



MATTER 1

RESPONSES OF LOUGHTON TOWN COUNCIL (“LTC”)

ISSUE 1

National Policy and Advice

1. There is an inconsistency between policy SP6 District Open Land (Plan p 51) and NPPF (ed. 12.03.12) paragraphs 76 – 78 Local Green Space.
2. DOL purports to be LGS (paragraph 2.144), but:
 - (a) only ex-Green Belt land is designated as DOL¹, the justification being to prevent the alteration of the Green Belt boundary resulting in “holes” in the Green Belt; and
 - (b) the definition or characteristics of DOL (SP6B) are not consistent with those of LGS (NPPF paragraph 77), in particular the statement in the policy itself that *“it is not necessary for each of these characteristics [of DOL] to be present”* is inconsistent with NPPF paragraph 77 that all the criteria there set out should be present.
3. Policy SP6B should accurately reflect NPPF paragraph 77.² Thereafter, a proper inquiry should be made as to which areas are suitable to qualify as LGS, rather than simply allocating small areas of ex-Green Belt land. The policies map should show Jessel Green as LGS (or DOL if that nomenclature is to be retained) since Jessel Green complies with all the requirement of paragraph 77 of NPPF.

¹ There are only three small areas of DOL identified on the Policies map – THOR R2, CHIG R9 and a parcel in North Weald: see also p. 229 of the Plan.

² See paragraphs 99 – 101 of the latest edition of the NPPF. There is little material difference between the 2012 and the latest version as regards LGS.

ISSUE 2

Questions 2 (d & f) & 3

1. Neither in the August 2010 Community Strategy nor in the July 2012 “Issues, Options & Community Choices” document (EB131) was Jessel Green shown as suitable for housing development. Indeed, the latter document at paragraph 3.13 called for protection of green spaces at Loughton. The Community Choices consultation period was from 30th July 2012 to 15th October 2012, which was inconvenient given that it fell over the summer holiday period.
2. The 2016 Site Selection Report (EB801 & EB801Gviii)) for the first time showed Jessel Green as a potential site for 321 houses. The report, under the rubric “Community Feedback”, correctly noted that *“The Council did not consult on a growth location which covers or is near to this site.”*
3. The draft Local Plan of 2016 (EB123) included the allocation of Jessel Green as a housing site with 195 dwellings. The 2017 draft Local Plan Consultation Report (EB122) indicated substantial opposition to the Jessel Green site and to the loss of public open space in Loughton. Proposed site SR-0361, (Colebrook Lane / Jessel Drive Amenity Open Space) received significant objection, including objection from LTC. The Report noted that *“Respondents expressed opposition to the loss of managed public open space in Loughton, which was stated to be very important to the local community in maintaining their quality of life; improving health and also providing residents with an opportunity to socialise and exercise. 228 respondents specifically disagreed with the redevelopment of Jessel Green, with residents also calling for it to be given village green status.”*

4. In the circumstances, there was a legitimate expectation on the part of LTC that Jessel Green might well be removed from the Submitted Local Plan. As it transpired, it was not removed, but remained as a housing allocation albeit with a reduced number of dwellings.

5. Representations to the submitted version were to be made between 18th December 2017 and 29th January 2018 (inconveniently over the Christmas period). The submission version of the Local Plan was allegedly supported by the 2017 Site Selection Report (EB802B) but significantly without Appendix B to that Report which set out the reasons for the selection of the allocated residential sites in Loughton, including Jessel Green. At paragraph 2.137 the SSR noted, in relation to Loughton: *“allocations amended and overall quantum of development reduced on managed open spaces in response to representations to the Draft Local Plan and additional urban brownfield sites promoted in 2017.”*

6. Appendix B was only added to EPDC’s website on or about 14th March 2018, well after the end of the period for making representations. Its absence made it difficult for LTC to understand the reasons for Jessel Green’s continued inclusion as an allocated housing site³ and hampered LTC’s ability to make informed decisions on, and cogent representations to, the Plan.

7. That problem was compounded by the fact that the Open Space Strategy (EB703) was available only in November 2017. The qualitative assessment of Jessel Green at 55% was, and is, strongly challenged. There are a number of other inaccuracies in the Strategy.

