



Matters and Issues for Hearings Wednesday 22 May 2012

The RSPB has no comment on Question 1(a) and is not invited to respond to Question 5.

Question 1 Policy Context

(b) *The National Planning Policy Framework (the Framework).*

- i) *Does the proposed allocation comply with paragraph 118 which indicates that proposed development on a SSSI should not normally be permitted.....an exception should only be made where the benefits of the development.....clearly outweigh both the impacts it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSIs?*

Paragraph 118 must be read as a whole. The extract quoted above (the second bullet point of paragraph 118) must be read in the context of the first bullet point, and should be read in its entirety. Notably the words “*at this site*” are omitted from the above extract. The Lodge Hill Strategic Allocation (LHSA), Policy CS33, does not comply with paragraph 118.

The proper approach to considering compliance with paragraph 118 is to consider the sequential tests of the first bullet point, and also apply the tests of the second.

Retaining policy CS33 would be inconsistent with the first bullet of paragraph 118 because it has not been shown that significant harm resulting from the development:

1. cannot be avoided through locating on an alternative site with less harmful impacts; and,
2. cannot be adequately mitigated; and,
3. can be compensated for.

The RSPB does not consider that the Council has satisfied these tests because:

- Insufficient consideration of alternatives has been undertaken. See Question 3(a) below.
- Significant uncertainties remain around whether it is possible to compensate for nightingales or MG5 grassland. See Question 2 below.

In relation to SSSIs the Council must also show that both of the following tests are met:

4. the benefits of development at this site, clearly outweigh the impacts on the features of the site that make it of special interest;
5. the benefits of development at this site, clearly outweigh the impacts on the national network of SSSIs.

The BTO Report¹ describes the likely effect of development on the nightingale population at Lodge Hill. The RSPB’s letter of 18 July 2012² sets out the harm to the national network of SSSIs if development proceeds.

¹ Document EX60, Page 29, paragraph 1

² Document EX22

The RSPB does not question the need to provide housing and employment opportunities in Medway. The Council has not demonstrated that it is essential to cause significant harm at Chattenden Woods and Lodge Hill SSSI in order to deliver those opportunities. The case has not been made that it is necessary to harm the nationally important population of nightingales and nationally important areas of grassland and woodland at Lodge Hill and to impact on the national network of SSSIs (i.e. the only site in the SSSI network notified for nightingale as a single species and the one of the largest losses of an area of SSSI in the UK).

(c) *Core Strategy*

i) *Is there an internal conflict between Policies CS6 and CS33?*

There is a fundamental conflict between Policy CS6 (Preservation and Enhancement of Natural Assets) and Policy CS33 (Lodge Hill).

The delivery of Policy CS33 (assuming the other paragraph 118 tests could be satisfied) relies on compensatory measures to offset loss to an SSSI³. If it is the Council's position that no change is needed to the plan, one cannot conclude that Policy CS6 will be effective in protecting, maintaining and enhancing biodiversity. As the title of the policy states, it is intended to preserve and enhance natural assets, especially those of national importance.

The interpretation necessary to allow Policy CS6 to provide compensation for harm to Lodge Hill and Chattenden Woods SSSI in the present circumstances, would conflict with paragraph 118 of the NPPF and would render Policy CS6 incapable of protecting SSSIs or wildlife sites with a lesser designation throughout the borough.

There is now an irreconcilable conflict of policy objectives, because the Core Strategy has not changed in material ways to reflect unfolding events. The delivery of Policy CS33 (assuming the other paragraph 118 tests could be satisfied) relies on compensatory measures⁴ for loss to an SSSI, which Policy CS6 does not allow.

It is also important to note that Policy CS33 was drafted with protection of SSSIs in mind. Paragraph 10.105 outlines the principles guiding development, to "*ensure the protection of nearby...nationally designated sites*". The Lodge Hill Development Brief (LHDB) which is woven into Policy CS33 states that "*SSSI land ... [is] protected by other policies and will not be developed*" (emphasis added)⁵.

Question 2 Mitigation and Compensation Measures

(a) *Is providing compensatory habitat, rather than preservation in situ, the right approach for a site with nature conservation value of national importance?*

As set out in Question 1(b) above, the NPPF contains a series of very clear safeguards which must be satisfied before loss of, or damage to an SSSI is contemplated. These safeguards are integral to the NPPF and allow development to go ahead on SSSIs, but only in very specific, exceptional circumstances.

³ Document EX83, p27, paragraph 6.8

⁴ *Ibid.*

⁵ Document EB41, paragraph 4.69

Provision of compensatory habitat for loss of an SSSI can only ever be the “right approach” where it is clearly demonstrated that all of those tests are met. In all other cases, protection of the designated site and its features of special interest, in situ, will always be the right approach.

