



Medway Core Strategy Examination 2013

Hearing on 22nd and 23rd May

Closing Statement on behalf of Medway Council

1. The Council's case and evidence on the matters and issues identified by the inspector are set out in the hearing statement. In this closing submission I will not repeat the evidence contained in the hearing statement.
2. These submissions are made in note form, and full citations of relevant legislation is not provided, so as to comply with the inspector's 3,000 word limit.
3. Medway Council and others have striven to promote development that will assist the area to restructure its economy following the loss of its traditional employment base as a result of the closure of Chatham Dockyard and to attract higher value economic activities and to encourage residents to contribute to those activities.
4. Following considerable success in attracting higher education facilities, Medway is now in a position to attract higher value, and knowledge based enterprises to the area, but will only succeed in doing so if it can create the right environment.
5. The Lodge Hill scheme offers an opportunity to create a new community which will combine housing and business uses. This will include a business park of a scale and quality demanded by higher added value users. There is no other site or sites in Medway capable of delivering the economic benefits which will flow from the Lodge Hill proposal and will better both Medway and Thames Gateway.
6. Furthermore, the Lodge Hill proposal will make a major contribution to the area by addressing the social needs of Medway's most deprived rural communities across the Hoo Peninsula. It will provide new health, education facilities, create new job opportunities and improve access through public transport initiatives. Because of its scale, critical mass and location Lodge Hill is the only credible growth option to meet the Peninsula and Medway's needs.
7. Those opposed to the Lodge Hill development draw attention to the fact that it would be unusual to allocate land which is notified as a SSSI for development¹. However objectors do accept there is no absolute prohibition on development in a SSSI².
8. In that case it is important to bear in mind the following four main factors which distinguish this case:
 - a. The Lodge Hill allocation offers the only opportunity in the plan area to achieve long sought social and economic objectives;
 - b. Given the characteristics of Nightingales and their habitats (and of MG5 grassland), it is feasible to provide replacement habitat³.
 - c. In NE's view, as expressed at the examination and repeated in paragraph 8 of their closing statement, is that the compensation proposals for the Nightingale habitat have a good chance of succeeding, and (at paragraph 9) that species rich grassland could be created.
 - d. The time lag between removing existing habitat and providing compensatory habitat is not, in NE's view⁴, as expressed at the examination a barrier to providing compensatory measures.

¹ E.g. Peter Court Closing, paragraph 24

² E.g. RSPB Closing 2nd page

³ EX 60: BTO Report paragraph 9 on page 32

⁴ As expressed by Mr Cook at the examination

The purpose and function of the examination

9. It is important to bear in mind the ambit of Section 20(5) of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”).
10. The main issue before this session of the examination hearings is whether the DPD is sound⁵, and whether the requirement to undertake a sustainability appraisal and prepare a report of that appraisal has been carried out⁶. Compliance with the SEA requirements is also in issue.
11. I will address ‘soundness’, and then SA/SEA.

Soundness

The principles to be applied when resolving the matters at issue

12. The approach to be taken when considering plan making is that set out at paragraph 152 of the NPPF. As is to be expected the advice which applies to planning applications (in paragraph 118) is consistent with the advice which applies to plan making.
13. If those principles are applied, the duty imposed by section 28G of the Wildlife and Countryside Act 1981 is capable of being complied with.
14. The principles to be derived from the policy are not at issue. The following matters are to be considered in sequence:
 - a. Does the proposal achieve each of the three dimensions of sustainable development?
 - b. Can adverse impact on the environmental dimension be avoided?
 - c. Are there alternative options which reduce or eliminate the impacts?
 - d. If adverse impacts are unavoidable, mitigation should be considered.
 - e. Where adequate mitigation measures are not possible compensatory measures may be appropriate.
15. Paragraph 14 of the NPPF is also referred to by those opposed to the proposed allocation⁷. Local plans are required to meet objectively assessed need unless (two matters are set out):
 - a. The economic and social benefits of the allocation are critical to the achievement of the strategic objectives. Given that compensatory measures are available to overcome environmental harm, the adverse environmental impact would not outweigh the benefits. The circumstances do not fall within the first indented point after the ‘unless’.
 - b. The second indented point after the ‘unless’ refers to policies relating to a number of nationally designated areas and sites. The reference is not to the sites as such but to the policies. In this case the policy (at paragraphs 152 and 118 of the NPPF) does not impose an absolute prohibition on development, but an avoid, mitigate and compensate approach. If that approach is followed the policies do not indicate that

