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Your Ref :
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Dear Sirs

Witchford Neighbourhood Plan - Regulation 16 Consultation

We are instructed on behalf of Manor Oak Homes Limited to bring to your attention a number of fundamental legal flaws in the Witchford Draft Neighbourhood Plan ("the WNP"), which we consider render the WNP unlawful and contrary to the basic conditions. Your Council, as the relevant authority, must ensure that the WNP complies with relevant statutory requirements before proceeding further with the draft WNP.

Background

The Regulation 15 version of the WNP has been submitted to East Cambridgeshire District Council ("the Council") and the Council have invited comments on the WNP within the period up until 28th November 2019. We note from the website of Witchford Parish Council ("the Parish Council") that at their last meeting on 12th November 2019 the Parish Council chose to appoint Peter D Biggers (BSc Hons Town Planning MRTPI, AIHBC) of Trevor Roberts Associates as the Independent Examiner to ensure that the Neighbourhood Plan Examination should proceed as quickly as possible.

Legal Principles

The process for bringing forward a Neighbourhood Plan is primarily set out in Schedule 4B of the Town and Country Planning Act 1990 ('the 1990 Act'), and Part 5 of the Neighbourhood Planning (General) Regulations 2012 ('the 2012 Regs').

Para 8 (2) of Schedule 4B of the 1990 Act sets out the basic conditions that a neighbourhood plan must meet to progress to referendum:

A draft order meets the basic conditions if—

a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,

b) *having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order,*
c) *having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order,*
d) *the making of the order contributes to the achievement of sustainable development,*
e) *the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),*
f) *the making of the order does not breach, and is otherwise compatible with, EU obligations, and*
g) *prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order.*

Strategic Environmental Assessment

For the WNP to be found in conformity with basic condition (f), it is incumbent on the relevant bodies to ensure that the WNP is able to meet the legal requirements in respect of a Strategic Environmental Assessment ("SEA") as set out in European Directive 2001/42/EC ("the SEA Directive"). The SEA Directive is transposed into UK law through the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"). Neighbourhood plans fall within regulation 5(4) of the SEA Regulations as they set the framework for future development consent of projects and as such the "*responsible authority*" which is the Parish Council in this case "*shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.*"

Article 4(1) of the SEA Directive requires that the SEA and the opinions expressed by relevant authorities and the public, are taken into account during the preparation of the plan and before its adoption or submission to the relevant legislative procedure. The following are consultation bodies:

a) The Countryside Agency (now Natural England)
b) The Historic Buildings and Monuments Commission for England (English Heritage)
c) English Nature (Natural England); and
d) The Environment Agency

In April 2019 the Council prepared the Strategic Environmental Assessment and Habitat Regulation Assessment Screening Report ("the Screening Report") to determine whether a full SEA and / or Habitats Regulation Assessment ("HRA") was required. The outcome of this screening was that "*the Neighbourhood Plan does not seek to increase the overall quantum of growth beyond that which has already been permitted through the planning system. The effects of this growth have therefore been considered during the application stage for each of the respective sites. Other policies generally accord with the adopted Local Plan, the potential environmental effects of which were duly assessed through the plan-making process.*" Further it was considered that preparing evidence bespoke to the WNP would be disproportionate and would result in unnecessary duplication.

The Council produced the "Strategic Environmental Assessment Determination Statement" ("the Determination Statement") on the 2 October 2019. This confirmed what had been concluded in the Screening Report, that; "*it is not likely that significant environmental effects will arise from the implementation of the Witchford Neighbourhood plan and therefore Strategic Environmental Assessment is not required.*"

The three sites which are proposed in the WNP are as follows:

i. WNP WFDH 1 – Land at the north of Field End for the residential development of up to 168 homes, permitted pursuant to two applications
ii. WNP WFDH 2 – Land at Common Road for the residential development of 116 homes
iii. WNP WFDH 3 – Land south of Main Street for the development of 46 homes

All three proposed allocations appear to now benefit from extant planning permissions and in the case of WFDH 1 and WFDH 3 we understand that development has already been commenced. All three allocations are included in the Council's latest Housing Land Supply report (dated June 2019).

We do not accept these sites should be properly identified as allocations aimed at meeting an identified future housing need at all. Nor do we accept that the existence of extant planning permissions obviate the need to undertake an SEA.