³ In any event, the scoring system in the SSR is very obscure.

8. We submit that the following provisions of the SCI are relevant to the Inspector's questions:
- (a) Paragraph 7: *"Both the Local Plan and the supporting studies will be available to view on the Council's website."* Appendix B was not available at the appropriate time.

 - (b) Paragraph 8: *"There are a number of studies which are used as background evidence to the main Local Plan document. The studies are used to help guide the policies that are going to be in the final document and perhaps identify options that are not feasible. These will be available from the Council offices or on the Council's website when they are finalised."* It is simply not acceptable blandly to assert that Appendix B was not available because it was being finalised and would be published when completed. Appendix B should have been finalised and available for consideration prior to the time for representations. If it could not be finalised, and no credible explanation for the failure has been given, then the submission of the Plan and/or the beginning of the time for representations should have been delayed.

 - (c) Paragraph 29: *"The period for representations on the 'soundness' of the plan is 6 weeks.... Any representations should be based on why the document is unsound and the changes that are needed to make it sound."* The necessary implication of that paragraph is that those documents material to understanding the reasons for policies in the submitted Local Plan, and in particular the site allocations, would be available to those wishing to make representations in order to enable such representations to be cogent and based on available evidence and studies.

ISSUE 5

Introduction

1. The preventive measures of Article 6 of the Habitats Directive fall into two stages:
2. First, the screening stage.
 - (a) The decision maker is required to ask itself whether the plan is likely to have a significant effect on the SAC.
 - (b) The test is set at a low level. “Should we bother to check?”⁴
 - (c) The question is simply whether the plan or project concerned is capable of having an effect. Is there a probability or risk?⁵ There is no need to establish such an effect. It is merely necessary to determine that there may be one.⁶
 - (d) The precautionary principle applies at this stage (as indeed it does in the subsequent stage). A risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned.⁷
 - (e) The requirement that the effect in question should be “significant” exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded.⁸

⁴ **Sweetman and others v An Bord Pleanála** [2015] Env LR 18, AG’s opinion at [50] (hereinafter “Sweetman”).

⁵ **People Over Wind & Sweetman v Coillte Teoranta** [2018] Env LR 31 at [34] (hereinafter “POW”).

⁶ **Sweetman** AG’s opinion at [47].

⁷ **POW** at [34]

⁸ **Sweetman** AG’s opinion at [48].

- (f) Mitigating measures should not be considered at the screening stage. The fact that mitigating measures are required presupposes that it is likely that the site is affected significantly.⁹

3. Second, the Appropriate Assessment Stage

- (a) If a positive answer is given at the screening stage, then the decision maker must next consider whether the plan will adversely affect the integrity of the site concerned.
- (b) in order for the integrity of a site not to be adversely affected, the site needs to be preserved at favourable conservation status.¹⁰
- (c) The threshold of the second stage is noticeably higher than that of the first stage.
- (d) The appropriate assessment must not contain lacunae but has to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site.¹¹ The material date is the date of adoption of the decision authorising implementation of the plan.¹²
- (e) The precautionary principle applies where there is uncertainty as to the existence or extent of risks. If doubt remains as to the absence of adverse effects, authorisation must be refused.¹³
- (f) There is a distinction drawn between protective measures that form part of a plan and that aim to avoid or reduce any direct adverse effects on the

⁹ POW at [35] – [37] & [40].

¹⁰ Grace v An Bord Pleanála [2018] Env LR 37 at [34] (hereinafter “Grace”).

¹¹ Hilde Orleans v Vlaams Gewest [2017] Env LR 12 at [50] (hereinafter “Orleans”).