⁵ Section 20(5)(b) PCPA 2004

⁶ This requirement is imposed by section 19(5) PCPA 2004

⁷ E.g. RSPB, Barratt Strategic

development should be restricted, and therefore the circumstances do not fall within those described in the second indented point after the 'unless'.

Application of the Principles

16. The development achieves important social and economic objectives as identified in the vision set out in the Core Strategy, and in particular to nurture higher value activities⁸. The facilitation of development to attract higher added value users to the area has been a longstanding objective of the Council. The means by which the Lodge Hill allocation will contribute to meeting those objectives is identified in paragraph 2.4 of the Council's Hearing Statement and in the documents referred to at footnote 6 to that statement⁹.
17. There will be an adverse impact on the environmental dimension of sustainable development.
18. The social and economic advantages of providing a new settlement in an appropriate location and which has the attributes required to attract higher added value uses cannot be achieved at alternative sites. The scale and location of the proposal uniquely meets the social needs of Medway's most deprived rural communities.
19. The adverse impacts on the environmental dimension cannot be overcome in its entirety by mitigation.
20. Compensatory measures are available and they have a good prospect of succeeding.
21. In accordance with the application of the avoid, mitigate, compensate principles the Lodge Hill allocation should be retained.
22. If the Lodge Hill allocation is rejected, it will inflict a very severe blow on the Medway towns and their ability to attract higher value enterprises and the jobs associated with them.

The inspector's Issue 1

South East Plan revocation:

23. The Lodge Hill allocation is required to meet an objectively assessed need, and to meet a CS strategic objective, and is not dependent upon any higher tier policy requirement.
24. The revocation of the SE Plan does not alter the case in favour of making the allocation.

NPPF

25. As noted above, there is little dispute that the policy requirement is that the avoid, mitigate, compensate approach be followed.
26. Given NE's position¹⁰, and the BTO Report, there can be little doubt that compensatory provision of Nightingale habitat has, at the very least, a good

⁸ Core Strategy submission draft page 22

⁹ Mr McCutcheon provided the specific references in a written note on the second day of the resumed hearing

¹⁰ NE Closing paragraph 8

chance of success, and that species rich grassland could be created¹¹. That evidence gives sufficient certainty at the plan making stage.

27. Given that the social and economic objectives cannot be met elsewhere, and that mitigation cannot overcome all the adverse impacts, the policy test is satisfied.

CS6 and CS33

28. Policy CS6 contemplates the provision of compensatory measures in cases where negative impact cannot be avoided.
29. If an application relating to any site, including Lodge Hill, involved proposals which gave rise to a negative impact on wildlife habitats or biodiversity features, which could not be mitigated, compensatory measures would be required in order to comply with CS6.
30. It is accepted that changes are required to be made to CS33¹². The position could be further clarified if CS33 made plain that compensatory habitat was required. If the inspector considers that such a modification¹³ is necessary the Council asks¹⁴ that she so recommend.

