

1st May 2018

151509_180430_Neighbourhood Plan HRA Issues

Adam Luscombe

Team Lead, Strategy and Project Delivery

Torbay Council

By email only to adam.luscombe@torbay.gov.uk & future.planning@torbay.gov.uk

Dear Adam

Habitat Regulation Assessment Issue with the Neighbourhood Plans in the Torbay Council area

We are writing to you on behalf of our client, Abacus Projects/Deeley Freed Estates Ltd, the joint applicant for the proposed Inglewood development on land west of Brixham Road contained within the Brixham Peninsula Neighbourhood Plan (BPNP) area (ref. P/2017/1133). You will be aware that in addition to acting as Planning Consultant/Design Lead and EIA Coordinator for the application we have previously engaged in each round of formal consultation on the three neighbourhood plans which are proposed for the Torbay area; our misgivings regarding the plans are a matter of public record.

Whilst recognising that each of the neighbourhood plans is now the subject of examination, and that the formal period for making representations has passed, we are writing to raise what we consider to be a potentially significant issue relating to the manner in which the proposed plans have been 'Appropriately Assessed' under the Conservation of Habitats and Species Regulations 2010 (the Habitat Regulations).

My clients feel compelled to raise this concern with you in light of legal advice that they have received. The advice relates to a recent Judgement of the EU Court of Justice which, put simply, says that mitigation measures must not be taken into consideration when screening plans or projects for Appropriate Assessment; a copy of the legal Advice Note is enclosed for your information and is referred to herein as the 'People over Wind' or 'POW' case.

As noted, we recognise that the period for making representations on the neighbourhood plans has closed but nonetheless we are concerned that the recent judgement should be drawn to the Examiners' attention and its implications with respect to the neighbourhood plans considered. We are also mindful of the advice contained within the Neighbourhood Planning Independent Examiner Referral Service (NPIERS) *Guidance to service users and examiners* (1st Edition, March 2018), specifically paragraph 2.8.7 which recognises the need for examiners to maintain "*an independent stance*" which "*is not open to accusations of bias*". We note that the Guidance recommends that Examiners should refer any direct contact from third parties back to the local authority and so we thought it more appropriate to raise this with you rather than contact the Examiners directly ourselves. We also recognise that as the ultimate plan-making authority it is in any event the Council who is the competent authority under the Habitat Regulations.

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As such, this letter is addressed to you but we would respectfully request that you either forward it, or highlight the issues raised, to the Examiners of each of the three Neighbourhood Plans.

You will see that the Advice Note refers to the NPIERS Guidance and concludes that there is scope for the Council to request that the examinations be suspended¹ to enable full AA (including cumulative AA of the effect of the three NPs in combination) to be conducted and that not to do so could open the plan-making process up to challenge in respect of all three NPs.

The remainder of this letter sets out our specific concerns in relation to the draft Neighbourhood Plans in light of the recent ECJ judgement and the Regulation 16 representations submitted by Natural England (copies of which are enclosed). We would stress that this does not introduce new evidence but merely highlights issues with the evidence base which underpins the submitted neighbourhood plans and the manner in which it has informed their preparation. The points raised here follow those set out within our client's Regulation 14 and 16 representations along with the Council's own submission. For ease of consideration by the respective Examiners, comments are set out for each of the neighbourhood plans separately.

Brixham Peninsula Neighbourhood Plan (BPNP)

The BPNP submission is accompanied by a Habitat Regulations Assessment Screening document prepared by AECOM. This notes within Section 4 that a screening was undertaken and that this flagged those policies with potential HRA implications; this included the main allocation policies. Section 5 continues, noting that Policies J1 and BH3 have been considered for the potential for likely significant effects.

What is clear from the screening report is that there are a number of instances where assumptions have been made about the potential for impacts. Many of these do not appear to be based upon a full suite of Natural England compliant survey data; the importance of this is addressed later.