It is the view of the RSPB that a decision maker should not give significant weight to the possibility of compensating for harm to an SSSI when weighing the planning balance of the benefits of development at the relevant site (here Lodge Hill) compared to the harm (here to nightingales and MG5 grassland) and the desirability of conservation in situ. It is only if that balance is clearly in favour of development, in accordance with NPPF paragraphs 14 and 118 as already discussed, that the question of compensation arises, as a last resort.

Harm to nature conservation interests at Lodge Hill are clearly avoidable. If the Council chooses not to adopt or even properly examine alternatives, that is not a justification for harm to the national importance of the SSSI.

Even if compensation were taken into account in the planning balance, the caveats applied to the BTO advice⁶ indicate that very little weight should be given to assertions that harm can be avoided or significantly reduced by compensation measures.

(b) If it is acceptable, I am minded to give significant weight to the conclusions of the BTO study that it is ‘theoretically feasible to create habitat that will be occupied by nightingales in lowland England’ and that ‘if the right conditions are satisfied’, there is greater probability of achieving success in Kent than in most parts of the Country’. On that basis:

i) How much compensatory habitat is required and how likely is it that sufficient land of a suitable type will be made available and what potential adverse impacts may arise, such as loss of good quality agricultural land?

The RSPB has previously set out well established compensation principles, which ought to be applied⁷.

The RSPB believes the Inspector should give very limited weight to the compensation proposals. However, to answer the Inspector’s question, the RSPB sets out below its views on the calculations put forward.

Habitat compensation or offsetting ratios are designed to address known risks, and are only appropriate where there is reasonable confidence that a larger area of habitat will succeed in overcoming those risks and ensure the compensation objectives are met. In the case of species-led compensation measures, this requires confidence that the provision of a larger area of lower quality habitat will support a population at the required level and sustain it in perpetuity. This is not the case with nightingale, where the list of uncertainties is considerable⁸.

The BTO calculations

In their report⁹, the BTO “suggest that an area of at least 300 hectares of structurally high quality scrub” is a realistic requirement to provide compensatory habitat for 75 nightingale territories. This

⁶ Document EX60, p7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20/21, 22, 23, 25, 26, 28, 29, 30, 31, 32, 33 and 34, Document EX61, Chris Hewson response, paragraphs 3, 4 and 5

⁷ Document M5–65, p5

⁸ *Ibid.* 6

⁹ Document EX60, p30, end of first paragraph

means that all of the area should be high quality scrub¹⁰. There is nothing to suggest that significant areas of unsuitable or poor quality habitat would be included.

There are many reasons why any large area in Kent might not be capable of supporting high quality scrub across the whole site, for example:

- Agriculture, landscape and amenity constraints.
- Presence of features incapable of conversion to scrub (e.g. water bodies).
- Presence of existing high quality habitats, whose conversion to scrub would be unacceptable.
- Areas of woodland. The BTO view is that coppice woodland, even managed by the mulching method discussed in their report, is likely to be less attractive to nightingales than scrub¹¹.
- Variations in soil quality, which might result in very slow growth (with implications for time lag), or conversely rapid growth which could rapidly lead to loss of the clumped nature of high quality scrub. On former agricultural land, high soil fertility significantly risks the latter scenario.

For these reasons an area of 300-400 hectares would be unlikely to be sufficient.

The Offsetting calculations

Since it is unlikely that any area could be found that wholly would fulfil the conditions of high quality scrub, it would be necessary to increase the size of the area provided to allow for habitat variability, as well as other risks.

Environment Bank Limited (EBL) have attempted this¹² by applying multipliers to derive a suggested figure of c.650ha comprising a mix of restored and created habitat. The RSPB does not consider the use of offsetting metrics to be appropriate in this case¹³, but in any case has serious concerns about the EBL Report¹⁴.

It is also noteworthy that based on EBL's offsets metrics approach Natural England suggests¹⁵ that the inherent high distinctiveness of SSSI quality habitat, means that an area in excess of 849ha may be required.

Compensation sites

An Executive Summary Report from Greening the Gateway Kent and Medway¹⁶ was provided on 24 April 2013 and describes levels of "certainty" around a number of identified proposed compensation sites. The reasons for submitting an Executive Summary rather than the full report are unclear. This Executive Summary does not provide convincing evidence that there is a reasonable prospect that adequate compensatory habitat could be established and should be given no weight.

It is clear that all of the identified sites could well result in loss of agricultural land, but in the absence of the full report, the RSPB is unable to offer a detailed view on whether the land identified is sufficient, suitable or likely to be made available, or on the potential adverse impacts which may arise. Attached at Appendix 1 is a very brief critique, based on what we are able to glean from the Executive Summary.