Inspector's Issue 2

31. The right approach is to comply with paragraph 152 of the NPPF; policies CS6 and CS33 are consistent with that approach.
32. Quantum of habitat required: The range is 300-851 ha (MC hearing statement paragraph 5.3).
33. The question at the plan making stage is whether the plan is deliverable, and so whether there is a realistic prospect that sufficient suitable land will be available. The GGKM report demonstrates that sufficient land is available¹⁵.
34. The time lag:
- No adverse impact on delivery will result as the development can proceed in phases while the compensatory habitat is provided.
 - As noted above, NE does not regard time lag as a barrier.
35. The evidence from Mr Woodfield at the hearing (subject to the uncertainties that he identified¹⁶) and of Dr Shepherd is that MG5 grassland is capable of translocation.

SA/SEA

36. The Council are required, by the Environmental Assessment of Plans and Programmes Regulations 2004 ("the 2004 Regulations") to carry out or secure the carrying out of an environmental assessment of the plan¹⁷. As part of that

¹¹ NE Closing paragraph 9

¹² MC Hearing Statement paragraph 3.4

¹³ NE request such a modification at paragraph 7 of their Closing

¹⁴ In accordance with section 20(7C) PCPA 2004

¹⁵ EX 98

¹⁶ See Peter Court closing paragraph 23

¹⁷ Regulation 5(1) of the 2004 Regulations

assessment the Council are required to prepare an environmental report¹⁸. That report is required (inter alia) to identify describe and evaluate the likely significant effects on the environment of reasonable alternatives taking into account the objectives and geographical scope of the plan.

37. Given that the plan is prepared in stages, the environmental report can be produced in stages, and updated to reflect changes to plan as the drafts are refined and changed.

The Alleged Defects

Alleged Error in Table 4.3 in the SA/SEA Addendum¹⁹

38. Table 4.3 sets out a summary of the alternatives considered and the Council's reasons for selection/rejection.
- a. The summary reason relating to Lodge Hill, Option 1, is inaccurate, as option 1 would not necessarily avoid the loss of best and most versatile agricultural land, as such land may be required for compensatory measures.
39. That inaccuracy does not affect the analysis.
40. That element of the SEA does not contain the detailed identification, description and evaluation of the likely significant effects. That detailed evaluation is contained in the appendices.
41. Each option is assessed under a number of headings.
42. The impact on agricultural land is identified under heading 16. For option 1 this is found at A1-16.
43. It is not able to be determined at this stage, whether the compensatory habitat would be provided on best and most versatile agricultural land.
44. For option 2 the assessment is found at A1-24.
45. The results of that appraisal are summarised in the table 4.2. The loss of best and most versatile agricultural land is reflected in the ? score. If a highly precautionary approach had been taken, option 1 would have been scored at √ ? not √√. That scoring would not have caused option 1 to score equally with other options on criteria 16. That would not have made a difference to the outcome.
46. The inaccuracy:
- a. Can be rectified in the final environmental report; and
 - b. Does not cause the report to fail to comply with the requirements of the 2004 Regulations.
47. As a result the process is not 'legally flawed' as alleged²⁰.

The Inspector's Questions

Other alternatives

48. Hearing statement 8.1-8.9.

¹⁸ See in particular regulation 12(2)

¹⁹ EX 83

²⁰ Peter Court Closing paragraph 13

49. The obligation imposed by regulation 12(2)(b) of the 2004 Regulations is restricted to reasonable alternatives “taking into account the objectives and the geographical scope of the plan....”.
50. The strategic objectives of the plan are identified at paragraph 3.22 of the CS.
51. The reasonable alternatives considered, as required by the regulations, are limited as account has been taken of the objectives and geographical scope of the plan.
52. The alternative advanced by Barratt, namely a smaller development at Chattenden and additional development in an extended Hoo site²¹, is not a reasonable alternative taking account of the objectives of the plan; it would not attract the higher added value businesses.
53. There are no other reasonable alternatives taking into account the strategic objectives as identified at paragraph 3.22 of the CS.

Heard v. Broadland

54. Has there been an equal analysis of alternatives? (see paragraphs 69-71 of the judgment)
55. Each site has been subject to the same assessment against the same criteria.
56. As a planning application has been made for one site there is inevitably more information.
57. The analysis is equal.