In particular, it is notable that Greena Ecological Consultancy work underpinning the screening indicates that:

“some sites (Greenway Road, Archery Field, Waterside Quarry, castor Road and Oxen Cove with Freshwater Quarry) will require further survey work in preparation for planning consent in order to establish the extent of site usage by Greater and Lesser horseshoe bats. Some sites identified in the plan (Greenway Road, Archery Field, Waterside Quarry, Oxen Cove and Freshwater Quarry) will likely require mitigation and biodiversity enhancement to comply with the standing wildlife legislation and local biodiversity plans.” (para 4 of Addendum Ecological Survey Report dated 31st July 2017 at Appendix D of the HRA Screening Report).

There are therefore clear questions as to whether there is sufficient information to screen allocated sites as not having the potential for impacts.

¹ As allowed for within paragraphs 2.13.7 – 2.13.10 of the NPIERS guidance

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Continuing, it is noted that section 5.1.2 of the Screening Report indicates those sites considered in more detail. However, in reaching conclusions, there is reliance upon mitigation measures in assessing sites, conflicting directly with the POW case. For instance, as is referred to in the legal Advice Note, in discussing Castor Road, it is stated that:

Appropriate design and mitigation should be put in place, including limiting light spill to no greater than 0.5 lux outside the boundaries of the new development.

And for St Mary's/Old Dairy, significant assumptions are made about the potential to secure compliant development:

Kestrel Wildlife recommends that this site is subject to a full suite of surveys from April to October inclusive, in line with the Natural England guidance for South Hams SAC; it is understood that the most recent suite of surveys in line with this methodology was undertaken in 2015. Kestrel Wildlife also recommends that all existing mature trees and hedge lines are retained and protected to provide commuting habitat features, and this is the expectation of the Parish Council; indeed the site presents opportunities for these features to be strengthened. There should be no light spill greater than 0.5 lux outside the boundaries of any new development, and effective mitigation measures would have to be provided to ensure no additional light spill, no loss of boundary features and retention of as much of the eastern part of the site as is necessary. The Neighbourhood Plan states that St.Mary's and Old Dairy in combination are proposed for the construction of 25 homes.

The re-development of the site (as seen in Figure 1 of HRA Site Appraisal Report of Torbay Local Plan Strategic Delivery Areas (Proposed Submission Plan): Addendum November 2014 (Kestrel Wildlife Ltd., 2014) should be undertaken at a suitable time of year to reduce disturbance to greater horseshoe bats.

Given that a large part of the site is existing hardstanding and buildings, and this will be the focus of new housing, it is considered that development could be delivered without a likely significant effect on the SAC provided the aforementioned policies in the Torbay Local Plan and Policy E8 of the Neighbourhood Plan are applied.

In the context of the POW judgement, this would indicate that mitigation has been considered at the screening stage which is contrary to the judgement.

Paignton Neighbourhood Plan (PNP)

In support of the PNP submission, a self-authored Sustainability Appraisal and Habitat Regulations Assessment Screening document has been produced. Reliance is placed on the protective policy in the Local Plan to screen out the need for appropriate assessment of the PNP.

It states at paragraph 4.22 that *"the package of measures and mitigations that resulted from the Local Plan HRA have provided the necessary safeguards in the Local Plan (as finally adopted) that make it unnecessary and disproportionate for a Stage 2 "Appropriate Assessment" of the Neighbourhood Plan*

to be undertaken." As noted in respect of BPNP, the reliance on mitigation measures in coming to this conclusion is contrary to the POW ruling.

Torquay Neighbourhood Plan (TNP)

As with PNP, TNP is supported by a self-authored Habitats Regulations Assessment Screening Report.

Paragraph 5.2 of the screening report discusses those sites within the TNP which may impact upon the South Hams SAC by virtue of proximity and potential disturbance to flyway corridors. It is noted that:

"There is a possibility of disturbance of flyways at Edginswell Future Growth Area. Greater horseshoe bats are particularly light sensitive and tend to avoid areas that are subject to artificial illumination. Increased lighting used for recreation and crime prevention that could result in alteration of street lighting regimes in areas used by bats".