¹² Grace at [41]

¹³ Sweetman AG’s opinion at [51].

integrity of a site and compensatory measures that compensate for or offset the adverse effects of the plan on the integrity of a site. Regard may be had to the former as part of the appropriate assessment, but not to the latter, which are relevant only to the derogation stage of Article 6 (4).¹⁴ But, *“it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out.”*¹⁵

Question 1

4. LTC answers this question “no”. The HRA is fundamentally flawed.
5. At paragraph 9.1 of the HRA, AECOM concluded that *“the Submission Version of the Epping Forest District Local Plan will not result in a likely significant effect, either alone or in combination, upon any European sites.”* It is clear from that wording that AECOM answered the overarching screening question in the negative and therefore did not recommend undertaking an appropriate assessment (at least so far as the Loughton allocations were concerned).
6. But, in arriving at that conclusion, AECOM expressly took account of “mitigation measures” during the screening stage (see in particular paragraph 2.5 of the HRA.) That is not permissible: see paragraph 2 (f) above.
7. Taking as examples LOU. R4 and R5, removing from consideration the allegedly mitigating measures (see paragraph 5.3 and 5.39 of the HRA) of financial contribution to access management and monitoring of visitors to the Epping Forest SAC and the provision of additional or improved open space means that the identified impact of increased recreational pressure on Epping Forest SAC would inevitably constitute a significant effect on that site.¹⁶ That is particularly so when

¹⁴ **Grace** AG’s opinion at [58], specifically adopted at [47] of the judgment.

¹⁵ **Grace** at [51].

¹⁶ That would appear to be accepted: see paragraphs 11 and 27 of the Interim SAMMS.

consideration is given to the precautionary principle. In those circumstances, AECOM should have concluded that an appropriate assessment was required (at least for the Loughton residential allocations). None was undertaken.

8. However, it is questionable whether what AECOM appears to regard as mitigating measures are really mitigating measures. The provisions relating to financial contribution to access management and monitoring of visitors to the Epping Forest SAC are opaque in the Plan itself. Further detail is provided in the Interim SAMMS but:

(a) As to Strand 1a & 1b:

- The “mitigation measures” are not incorporated into the Plan.
- There is no evidence that they would avoid or materially and significantly reduce the adverse effects of the Plan on the integrity of the SAC, particularly by way of increased recreational pressure.
- The Strategy is not final, only interim: see paragraph 29.
- Many of the suggested measures would not be immediately implemented but only at a future date and when appropriate financing has been obtained.

(b) As to Strand 2, the suggested measures are simply evidence gathering, rather than mitigating measures.

9. As for the requirement to provide SANGS, that requirement is neither quantified nor is the location of such open space identified either in the Plan or in the Interim SAMMS. The benefits of such provision are therefore impossible to foresee with the required degree of certainty: see paragraph 3 (f) above. The Inspector must be in a position to “consider secured mitigation and evidence about its effectiveness”.¹⁷

10. In conclusion, we ask: where is the positive statement that the Plan will not adversely affect the integrity of the SAC?

¹⁷ **R (Langdon) v SEFRA** [2018] EWHC 2190 (Admin) 95 (underlining added).

Question 2

11. LTC responds only to those questions affecting its interests:

- (c) & An appropriate assessment must be undertaken of the effect on Epping Forest
- (d) SAC of the Loughton housing allocations, using up-to-date data and based on the revised ZOI.
- (e) No, it has not been: see paragraph 6 above. Yes, it should have been, subject to the qualification at paragraph 3 (f) above.
- (f) No, it is not justified. It is the effect of the Plan itself on the SAC that must be analysed. Deferring consideration would result in the present assessment containing lacunae, not containing complete, precise and definitive findings and being incapable of removing all reasonable scientific doubt as to the effects of the Plan on the SAC. Sufficient SANGS must be identified and secured through the Plan.
- (g) No. The Mitigation Strategy requires the authorities to monitor any impact on the environmental quality of the SAC, and to introduce mitigation measures where these are necessary. That approach pre-supposes the probability of some unascertained adverse effect on the integrity of the site. It puts the cart before the horse, calling for authorisation of the Plan before reaching any or any final conclusions as its impact upon the SAC. See also paragraphs 9 & 3 (f) above.
- (h) Note that there is no reference to “mitigation” either in the Directive or the Regulations. The ECJ refers to “protective” and “compensatory” measures¹⁸ and see paragraph 3 (f) above. It is not possible to ascertain, and therefore to

¹⁸

Grace at [25] & [26]

evaluate the effectiveness, of the type of mitigation envisaged for each type of likely significant effect.

- (j) A mitigation strategy must be finalised and then considered as part of an appropriate assessment before the Plan is adopted:
 - (i) Yes - essential.
 - (ii) The strategy must be completed. Otherwise how can an appropriate assessment be undertaken?

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