It is to be noted that in paragraph 044 Reference ID:41-044-20190509 of the PPG, it is clearly stated that "Neighbourhood Plans should not re-allocate sites that are already allocated through these strategic plans" e.g. Local Plans. Not only were these supposed "allocations" made at a time when they were included as allocations in the emerging Local Plan, but the sites now appear to all have the benefit of planning permission. The advice is therefore even more relevant to the present situation of seeking to make allocations of sites that national guidance considers should not be identified as allocations at all.

Consequently the WNP does not make any new housing allocations and rather it simply recognises the existing housing permissions in the parish of Witchford (arising from the now abandoned Local Plan allocations). In the circumstances the Council needs to clarify whether, for the purposes of SEA, the WNP sets the framework for future development consent of projects or not.

The WNP does not consider the actual housing need of the parish or the district where at present the Council cannot currently demonstrate a five year supply of housing land. As at June 2019 the supply was 3.7years (including the three "allocated" sites). It therefore cannot be correct that the only proposed allocations in the draft WNP are three sites which already have planning permission yet the WNP purports to allocate housing sites to accommodate future housing needs for the settlement.

Insofar as the three sites are considered to be "allocations" they must be suitable to meet the needs of the parish and they must be in accordance with the SEA Regulations, in that they are not likely to give rise to any significant environmental effects. The Council, in their Determination Statement, rely exclusively on the fact that the environmental impacts of the three sites would have been considered at planning application stage and therefore it goes beyond what is required by the SEA Regulations, to consider again whether the development would result in any environmental impacts.

Of the three allocated sites WFDH 1 and WFDH 3 were both screened by the Council and an ES was found not be required. Both sites were screened on the basis of a screening request from the applicant's agent which had no supporting expert reports and in both cases because of the Council's determination there was no further consideration of the environmental impacts of the sites. WFDH 2 was not screened at all.

It is our contention that this is not sufficient to reach a conclusion that an SEA is not required as part of the WNP on this basis. A bespoke approach should have been carried out in respect of the WNP to make sure that the WNP as a whole was adequately screened in terms of its environmental impact. Furthermore individual projects are governed by EIA requests not by SEA requests. The District Council should assess the likely significant environmental effects of the Plan as a whole and do so in light of the comments below about potential impacts on European designated sites which may be adversely affected by the proposals set out in the WNP. As a result of this failing, the WNP does not meet the basic condition (f) and is therefore unlawful until this is rectified.

Assessment of "Reasonable Alternatives"

If the requirement for an SEA is established there is a requirement to assess reasonable alternatives by virtue of regulation 12(2) of the SEA Regulations which provides:

"(2) The report shall identify, describe and evaluate the likely significant effects on the environment of–

(a) implementing the plan or programme; and
(b) reasonable alternatives taking into account the objectives and the
(c) geographical scope of the plan or programme."

This requirement has been subject to a significant amount of litigation. The relevant principles were summarised by Hickinbottom J in R (RLT Built Environment Ltd) v Cornwall Council [2016] EWHC 2817 (Admin) at paragraph 40 and which in summary include the following:

i. ensuring that potentially environmentally preferable options which attain policy objectives are not discarded as a result of an earlier strategic decision;
ii. a focus on the authorities "preferred plan" along with "reasonable alternatives" which are identified, described and evaluated in the SEA and it is noted that without this there cannot be a proper environmental evaluation of the preferred plan;
iii. Article 5(1) refers to "*reasonable alternatives taking into account the objectives… of the plan or programme*", there is therefore a judgement to be made as to which alternatives should be considered based on whether they achieve the objectives of the plan. There may be cases where there are no alternatives to those proposed and as such nothing further needs to be considered.

As further noted by the Court of Appeal in Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2015] EWCA Civ 681:

"*In Heard v Broadland District Council…at paragraphs 66-71, Ouseley J held that where a preferred option – in that case, a preferred option for the location of development – emerges in the course of the plan-making process, the reasons for selecting it must be given. He held that the failure to give reasons for the selection of the preferred option was in reality a failure to give reasons why no other alternative sites were selected for assessment or comparable assessment at the relevant stage, and that this represented a breach of the SEA Directive on its express terms. He also held that although there is a case for the examination of the preferred option in greater detail, the aim of the Directive is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination alongside whatever may be the preferred option.*"