And that:

"A landscape buffer would be required along the western edge of the Future Growth Area between any future built development and the A 380. This buffer would retain and create connective corridors. Provision of such a corridor would be consistent with the Local Plan Policy NC1."

It seems to us that the statements above make an assumption as to the provision of mitigation that might remove the potential for significant effects to occur. As noted above, the POW judgement would render this a procedurally unlawful position to take.

General Applicability

In highlighting the above points, we recognise that there are a number of instances where reference is made to reliance upon the Local Plan. This is understood given that the Local Plan has identified sites for potential inclusion within the relevant Neighbourhood Plan.

Our concern is the apparent overreliance on those Local Plan policies to adequately protect the range of protected sites across the Bay Area through the AA process. As is recognised by all, albeit the level disputed in some instances, there is a requirement placed upon each of the Neighbourhood Plans to support the delivery of the wider Torbay Council growth strategy, and critically, the level of housing and employment provided to deliver upon that strategy.

Therefore, as there is a presumption that the Neighbourhood Plans will provide site allocations, and in particular to secure a 5 year supply of housing for years 2017/18 – 2021/22, it is reasonable to expect that the three Plans will be suitably detailed and have been sufficiently assessed in Habitat Regulations terms to allow them to be relied upon. Failure to do so leaves each Plan, and the Council, vulnerable to challenge. Paragraph 47 of the National Planning Policy Framework notes that 'deliverable' sites are those that are available, suitable and achievable; it is expected that there should be sufficient information available and assessment made to ensure that sites, whilst acknowledging that they will

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be subject to further detailed assessment via a planning application, can actually be delivered during the 2017/18 – 2021/22 5 year period.

The details set out within the consideration of HRA matters for each of the three plans suggests that there remain significant questions, including in respect of survey data and mitigation, the effect of which is that the majority of proposed sites cannot reasonably be considered to be deliverable in the context of the Framework. Failure to secure this would significantly undermine the Local Plan and the Council's wider strategy to promote growth in the Bay area.

To provide a worked example, the situation is akin to the Council's decision during the Local Plan examination to reverse the proposed allocation of our client's land south of White Rock (now known as Inglewood) on the basis that there was inadequate survey detail to draw a conclusion that there would not be potential for a likely significant impact.

The POW judgement is clear that mitigation must be considered *after* an initial screening and not as an integral part and therefore this fundamentally brings into question the ability to rely upon the proposed allocations in the three Neighbourhood Plans.

If you would like to discuss this matter further please do not hesitate to contact me.

Yours sincerely,



Mike Harris, MRTPI

For
STRIDE TREGLOWN LIMITED

cc. Ailsa Delaney, Torbay Council Solicitor via Ailsa.Delaney@torbay.gov.uk
Enc. Natural England Regulation 16 Representations

**People Over Wind v. Coillte Teoranta - Case C-323/17
Judgment of the EU Court of Justice (Seventh Chamber) - 12 April 2018
Implications for Torbay Neighbourhood Plans**

1. I have been asked to advise on the implications of the recent decision of the EU Court of Justice on the case of *People Over Wind v Coillte Teoranta* ("POW") and in particular on whether the case impacts on the neighbourhood plan ("NP") processes that are underway in Torbay. This ECJ decision is applicable to the Habitats Directive 1992 ("Habitats Directive") and the Conservation of Habitats and Species Regulations 2010 ("Habitats Regulations") and the relevant UK law.
2. The principle arising from the POW judgment is that it is not appropriate to take account of measures intended to avoid or reduce the harmful effects of a plan or project (for shorthand I will call these "mitigation measures") when screening a plan or project for whether it requires appropriate assessment under the Habitats Directive.
3. The EU Habitats Directive is now implemented into English law by the Habitats Regulations. Regulations 102 and 102A of the Habitats Regulations provide as follows:

102 Assessment of implications for European sites and European offshore marine sites

(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.

