

Issue 1 – Have the relevant procedural and legal requirements been met, including the duty to co-operate?

Introduction

1. This Hearing Statement is prepared on behalf of Canon Woods and Orchard Action Group (CWOAG). JBPA submitted representations on behalf of CWOAG in response to the Ashford Local Plan 2030 Regulation 19 Consultation in August 2016. These included:
 - A representation on the adequacy of public consultation carried out in the preparation of the Local Plan (Representation on Paragraph 2.6), informed by an Opinion provided by John Pugh-Smith, Counsel, of 39 Essex Chambers. This concluded that the Council had failed to meet the requirements of its Statement of Community Involvement (SCI).
 - A representation challenging the soundness of the proposed allocation of Land to the north of Willesborough Road, Kennington as a strategic residential development (draft Policy S2).
2. JBPA submitted further representations in response to the Regulation 19 ‘Main Changes’ consultation in August 2017. This included a representation on Main Change 9 (concerning changes to Policy S2), which explained that the changes proposed did not address the numerous issues raised in our original representations.
3. In this Statement we respond to two of the Inspectors Issue 1 questions, which are relevant to matters raised in the above representations.
 - i) **Is the Sustainability Appraisal (SA) (SD02) undertaken suitably comprehensive and satisfactory and has it sufficiently evaluated reasonable alternatives?**
4. In our representation on Policy S2, we provide a review of the Sustainability Appraisal’s scoring of site references KE2 and KE3, which combined form the allocation set out in Policy S2. Whilst we appreciate that the Inspectors do not wish to discuss site specific issues until the Issue 12 hearing session, we consider it important to highlight the inconsistencies that we have noted in the scoring of sites KE2 and KE3 when compared with other ‘Urban Edge and Strategic Sites’ assessed

in Appendix 3c of the SA. These inconsistencies are identified in footnotes 5 to 10 of our representation on Policy S2.

5. In footnotes 5 and 8, we note that the SA has scored other sites (-1) that have the potential to affect the setting and views from the AONB, such as KE1 and KE4. KE2 and KE3 are scored 0, with the SA concluding they are “**not within or adjoining North Downs AONB**”. This does not accord with Policy S2 of the submission version of the Local Plan which includes an acknowledgement at paragraph 4.17 that “**The Kent Downs AONB lies approximately 1km to the north of the site. In order to minimise any impact on views from the AONB a Landscape and Visual Impact Assessment should be carried out...**” [emphasis added].
6. In footnotes 6 and 10, we note that the SA has scored other sites (-1) that are located within a mineral safeguarding area (MSA)¹, such as KE1. The SA acknowledges that both KE2 and KE3 are also located within a MSA, yet inexplicably scores these sites 0.
7. In footnote 7, we note that the SA has scored other sites (-1) that are located close to a Local Wildlife Site, such as BO1 and NW3. The latter receives this score as it is located 250m from the Great Stour Local Wildlife Site (LWS). The SA notes that KE3 is located within 100m of the same LWS yet scores the site 0. We note that the SA suggests the Policy S2 development would have limited impact on the LWS because it is on the other side of the railway line, however, this complete ignores the quantum of development proposed and the requirements of Policy S2 for enhanced public access across the railway line.
8. Lastly, in footnote 9, we note that other sites located next to the railway and the A2070 are scored (-1), yet KE3 scores 0 even though it is faced with the same constraints.
9. Notwithstanding the further points made in our representation where we consider that the assessment of impacts has been understated within the SA, if KE2 and KE3 were scored on a consistent basis with other sites then they would have received scores of -4 and -5, instead of -2 and -1 respectively.

¹ As designated by the Kent Minerals and Waste Local Plan (adopted July 2016)