Ashdown Forest also establishes that "*where the authority judges there to be reasonable alternatives it is necessary for it to carry out an evaluation of their likely significant effects on the environment, in accordance with regulation 12(2) and paragraph 8 of Schedule 2… In order to make a lawful assessment… the authority does at least have to apply its mind to the question.*"

Finally, Ouseley J stated at paragraph 66 in Heard v Broadland that only an "*obvious non-starter" is exempt from the requirement to be assessed as a reasonable alternative.*"

Given that the Council concluded in the Screening Report, and confirmed in the Determination Statement that there was no requirement to carry out an SEA because there were no likely significant environmental effects no "reasonable alternatives" were considered. It is our position that there is a fundamental flaw in the Screening Report and the Determination Statement and in fact the three sites should be re-assessed alongside the WNP as a whole to determine what, if any, environmental impacts arise as a result of the WNP. Until this is done it is not reasonable to reach a conclusion that the WNP has no likely significant effects. Once the environmental impacts of the WNP have been considered, and if it is concluded that an SEA is required then this will need to take into account "reasonable alternatives" to the three sites proposed in the WNP of which our client's site should be included.

Habitat Regulation Assessment

Within the Witchford Neighbourhood Plan Basic Conditions Statement, the Council purport to deal with Habitat Regulation Assessment in relation to the emerging WNP in Section 7. The issue is dealt with very briefly in paragraphs 7.1 and 7.2 on page 31 of the Basic Conditions Statement.

Reliance is placed on the Screening Report that East Cambridgeshire District Council produced in April 2019. This report concluded that the implementation of the Neighbourhood Plan is "not expected to result in likely significant effects on designated sites and that, as such, a full HRA is not required". In short the District Council make a determination that an appropriate assessment is not required for the purposes of the 2017 Conservation of Habitats and Species Regulations. It is for that reason that the Neighbourhood Plan is not accompanied by an Appropriate Assessment.

That then requires us to look at the Screening Report that the District Council produced in April 2019 and the conclusions upon which the Parish Council rely in moving forward with the WNP and whether the same is compliant with Reg 8(2)(f) of Schedule 4B of the 1990 Act.

Within the Strategic Environmental Assessment Determination Statement comments are quoted from both the Environment Agency and Historic England relating to the need for strategic environmental assessment only.

All that Natural England have stated is that in their view the proposals within the Plan would not have significant effects on sensitive sites that Natural England has a statutory duty to protect.

This response does not absolve the Parish Council of the need for full consideration of habitat assessment requirements in relation to the proposals within the emerging Neighbourhood Plan and for an Appropriate Assessment to be conducted if required.

Turning to the Screening Report appended to the Strategic Environmental Assessment Determination Statement. The report recites the relevance of Directive 92/43/EEC albeit it refers to the 2010 rather than 2017 Regulations. It then goes on to state that the purpose of the report is to carry out a screening exercise to determine whether appropriate assessment is required for the purposes of the Habitat Regulations. It correctly identifies that under the EU ruling in People over Wind and Sweetman v Coillete Taoranta (C-323/17) that mitigation cannot be taken into account at the screening stage but only subsequently when carrying out an appropriate assessment.

At paragraph 2.13 of the Screening Report it is recognised that the HRA conducted by the Council in respect of its emerging Local Plan in June 2018 identified the potential for development in Witchford to lead to increased disturbance from recreational pressure on the Ouse Washes and Wicken Fen with other residential allocations and in combination with housing development in neighbouring districts. In paragraph 2.15 it is also stated that the Ouse Wash is vulnerable to changes in water quality and quantity and that development including that within Witchford, could lead to potential effects on key vulnerabilities in combination with other residential allocations. The Screening Report identifies the potential for impacts on a European designated site or sites. It then comments on the fact that the allocations within the emerging Witchford Neighbourhood Plan are either permitted sites or on in one case, has been resolved to be permitted, subject to a Section 106 Agreement. That Agreement has been concluded and planning permission granted.

Paragraph 3.10 then goes on to state that because the potential effects arising from the Neighbourhood Plan policies for housing and employment have been considered through the planning process, i.e. they have already been granted permission or resolved to be granted permission in the case of the residential sites, the proposed allocations have all been assessed for Habitat Assessment impacts through the determination of the individual planning applications. This point is again repeated at paragraph 3.22 in the Summary of Likely Environmental Effects. Paragraph 3.26 suggests that to reappraise the likely effects of future development through SEA

and HRA is therefore a duplication of work previously undertaken. The conclusion therefore is that would not be a reasonable or proportionate response.