102A Assessment of implications for European site: neighbourhood development plans

(1) *A qualifying body which submits a proposal for a neighbourhood development plan must provide such information as the competent authority may reasonably require for the purposes of the assessment under regulation 102 or to enable them to determine whether that assessment is required.*

(2) *In this regulation, "qualifying body" means a parish council, or an organisation or body designated as a neighbourhood forum, authorised for the purposes of a neighbourhood development plan to act in relation to a neighbourhood area as a result of section 61F of the TCPA 1990, as applied by section 38C of the 2004 Planning Act.*

(3) *Where the competent authority decide to revoke or modify a neighbourhood development plan after it has been made, they must for that purpose make an appropriate assessment of the*

implications for any European site likely to be significantly affected in view of that site's conservation objectives; and regulation 102 and this regulation apply with the appropriate modifications in relation to such a revocation or modification.

4. The process then in relation to NPs is that where a plan is likely to have a significant effect on a European site the local planning authority (being the plan-making authority) must conduct an appropriate assessment ("AA"). The screening process is the process by which it is determined whether a plan is likely to have a significant effect on a European site in the first place.
5. The POW case stipulates that it is not appropriate at the screening stage to take account of mitigation measures that are proposed (or assumed) will be put in place.
6. The appropriate time for taking mitigation measures into consideration is in the course of the AA process itself, the aim of which is to determine whether the plan will adversely affect the integrity of the European site in question. It is only if it is ascertained that adoption and implementation of the plan will not adversely affect the integrity of the European site that the plan may be adopted (save where there are imperative reasons of overriding public interest which as far as I am aware are not in play here).

Situation in Torbay

7. There are currently three proposed NPs within Torbay each of which are currently at the examination stage. The Brixham Peninsula Neighbourhood Plan ("BPNP") and the Torquay Neighbourhood Plan ("TNP") are each accompanied by a specific Habitat Regulations Assessment Screening Report while Paignton Neighbourhood Plan ("PNP") is accompanied by a document entitled Sustainability Appraisal Habitat Regulations Assessment Screening & Non Technical Summary. From my reading, each of these documents refer to taking mitigation measures into consideration at some point and in some form.
8. The TNP in particular has an Appendix C which presents a table entitled "Matrix of Housing Sites". In that table they set out mitigation and avoidance measures in the second column from the right, which are then taken into consideration in assessing whether AA is required as set out in the final right hand column, answering 'no' to each of them.
9. The PNP places reliance on protective policies in the Local Plan to screen out the need for appropriate assessment of the PNP. It states at paragraph 4.22 that *"the package of measures and mitigations that resulted from the Local Plan HRA have provided the necessary safeguards in the Local Plan (as finally adopted) that make it unnecessary and disproportionate for a Stage 2*

“Appropriate Assessment” of the Neighbourhood Plan to be undertaken.” The reference here to mitigations suggests that this has influenced their assessment to screen out AA of the plan.

10. The BPNP also refers to mitigation measures being taken into consideration. On page 30 under the heading "Castor Road" it states: *"Appropriate design and mitigation should be put in place, including limiting light spill to no greater than 0.5 lux outside the boundaries of the new development"*. Similarly under "St.Mary's/Old Dairy" it states: *"There should be no light spill greater than 0.5 lux outside the boundaries of any new development, and effective mitigation measures would have to be provided to ensure no additional light spill, no loss of boundary features and retention of as much of the eastern part of the site as is necessary"*.
11. The format of the BPNP screening report goes through an initial screening assessment followed by a more detailed assessment in relation to two sites. It is not clear in my mind whether this is still part of their screening assessment or if they have in fact moved on effectively to conduct a form of AA – albeit that the AA in legal terms needs to be conducted by the competent plan-making authority, i.e. the Council.
12. To the extent therefore that each of these draft plans takes mitigation measures into account in screening out the need for AA in relation to any policy or site allocation, or the plan as a whole, then the POW case says that this is inappropriate and challengeable. Any such screening should be carried out at face value without taking any mitigation measures into consideration and the plan should proceed to an AA if, from that screening, it seems likely that there may be significant effects on a European site. It should be noted that the AA itself is then conducted by the competent authority, not by the qualifying body.
13. It is only in the course of the AA itself that mitigation measures can be taken into consideration. During the course of that AA the Council as competent authority may require the qualifying body to provide whatever information it may reasonably require for the purposes of that assessment (per regulation 102A of the Habitats Regulations).

