphasise also that the policies in the Plan are not site specific; they are designed to cover <u>any</u> application within the plan period in Bradford to which this policy and its associated policies are or may be material. That is an important principle. A policy in a Core Strategy is not generally about one particular potential application . Policy SC8 and its associated policies and supporting text need to be sufficiently clear to other prospective developers and landowners and the public over a period of 15yrs for them to understand what the policy is aiming to achieve.

B HRA

4. It is important to emphasise also that CEG states that " CEG regards the AA Nov 2015 as adequate as an assessment of the Core strategy and sees no need for any further amendments to it prior to adoption of the Core strategy "[3].

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[1] PS/j020A
[2] PS/K001
[3] Freeths paragraph 18

5. Furthermore, Natural England has confirmed that it supports the findings and conclusions of the 2015 HRA.

C CASE-LAW

6. I note that CEG have referenced many cases in the legal opinions obtained. I note also that Freeths refer to case-law in Annex 1 of their 2016 representation[4].

7. In my opinion, however, there are three further relevant cases which have a bearing on the issues raised , and which do not appear to have been referred to , namely

   (1) the **Cairngorms** case 2012 ,

   (2) **Feeny v Oxford City Council** 2011(Oxford Meadows SAC) , and

   (3) **RSPB v Secretary of State.**

8. The first two cases are concerned with challenges to development plans, but each case contains relevant material to plan-making . The RSPB case considered the status of land outside a European site which is functionally linked to the site.

D THE CAIRNGORMS CASE

9. In **Cairngorms Campaign v Cairngorms NPA** , 21 September 2012 **[2012] CSOH 153** , Lord Glennie said, in an opinion upheld subsequently in the Inner Session on July 3, 2013 -

   " [137] At first glance those cases appear to provide some support for the appellants' submission. Their argument is simple. An Appropriate Assessment requires to be made at the stage of the Local Plan. That is not in dispute. The Local Plan cannot be approved or adopted by CNPA unless, on the basis of the Appropriate Assessment, CNPA are *convinced*

[4] Represntation 495.

or have *made certain* that implementation of the Local Plan *will not* adversely affect the integrity of that site. That requires decisions to be made at that stage as to what the risks are, whether or not they can be avoided (and, if so, how), and what mitigation steps are needed, and how and when they are to be implemented. The Local Plan should not contain housing and other development policies if it is not clear, in relation to those policies, that risk to the integrity of the site can be avoided or mitigated to acceptable levels. Those decisions cannot be left to be dealt with at the stage of an application for planning permission for a particular development.

[138] Despite its superficial attraction - and I mean no disrespect by using that word - I do not accept this argument. It appears to me to conflate the requirement for there to be an Appropriate Assessment at a particular stage with the question of what that Appropriate Assessment must contain. To my mind, it does not follow from the fact that an Appropriate Assessment must be carried out at the stage of drawing up the Local Plan that that assessment must provide a conclusive answer to all the questions legitimately raised about the potential for significant adverse effect on the integrity of the site. The Appropriate Assessment carried out at this stage must be sufficient to inform the local plan and to satisfy the decision maker that implementation of the plan will not adversely affect the integrity of the site. The local plan itself contains a judgement, perhaps many judgements, as to the future. The decision maker at this stage is entitled, when assessing the likelihood of the plan having an adverse effect upon the integrity of the site, to take into account all the circumstances relating to that future. That means taking into account not only likely impacts of any development but also measures to prevent such impacts arising or to mitigate their effect. As the respondents' submitted, the appellants' challenge under this head is predicated upon the unwarranted proposition that no regard can be had to any subsequent process in assessing the affect upon the integrity of European sites. A plan of this sort has to be prepared and approved at a certain level of generality. It makes housing and other allocations based on an assessment of housing needs and a large number of other factors, all as set out in the Local Plan. It is in no way intended as a guide to the details of forthcoming proposals for any such developments. The possibilities are, no doubt, many and varied. Matters of layout, design and infrastructure will be worked up by developers and considered with planners in the planning department. Although it is possible in the Appropriate Assessment to identify and assess in general terms the possible impact of development of a particular type upon the integrity of the site, it is not possible at that stage to be certain about whether the particular development for which permission is ultimately sought will or will not have an effect upon the integrity of the site; or, perhaps more realistically, whether the proposed development will comply with the various Policies in the Local Plan; and, if not, whether any, and if so what, mitigating measures would be needed and whether they would be effective. Those matters, so it seems to me, can be assessed in detail