Cogent Land

58. The SA/SEA Addendum has been produced in response to a change in circumstances, namely notification of Lodge Hill as an extension to the SSSI.
59. The SA/SEA Addendum is not an afterthought – it is the next stage in a genuine process.
60. The SA/SEA Addendum provides adequate reasons for preferring the alternative which was selected.

The score for PDL

61. There are two main issues at large under this heading:
 - a. What is the proportion of the site which should be considered to be PDL, and
 - b. Whether PDL of high environmental value is entitled to the benefit of the encouragement given in paragraph 17 of the NPPF.
62. The issue to be considered is whether the SEA/SEA Addendum is deficient. Deficiency or not is to be judged by asking whether the 2004 Regulations and the Directive are complied with.
63. Unless the approach to assessment of alternatives is so deficient as not to comply with regulation 12(2), the regulations are complied with, and there is no deficiency.
64. There is no dispute that a proportion of the Lodge Hill site is PDL, whereas alternatives on agricultural land do not include any PDL. As a result it is justifiable to draw a distinction between Lodge Hill and the reasonable

²¹ Judith Ashton closing paragraph 1

alternatives considered. That approach, does not cause the SEA/SEA Addendum to be deficient.

65. The policy set out in paragraph 17 of the NPPF encourages use of PDL other than that which is of high environmental value. That policy does not prevent PDL (whether of high environmental value or otherwise) from being a factor to take into account when examining alternatives. The scoring is a matter of judgment.
66. There is no deficiency in the approach taken in the SEA.

Format for an environmental report

67. Peter Court Associates refer to the fact that a 'paper chase' has been found to be unlawful in other cases. They refer to the note produced by Mr McCutcheon on the second day of the resumed hearing session. The Peter Court reference is believed to be to the Berkeley²² case.
68. This case is very different from, and can be distinguished from, Berkeley as:
 - a. Berkeley was concerned with EIA not SEA.
 - b. In Berkeley no ES was submitted – a range of reports and supporting papers was relied upon in support of an argument that 'substantial compliance' had been achieved. The 'paper chase' comment was made by Lord Hoffman when considering the substantial compliance argument.
 - c. The 2004 Regulations (at 12(4)) contemplate that other documents can be relied upon as a source of information:

(4) Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making or through other [EU] legislation.

69. The SEA and SEA Addendum report contain the information necessary to identify, describe, and evaluate the likely significant effects on the environment of implementing the plan and of reasonable alternatives. The note produced by Mr McCutcheon (with references to other documents) was produced to assist the inquiry and answer the inspector's question; the information in the note is not needed to make the SEA/SEA Addendum comply with the 2004 Regulations; it shows how information in the SEA has been obtained from other documents in accordance with regulation 12(4). There is no illegitimate paper chase.

Conclusions

70. The essential point to grasp is that the Lodge Hill proposal offers a unique opportunity to address the social and economic challenges that face Medway. The suggestion that there are other means of addressing housing need, such as dispersal of the proposed housing element of the allocation, demonstrate a failure to understand the nature and purpose of the Lodge Hill allocation. There is no realistic alternative to the Lodge Hill proposal.

²² [2001] 2 AC 603 at page 617D

71. The BTO report makes plain that it is theoretically possible to create replacement habitat²³; that is accepted by NE²⁴. The Environment Bank report²⁵ and the Greening the Gateway report²⁶ demonstrate that sufficient areas of replacement habitat can be provided.
72. Given that there is no realistic alternative to the Lodge Hill allocation which will deliver equivalent social and economic benefits, and given that adequate compensatory habitat can be provided, it is the Council's strong view that the allocation needs to be retained in the plan.

²³ Doc EX60 paragraph 9 on page 32

²⁴ NE Closing paragraph 8

²⁵ Doc EX76

²⁶ Doc EX 98