HRA Assessment and In Combination Effects

14. Each of the documents accompanying the NPs are titled as a 'Screening' report and I can see no evidence on the Council's website that they (as competent authority) have gone on to conduct an AA on each or indeed any of them. It is also important to note that the requirement on the plan-making authority is to ensure that each plan is not likely to have a significant effect on a European site ***either alone or in combination with other plans or projects***¹ (my emphasis). **It is**

¹ Habitats Regulations 2010, regulation 102(1)(a)

important that the Council as competent authority is satisfied therefore not only that the NPs have been assessed individually but cumulatively as well.

15. While each of the draft NPs' HRA screening reports present an in combination assessment of the NP with other relevant local plan documents, I cannot see that any of them conduct any kind of assessment of the impacts of their neighbourhood plan in combination with the other two neighbourhood plans that are being proposed. As the competent plan-making authority, the Council does need to carry out that exercise.
16. To assist the Council in conducting its assessments it is entitled to ask the relevant qualifying body to provide such information as it reasonably requires. The obligation is then on the qualifying body to provide such information. The duty on them to do so is in regulation 102A(1) of the Habitats Regulations 2010.
17. To the extent that this process has not been complied with, Torbay Council should consider rectifying this as soon as possible.
18. In any event it would appear that the NPs have each taken mitigation measures into consideration in some shape or form in screening their plans, contrary to the dictum in the POW case.
19. Certainly under the NPIERS Guidance² there is scope for the local authority to request that the examinations be suspended to enable the AA (including cumulative AA of the effect of the three NPs in combination) to be conducted. In my opinion not to do so would open the plan-making process up to challenge in respect of all three NPs.

I trust that the above is clear but if you would like to discuss anything or require any clarification please contact me on the details below.

01 May 2018

Anne Harrison
Legal Director (Barrister)

██████████
████████████████████

² See in particular paragraphs 2.13.7 to 2.13.10

Date: 10 January 2018
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Dear Mr Luscombe

Planning consultation:

Brixham Neighbourhood Plan: Submission Plan, Habitats Regulations Assessment (HRA) and Strategic Environmental Assessment (SEA)

Thank you for your consultation on the above dated 01 November 2017

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

Natural England welcomes the preparation of the Neighbourhood Plan and the supporting Strategic Environmental Assessment (SEA). We have a number of comments on the Plan and associated SEA Report which we hope you will find useful. These are set out below.

Allocated housing Sites (Policy BH3 – Delivery of New Homes) and Employment Sites (policy J1 – Employment Land).

For sites at St Marys/Old Dairy (H3-I2), Oxen Cove/Freshwater (H3-I6)/(J1-2) and Castor Road (H3-I9) the HRA makes specific recommendation regarding mitigation measures. These are set out in section 5.1.2 of the Habitats Regulations assessment report. We advise that the need for mitigation and suggested measures as set out in the HRA be reflected within the accompanying SEA assessment for these sites. For instance for the site at St Marys/Old Dairy the HRA identifies the need to ensure there is no additional light spill, no loss of boundary features and retention of as much of the eastern part of the site as is necessary. This should be reflected in the SEA. It is noted that adopted Torbay Local Plan policy NC1 already makes specific requirements regarding development likely to have a significant effect on the South Hams SAC including a requirement to maintain light levels at 0.5 Lux and to protect existing hedgerows that surveys show are being used as bat flyways.

Policy E1: Natural Environment

E1.1. reference should be made to geodiversity as well as biodiversity interests.

E1.2. Where specific designations are referred to a distinction should be drawn between those designated for their biodiversity/geodiversity or landscape interest. A Special Area of Conservation (SAC) is a high quality conservation site designated under the EC Habitats Directive whilst a National Nature Reserve (NNR) is a site of national biodiversity/geodiversity interest. E1.2 appears to be focussed on landscape designations so we question whether it is appropriate to include SACs or NNRs here. Such designations would seem to fit more comfortably under policy E8:

“International and nationally important ecological sites and species”.