only when the particular development proposals fall to be considered. By setting out Policies in the Local Plan which will govern the treatment of future planning decisions, CNPA have adopted a procedure by which they can be convinced (or "certain") that such development as follows on from the proposals in the plan will not adversely affect the integrity of the site. In the last resort, if, despite the inclusion of all possible and relevant mitigating measures, a planning application cannot satisfy those Policies, it will not be granted. Of course, views may differ as to whether the decisions made by the local authority - both at the stage of the local plan and also later, at the stage of planning consent - are the correct ones. They can be challenged only on well-known judicial review grounds. But to require more at the Local Plan stage would impose too great a burden on the local authority. As was submitted for the respondents, the whole plan led system would in significant part grind to a halt if full details of every housing or other development allocation were needed at local plan stage whenever there was perceived to be a risk of adverse impact on the integrity of a European site.

[139] Such an approach does not render worthless an Appropriate Assessment at the stage of adoption of the local plan. Nor is it in conflict with the reasoning of the ECJ in *Commission v United Kingdom* to which I have referred. The reasoning in that case is based on the fact that applications for planning permission are determined in the light of the relevant "land use plans", such as the local plan, so that such plans necessarily "have considerable influence on development decisions and, as a result, on the sites concerned". If the Appropriate Assessment identifies and assesses the risks inherent in development on the sites proposed for development, and the Local Plan lays down clear and firm Policies to eliminate or mitigate such risks, with a requirement that any planning permission will only be granted if it is in line with the relevant Policies in the Local Plan, then the Local Plan, informed by the Appropriate Assessment, will have played its part in constraining such development and ensuring that the development will not affect the integrity of the site."

E THE OXFORD CASE

10. In **Feeny v Oxford [2011] EWHC 2699** (Admin) , Stephen Morris QC

sitting as a judge of the High Court said

"24 I have also been referred, in some detail, to two decisions of the European Court of Justice relating to the Habitats Directive: Case C-127/02 *Landelijke Verenigung Tot Behoud Van De Waddenzee, Nederlandse Verenigung Tot Bescherming Van Vogels v. Statssecretaris Van Landbouw, Natuurbeheer En Visserij ("Waddenzee")* [2004] ECR I-7405 and Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017 ECJ and the opinion of Adv. Gen. Kokott. In *Waddenzee*, the ECJ held as

follows. *First*, the test for whether an appropriate assessment under Article 6.3 of the Habitats Directive is required to be carried out in the first place is where "it cannot be excluded on the basis of objective information that it will have a significant effect on that site, either individually or in combination with other plans or projects". A "risk" of significant effects triggers the requirement for an appropriate assessment (ECJ judgment, §§39 to 45 and §3 operative part). *Secondly*, in an appropriate assessment it is necessary to identify all aspects of the plan (in combination with other plans) which can affect the site in the light of the best scientific knowledge in the field (ECJ judgment, §54 and §4 operative part). *Thirdly*, the competent authorities, taking account of the appropriate assessment, are to authorise activity *"only if they have made certain that it will not adversely affect the integrity of that site"* (ECJ judgment, §§59 and §4 operative part). In this regard, the ECJ held at §§56 to 58:

"56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see Case C-157/96 National Farmers' Union and Others [1998] ECR I2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision." (*emphasis* added)

§§58 and 59 indicate that, in order to satisfy the second sentence of Article 6.3, it is sufficient to ensure *prospectively* that there will be no harm in the future.

…..........

57 Joint Statement of Oxford City Council, Natural England and BBOWT: September 2010

Meanwhile in June 2010 officers of the Council had met with officers of Natural England, and the BBOWT to discuss potential recreational impacts on the Oxford Meadows SAC. There was also a meeting with the Northern Gateway developers in August 2010. Then in September 2010, the Council, Natural England and BBOWT prepared, and submitted to the examination, a Joint Statement. This I ncluded agreed wording to be inserted into the Core Strategy to ensure that there would be no adverse effects on the integrity of the SAC from development at the Northern Gateway. This was submitted as a core document and in order formally to propose the new wording as an

examination change. The Joint Statement stated as follows:

> *"the northern gateway policy CS6 as currently worded does not provide certainty that adverse impacts on the integrity of the Oxford Meadows SAC will be avoided ...*
>
> *The Council has recognised that the concerns of the environmental bodies are valid and the following wording is jointly suggested in order to ensure that the plan is compliant with the Habitats Regulations and can therefore legally be adopted if sound."*
>
> (*emphasis* added)

The Joint Statement then set out its proposed additional wording. This was incorporated into the Core Strategy as finally adopted (at §§3.4.40 to 3.4.43). It is set out in paragraph 74 below; I refer to it as "the qualifying wording"......