10. The SA is therefore not satisfactory as it does not score sites on a consistent basis. In view of the weight given to the findings of an SA in influencing the development of Local Plans, CWOAG is extremely concerned that decisions have been made with respect to the allocation of sites based on a flawed assessment.
 - iv) **In preparing the Local Plan has the Council complied with its Statement of Community Involvement (GBD14)?**
11. Enclosed as Appendix 1 to our representation on Paragraph 2.6 of the Plan is an Opinion provided by Mr John Pugh-Smith, Counsel, of 39 Essex Chambers. In view of concerns raised by CWOAG with respect to a lack of awareness of the proposed allocation S2 until the consultation on the Regulation 19 Pre-Submission Local Plan, Mr Pugh-Smith was instructed to advise on the legality of the consultation approach taken by Ashford Borough Council in preparing its Local Plan.
12. Having completed this review, Mr Pugh-Smith is of the view that the Council has, in preparing its Local Plan, failed to meet the requirements of its adopted Statement of Community Involvement (SCI). In consequence, Mr Pugh Smith, concludes that the Plan is legally “unsound”.
13. Mr Pugh-Smith’s Opinion is already before the Inspectors (accompanying our representation on Paragraph 2.6), and we therefore do not repeat its content in full here. We instead highlight Mr Pugh Smith’s specific findings concerning the Council’s divergence from its SCI when preparing the Local Plan.
14. In paragraphs 3 to 9 Mr Pugh-Smith explains the legal requirements relating to consultation, noting at paragraph 7 that **“the publication of a Statement of Community Involvement under section 18 of the 2004 Act creates a procedural legitimate expectation that it will be followed (see e.g. R(Majed) v London Borough of Camden [2009] EWCA Civ 1029).”**
15. In paragraphs 10 to 27, Mr Pugh-Smith summarises the course of action taken by the Council, noting at paragraph 20 that the Council’s adopted SCI **“envisages a “traditional” plan preparation process of formal consultation documents, including versions of the Local Plan being produced at both the Regulation 18 and 19 stages of plan production, and these being made available during a**

public consultation on the Council's website, with the opportunity for all to submit representations".

16. This did not happen. No Regulation 18 version of the emerging Local Plan was published, and only limited opportunity was provided for residents in the Kennington Ward to obtain information and provide comments on the submitted sites during the Regulation 18 stage (i.e. a 2 hour event on a Saturday morning in April 2014).
17. Mr Pugh-Smith explains at paragraph 29 that "**this cannot be considered to be an effective form of engagement, as demonstrated by the lack of knowledge of the proposals amongst CWOAG members until the publication of the current Regulation 19 version of the draft Local Plan. In short, inadequate public consultation took place; and, as a matter of public law, the procedural expectations of the SCI have not been met.**"
18. Therefore, in answer to the Inspectors' question, it is clear from the above that the Council has not complied with its adopted SCI.
19. The consequences of this are that early and meaningful engagement with the public² did not take place. Had the Council consulted on a Regulation 18 version of the Local Plan, as was planned by its adopted SCI, then the representations made at this stage could have seen the plan take a different direction, and one that is more reflective of a collective vision and agreed priorities for sustainable development in the District. By the time CWOAG became aware of the emerging Local Plan at the Regulation 19 stage, the Council had already established its development strategy and the sites that would deliver growth over the Plan period.
20. Fundamentally, the Council has not met the requirements of Section 19(3) of the Planning and Compulsory Purchase Act 2004 which requires that "**in preparing the local development documents (other than their statement of community involvement) the authority must also comply with their statement of community involvement.**"

² A requirement of paragraph 155 of the NPPF and Article 6(2) of the Council Directive 2001/42/EC ("the SEA Directive")

21. With respect to overcoming this issue, we consider that the only course of action available is for the plan to be withdrawn and for the Council to return to the Regulation 18 stage of plan preparation. In doing so, it should ensure that it complies with its SCI and provide early and effective opportunities for the public to express an opinion on a draft plan, before proceeding to the Regulation 19 stage.
22. Having reviewed the Council's Regulation 22(c) Statement: Part 2 (Examination Document SD05), we note that the Council has responded to our Regulation 19 representation on page 11 of Appendix G. This states that the "**Council has sought its own legal advice on the issues raised and is content that the process followed has been sound. There is no requirement for a separate 'Regulation 18' version of a Plan to be published and the extent of local consultation and information since the start of the process has constituted a robust approach to meeting Regulation 18. There is little doubt that residents were aware of the sites submitted under the call for sites process as these were the subject of specific local events and were published on the council's website for information."**"
23. To inform the preparation of this hearing statement, we contacted the Council on 22 March 2018 and requested to see the legal advice it has obtained. We were informed that the advice was not part of the published evidence base, and that Officers did not have the time to locate the advice and share it with us before the 27 March 2018 deadline for submission of this statement.
24. As the advice it received is clearly of importance to the discussion on Issue 1, we consider it essential that it is made publicly available in good time before 11 April 2018. We submitted a request to the Council on 23 March 2018 for the advice to be provided under the Freedom of Information Act. However, with the 20-day response period extending beyond 11 April 2018, there is a prospect that the information request will not be released in time. We therefore, respectfully request that the Inspectors ask the Council to add this advice to the Examination Library as soon as possible so that it can be taken fully into account when discussing the issue at the Examination.
25. Failing the prompt disclosure of this important material we will be asking that Session 1 be postponed or adjourned part heard to a later date when Counsel can attend too.



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