E1.3. Neighbourhood Plan policies must comply with the National Planning Policy Framework (NPPF) and the Torbay Local Plan. By referring to other documents such as policies prepared by the National Trust or organisations such as ‘Green Balance’ there is a risk of providing conflicting policy advice. There is no NPPF requirement for development to be in accordance with policy prepared by these organisations. The Neighbourhood Plan may propose policy reflecting the views/policy of those organisations but will need to ensure such policy proposals reflect the NPPF and Torbay Local Plan.

Policy E8: Internationally and nationally important ecological sites and species

Policy E8 gives the same weight to designations of International and national importance and therefore does not accord with the NPPF (para 113). The Neighbourhood plan may wish to rely on adopted Torbay Local Plan policy for protection of designated biodiversity/geodiversity interests rather than repeat generic policy in the Neighbourhood Plan.

We would be happy to comment further should the need arise but if in the meantime you have any queries please do not hesitate to contact us.

For any queries relating to the specific advice in this letter only please contact Carol Reeder on 0208 225 6245/07721 108902 or carol.reeder@naturalengland.org.uk. For any new consultations, or to provide further information on this consultation please send your correspondences to consultations@naturalengland.org.uk.

Yours sincerely

Carol Reeder
Lead Adviser
Sustainable Development Team – Devon, Cornwall & Isles of Scilly

Date: 10 January 2018
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BY EMAIL ONLY

Dear Mr Luscombe

Planning consultation: Paignton Neighbourhood Plan: Submission Plan

Thank you for your consultation on the above dated 01 November 2017

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

Natural England welcomes the preparation of the Neighbourhood Plan. Our only comment relates to the extent to which the Neighbourhood Plan allocates sites for development. From the submission document it would appear that there are no site allocations. On that basis we have no comments to make. Where a site is allocated the plan should include a plan of the allocated site on an Ordnance Survey base map and a corresponding policy to identify the site as an allocation and set out, as necessary, any development management criteria. Specific site allocations must also be subject to screening as part of a Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA). The Neighbourhood Plan refers to sites already identified in the adopted Torbay Local Plan. It is our understanding that the Local Plan anticipates that sites will be allocated within the Neighbourhood Plan to meet housing delivery needs. Clarification is therefore sought on the degree to which the Neighbourhood Plan is compatible with the Local Plan.

We would be happy to comment further should the need arise but if in the meantime you have any queries please do not hesitate to contact us.

For any queries relating to the specific advice in this letter only please contact Carol Reeder on 0208 225 6245/07721 108902 or carol.reeder@naturalengland.org.uk. For any new consultations, or to provide further information on this consultation please send your correspondences to consultations@naturalengland.org.uk.

Yours sincerely

Carol Reeder

Date: 10 January 2018
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Dear Mr Luscombe

Planning consultation:

Torquay Neighbourhood Plan – Submission Plan and accompanying Habitats Regulations Assessment (HRA) and Sustainability Appraisal (SA).

Thank you for your consultation on the above dated 01 November 2017

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

Natural England welcomes the preparation of the Neighbourhood Plan and the supporting Sustainability Appraisal (SA) and Habitats Regulations Assessment (HRA). We have a number of comments on these documents which we hope you will find useful. These are set out below.

Policy H19, development envelope and associated allocations at Maidencombe

Plans relating to Maidencombe on page 64 show portions of land identified as development areas 2, 3a and 3b. However there appears to be no specific policy relating to these areas.

The Maidencombe Village Envelope and associated site allocations lies within a strategic flyway for the Greater Horseshoe Bat (associated with the South Hams Special Area of Conservation (SAC). The Strategic flyways are identified in Natural England's planning guidance for South hams SAC ("South Hams SAC: Greater Horseshoe Bat Planning Guidance, June 2010). Any allocations within this area need to be assessed as part of the Habitats Regulations Assessment (HRA) and subject to Strategic Environmental Assessment (SEA). We could find no reference to this specific allocation within the HRA or SA.