It is contended that the approach adopted in the screening report and the decision not to require the emerging WNP to be accompanied by an appropriate assessment of its environmental effects on European designated sites is fundamentally wrong as a matter of law.

The starting point in the consideration of any issue as to compliance with EU law relating to habitat assessment is Article 6(3) of Directive 92/43/EEC. The Directive talks of any plan or project, likely to have a significant effect on the protected site either individually or in combination with other plans or projects, shall be subject to appropriate assessment. Furthermore, in the EU case of Sweetman v Anboard Pleanala (C-258/11) the European Court quite clearly states that "likely" was set too high as a bar and that the possibility of an adverse effect on a protected site triggered the requirement for an appropriate assessment. Further that in assessing whether or not a plan will have a significant effect, as recognised in the screening report, mitigation cannot be taken into account in reducing the effects of the proposed developments to avoid appropriate assessment (People over Wind).

The mere possibility of adverse effects is also recognised in the Planning Practice Guidance at paragraph 002 reference ID:65-002-20190722 when it is stated "a risk or a possibility of such an effect is enough to warrant the need for an appropriate assessment".

The District Council has already concluded that residential developments within Witchford, both individually and in combination with other developments in Witchford as well as developments beyond Witchford could have adverse implications for a European designated site. On that basis and that basis alone that would trigger the need for the Neighbourhood Plan to be accompanied by its own appropriate assessment.

Furthermore whilst it is possible to utilise work done by other bodies including the District Council, the 2018 Habitat Regulation Assessment conducted by the Council in connection with its Local Plan does not actually specify the appropriate assessment undertaken or the likely impact on the integrity of the protected site, nor does it state the measures needed to be incorporated in order to safeguard the integrity of the European Designated Site under consideration, in respect of the Witchford proposals. All of this notwithstanding the clear recognition in Appendix 4 to the HRA that screening of the Witchford housing allocations, that mirrored the Neighbourhood Plan allocations, would have likely significant effects, whether alone or in combination with other projects.

In addition, the reasons advanced by the Screening Opinion for not undertaking an assessment, is the fact that the proposals have already received planning permission. That is simply not a basis for excusing the emerging Neighbourhood Plan for being assessed in terms of its impacts on European Designated Sites for a number of reasons.

Firstly it is noted that habitat assessment does not appear to have been screened or considered in the context of the previous grants of planning permission. Failure to carry out the relevant obligations in relation to appropriate assessment at the application stage for those applications creates an even greater onus to properly assess habitat impacts at the plan preparation stage.

Secondly even if the applications had been properly assessed in terms of habitat impact that does not then subsequently absolve the Council from conducting the appropriate assessment in connection with the Local Plan.

Thirdly any consideration of the application sites individually would not result in the same considerations as would apply to the emerging Neighbourhood Plan where all sites have to be considered for the purposes of both the Directive and the transposing regulations both in isolation and in combination with each other. The impacts and the consequences of those impacts will clearly differ as between a single project for which planning permission is sought and the entirety of the impacts from all of the proposals contained in the WNP. Consequently the same issues have not been addressed in respect of the planning applications to the extent required in the emerging WNP.

Once there is recognised to be the possibility of adverse impacts whether individually or in combination from the proposals in the plan, on European Designated Sites, then appropriate assessment must be undertaken in relation to the Plan. To screen out the need for that simply on the basis that permissions have already been granted, does not provide a legal basis for avoiding the requirements of both the Habitats Directive and the transposing Regulations.

Conclusions

The Council must get to grips with the nature and purpose of the WNP and whether or not it is a plan that allocates sites for housing or not. The ramification of that in housing land supply terms is fundamental as you will be aware. If these are allocations as claimed, then the approach set out in the WNP is fundamentally flawed for the reasons set out in this letter. If these are not housing allocations then they should be removed from the plan as such and the plan should be re-consulted on in light of those changes.

For the reasons set out in this letter we maintain that there are legal deficiencies in the preparation of the draft WNP and in particular with regards to the requirements of paragraph 8(2)(f) of Schedule 4B of the 1990 Act. This will prevent further progress with the Plan and will be raised with the Examiner if not addressed now before proceedings further with the WNP. Our clients will, if these issues are not addressed, challenge the validity of the WNP.

Yours faithfully

Howes Percival LLP

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Cc Witchford Parish Council