91The task of the competent authority is one of making certain, or ensuring, *prospectively* that no harm will arise in the future: see *Waddenzee*, and paragraph 24 above. I accept that there is no express statement, either in the Core Strategy itself, or by the Inspectors or by the Council in adopting the Core Strategy that "with the safeguard in place, I am satisfied that there will be no harm to the SAC". Nevertheless this is the effect of the terms of the Core Strategy in its final adopted form. As explained in the passage from the Joint Statement set out in paragraph 57 above, and in the Inspectors' conclusions, the very purpose of the inclusion of paragraph 3.4.43 of the qualifying wording was to guarantee that there cannot be an adverse effect in the future; "ensuring that the plan is compliant" means certainty as to absence of harm. This point was expressly made by Mr. Sloman in his written response madefor the full Council meeting (and also recorded in the April 2011 version of the HRA).

92 This conclusion is supported by the following further factors. *First*, a core strategy is a high level strategic document and the detail falls to be worked out at a later stage. Subsequent appropriate assessment of specific proposals is plainly envisaged by, and indeed necessitated under, the regime. Each appropriate assessment must be commensurate to the relative precision of the plans at any particular stage and no more. There does have to be an appropriate assessment at the Core Strategy stage, but such an assessment cannot do more than the level of detail of the strategy at that stage permits. Adv. Gen. Kokott expressly recognises this at §49 of her Opinion in *Commission v UK. Secondly*, if the use of a "safeguard" condition such as the present was impermissible, proposals would have to be ruled out altogether at the core strategy stage, and there could be no scope for subsequent appropriate assessment at a later stage, as specifically envisaged by Adv. Gen. Kokott. If the

Claimant's argument were correct, a core strategy could never be approved, where, as is likely, the specific detail of future particular development is not known. No core strategy could ever involve detailed consideration of the impact on SAC of specific development proposals. In this way, the Council cannot be criticised for not making an appropriate assessment at a site specific level; there are currently no detailed proposals. *Thirdly*, I do not accept the Claimant's allegation that the Council failed to have regard to the precautionary principle. The HRA itself expressly refers (at page 2) to the precautionary principle. Further the entire approach of the Council in introducing and approving the qualifying wording, in the context of possible concerns raised by Natural England and BBOWT, was based upon advance consideration of future possibilities. *Fourthly*, following the close of oral argument, the Council provided, and the Claimant did not dispute, a number of examples of core strategies having been approved subject to conditions, of which three have been made expressly subject to conditions as a "safeguard" to address potential harm to SACs under the Habitats Regulations. Moreover, in the specific context of the Habitats Regulations, it is noteworthy that, in the *Lewis* case, the scheme in issue was approved but only subject to conditions which had been specifically suggested by Natural England and the RSPB to address their concerns in relation to the particular sites.

F THE RSPB CASE

11. In **RSPB v Secretary of State [2014] EWHC** 1523 Ouseley J considered the status of land outside a European site which is functionally linked to the site. He said

" 17. Regulation 3 defines "European sites". Regulation 61 is the most important as it sets out the process whereby the effect of projects on designated sites is to be assessed:

"61. **Assessment of implications for European sites and European offshore marine sites**

(1) A competent authority before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which -

(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 that site,

must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.

(2) A person applying for such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by the body within such reasonable time as the authority specify.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be)".

21. Its most recent decision is its Third Chamber decision in *Sweetman v An Bord Pleanala* Case C 258/11, 11 April 2013. A project would be likely to have a significant effect if it is "likely to undermine the site's conservation objectives"; paragraph 30. That reflects the language of Regulation 61(1). The procedures are designed to maintain designated habitats and species "at a favourable conservation status"; paragraph 36.

25. Authorisation can only be given by a competent authority, here the Secretary of State, if the authorities:

> "Once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the Light of the best scientific knowledge in the field - are certain that the plan or project will not have lasting adverse effects on the I Integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 99, and Case C-182/10 *Solvay and Others*, paragraph 67)".