We recognise that policy E9 sets out requirements in relation to the Maidencombe area but it is important that policy is clearly evidenced through the HRA & SA.

Housing sites. Although plan text on page 19 states that the list of allocated housing sites is set out in Appendix 1 there does not appear to be a policy specifically identifying the sites for inclusion within the Neighbourhood plan. In addition the HRA (Appendix C: Screening Matrix of housing sites) makes one assessment for "the 3979 sites in Torquay". This is confusing since the Torquay Neighbourhood Plan (Appendix 1/Table 3) appears to identify 55 which together would make provision for 1233 dwellings (Appendix 1/Table 1). The Neighbourhood Plan must be clear about the sites allocated for housing. The Sustainability Appraisal does assess individual housing sites but there appear to be fewer sites assessed that shown in Neighbourhood plan Appendix 1. Table 3.

Clarification on this matter is sought.

Policy J1 designated employment sites TNPE 04 (Edginswell and TPNE 05 (Kerswell Gardens).

These two allocations lie within the strategic flyway for the Greater Horseshoe bat associated with the South Hams SAC. As for prospective allocations at Maidencombe, allocations TNPE04 and TNPE05 will need to be referred to specifically and assessed as part of the HRA. Currently the HRA assesses the Edginswell Future Growth Area (FGA) (HRA Appendix D). Whilst the FGA includes sites TNPE04 & TNPE05, it is our understanding that the FGA is not a Neighbourhood Plan allocation. Clarification within the HRA on this matter is sought. Any mitigation required in relation to allocated sites should also be reflected in the Sustainability Appraisal, and in Plan policy (unless specifically addressed under Torbay local plan Policy NC1).

In addition the assessment under “mitigation and avoidance measures” in the HRA Appendix C does not appear to reflect the mitigation hierarchy and the need to avoid or mitigate impacts and consider compensatory measures as a last resort (National Planning Policy Framework (NPPF) para 118). The text states that consideration should be given to seeking biodiversity off-setting for loss of foraging habitats and hedgerows. This would appear to pre-empt conclusions from future bat surveys and the requirement that impacts are first avoided or mitigated and as a last resort compensated for. Compensatory measures would only be a consideration where there are no alternative solutions and a proposal must be carried out for imperative reasons of overriding public interest (Conservation of Habitats and Species Regulations 2017). It is suggested that the HRA assessments for TNPE04 and TNPE05 are re-visited.

Policy J1(8) allocated employment site at Lummaton Quarry

Lummaton Quarry is designated as a Site of Special Scientific Interest (SSSI) and therefore the proposed allocation needs to be assessed, as part of the Sustainability Appraisal (SA) to ascertain whether there are likely to be significant effects on the designation. Para 7.3 within the SA does mention this site but an assessment in line with Strategic Environmental Assessment (SEA) requirements does not appear to have been undertaken. When this has been completed any measures required to mitigate impacts on the SSSI and revealed as part of the SEA process should be set out within policy criteria for this site. It is noted that Lummaton Quarry already has an employment use on the site. It would therefore be useful if clarification could be provided on Neighbourhood Plan proposals at this site.

Policy E1: Protection of SSSIs

This policy does not appear to comply with NPPF policy regarding SSSIs (NPPF para 118). There is no general exception in national policy to allow development likely to cause harm to an SSSI because that development is within the footprint of an existing building or surface structure. To avoid confusion regarding generic policy for protection of SSSIs it may be better to rely on existing adopted Torbay Local Plan policy.

We would be happy to comment further should the need arise but if in the meantime you have any queries please do not hesitate to contact us.

For any queries relating to the specific advice in this letter only please contact Carol Reeder on 0208 225 6245/07721 108902 or carol.reeder@naturalengland.org.uk. For any new consultations, or to provide further information on this consultation please send your correspondences to consultations@naturalengland.org.uk.

Yours sincerely

Carol Reeder
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