" 26 A project could adversely affect the integrity of a site, if it were "liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying

the designation of the site...in accordance with the [Habitats] directive;" "*Sweetman*, paragraph 48". The conservation objectives for the European sites here were to maintain in favourable condition certain habitats, and habitats for the populations of certain species of bird. A conservation status is "favourable" when the natural range and area covered by a habitat is stable or increasing and the specific functions and structure necessary for its long term maintenance exist and are likely to exist for the foreseeable future. "Maintain" meant "restore" if the condition was not favourable. The table of targets for bird species of European importance here uses phrases such as "No significant displacement" due to human disturbance in roosting and feeding areas.

27 There is no authority on the significance of the non-statutory status of the FLL. However, the fact that the FLL was not within a protected site does not mean that the effect which a deterioration in its quality or function could have on a protected site is to be ignored. The indirect effect was still protected. Although the question of its legal status was mooted, I am satisfied, as was the case at the Inquiry, that while no particular legal status attaches to FLL, the fact that land is functionally linked to protected land means that the indirectly adverse effects on a protected site, produced by effects on FLL, are scrutinised in the same legal framework just as are the direct effects of acts carried out on the protected site itself. That is the only sensible and purposive approach where a species or effect is not confined by a line on a map or boundary fence. This is particularly important where the boundaries of designated sites are drawn tightly as may be the UK practice. "

G FLL LAND IN RELATION TO THE CORE STRATEGY'

12. On the basis of the survey data currently available it cannot be demonstrated that any SHLAA sites are functionally linked land (see HRA November 2015, paragraphs 6.2.50 to 6.2.56). I note, however, that paragraphs 6.2.57 to 6.2.62 of the HRA discuss the additional surveys, assessments and possible mitigation that should be considered before 'amber category' sites are allocated or given planning consent. "'Amber category' sites are those for which – on the basis of currently available survey data – there is some evidence of use by foraging SPA birds, but not sufficient evidence to demonstrate functional linkage..[5] In

[5] *Paragraphs 7.2.2 to 7.2.5 of the HRA November 2015 are also relevant."*

my opinion these are matters for consideration at a later stage in the plan-making process – or , in the event of a planning application at that stage. There is no basis upon which it can be contended seriously that the Core Strategy is not legally clear and sound on this basis in relation to the HRA. Indeed it is common ground that as a whole the HRA is adequate as an assessment of the Core strategy and there is no need for any further amendments to it prior to adoption of the Core strategy.

H CEG'S PROPOSED CHANGES

13. CEG's proposed changes to MM33, MM53 or MM19 point to the fact that, if any land within the 2.5km zone is FLL, its protection should be for the sake of avoiding adverse effects on SPA integrity. To that extent there is common ground.

14. However, what these amendments also aim to achieve is a loosening of the language such that a developer could propose mitigation measures for loss/deterioration of FLL, rather than avoiding adverse effects on SPA integrity by avoiding development of FLL altogether. It is important to point out that mitigation can include avoidance measures – there is no reason not to avoid developing FLL as a means of avoiding adverse effects on SPA integrity.

15. To consider avoidance first is in line with the mitigation hierarchy. Avoiding loss/deterioration of an area of FLL by preventing development *may* be a more successful mitigation measure, when compared to allowing its loss to development and attempting to re-create the role of FLL elsewhere – and if CEG dispute this proposition in relation to their site , this is a matter that would fall for consideration at a later stage of the plan-

making process, as is clear from the HRA paragraphs 7.22 and 7.2.5.

I CONCLUSIONS

- 16. In conclusion, therefore, it is clear that

(1) the AA Nov 2015 is adequate as an assessment of the Core strategy and there is no need for any further amendments to it prior to adoption of the Core strategy;

(2) the language of policy SC8 benefits from the re-writing and the input from CEG , and it is contains language that is legally accurate and clear;

(3) Policy SC8 and the supporting text to SC8 and the associated policies to SC8 and text are clear and legally accurate and are consistent with the Habitats Directive, the Birds Directive and with relevant case-law, including the three cases noted above; and

(4) the three principal suggestions made by CEG (in M33 MM53 and MM19) are not necessary to ensure legal accuracy. I emphasise the point made above[6] that Policy SC8 and its associated policies and supporting text need to be sufficiently clear to all prospective developers and landowners and to the public over a period of 15yrs for them to understand what the policy is aiming to achieve.

ERIC OWEN

KINGS CHAMBERS

MANCHESTER LEEDS AND BIRMINGHAM May 11,2016

[6] Para 1