¹⁰ Document EX76, p14, first bullet point

¹¹ Document EX60, e.g. P.10, 3.3 paragraph 2 and 3.4

¹² *Ibid.* 10, Appendix 2

¹³ Document EX72, letter 30 November 2012, Paragraph 8-12

¹⁴ Document EX72

¹⁵ Document EX75, Annex A, paragraph 6, a, ii

¹⁶ Summary of Nightingale Habitat Creation Opportunities, Executive Summary Report, January 2013

- (b) ii) *What are the likely consequences of the time lag between loss of habitat at Lodge Hill and the provision of new habitat if development proceeds as currently proposed? Alternatively what are the implications for the Core Strategy if development at Lodge Hill is delayed to allow for new/restored/improved habitat to become available?*

Additional advice received from the BTO¹⁷ describes further uncertainties surrounding provision of compensatory habitat and the effects of time lag. If Lodge Hill is a source of recruits for its own and other populations (at present unknown), time lag would lead to a permanent reduction in the breeding population.

It is also important to note that the time given both in the BTO additional advice¹⁸ and in the EBL Report¹⁹ show the timelines for habitat to begin to come into condition, rather than to reach peak condition (i.e. ready to accept full numbers of nightingales).

If the Lodge Hill development is delayed to allow compensatory habitat to reach peak condition (20 to 30 years²⁰) the proposed development simply cannot be delivered within the plan period.

- (b) *To what extent can the loss of the area of MG5 Grassland be mitigated by changes to the Masterplan and if offsite provision is necessary what are the risks to delivery?*

The RSPB considers that this emerging issue needs to be given thorough consideration. To date the Council has not provided any evidence to support its conclusion²¹ that compensation for MG5 grassland is possible.

The RSPB has taken advice from Miles King, grassland expert and former Conservation Director at The Grasslands Trust. The RSPB's initial views are set out below. We have not provided detailed evidence, as we do not wish to overburden the Examination with new information. If the Inspector would like to see detailed evidence on this issue, the RSPB would be happy to produce it.

The RSPB's view is that the MG5 grassland is of national importance, due to its extent (it falls within the largest 10% of sites for MG5 in the country) and its undisturbed nature.

The RSPB is unable to comment on whether it is possible to make amendments to the master plan to accommodate the MG5 grassland within the development, as no proposal has been put forward by the Developer. However, in order to avoid eutrophication or destruction by human disturbance, very strict measures would need to be taken in order to accommodate the grassland within such a large development. Even with such measures in place, successfully conserving the grassland within a large housing development would not be without risk.

Offsite provision carries great risk. The Council mentions two potential ways to provide grassland elsewhere (i) by translocating and (ii) by seeding elsewhere. Neither would be reliable and a key feature present at Lodge Hill, Dyer's Greenweed, would not survive translocation or reseeded.

¹⁷ Doc EX61

¹⁸ *Ibid.* Page 4, Table

¹⁹ Document EX76, p12/13, Table 2

²⁰ Document EX72, letter 30 November 2012, paragraph 18

²¹ Document EX83, paragraph 4.14 and pA1-6

The RSPB is not aware of any peer reviewed evidence indicating that translocation of MG5 grassland would be successful in terms of sustaining the special interest and ecological integrity of the grassland including its flora and fauna (invertebrate) communities.

Question 3 SA Addendum

- (a) *Does the SA Addendum provide a robust assessment of alternative options? In particular:*
- i) *Are there other reasonable alternatives that should be evaluated in greater detail bearing in mind the changing circumstances in relation to Lodge Hill? For example, is it right to reject a more dispersed pattern of development without a more detailed evaluation of what that might mean in practice? Should neighbouring authorities be approached under the duty to cooperate in order to avoid development at Lodge Hill if there really is no reasonable alternative within Medway?*

The RSPB has already submitted that the lack of proper and even consideration of alternatives in the SA/SEA perpetuates a fundamental flaw in the evidence base for the Core Strategy²², and that failure to revisit the SLAA to take account of new information about biodiversity interest at Lodge Hill leads to a profound failure in the plan²³.

A more detailed evaluation of alternatives at this late stage is necessary but will inevitably lead to more delay. The plan is unsound and should be withdrawn to expedite the urgent need to assess alternatives, which the Council seems determined not to pursue. The RSPB does not seek to suggest that specific alternative sites should be considered in preference to others. We submit that there is no evidence to convince the Examination that housing and employment allocations at Lodge Hill could not be provided at alternative locations, following a fair assessment of alternatives with all criteria properly applied.

The RSPB considers it unlikely that need cannot be met through alternatives within Medway. However, we note that paragraph 14 of the NPPF does not rule out the prospect of objectively assessed needs being unmet in exceptional circumstances, such as where the NPPF indicates development should be restricted to protect SSSIs. If it is the case that there is genuinely no alternative within Medway, the RSPB would have expected the Council to have begun to explore with its neighbours, solutions for the provision of housing outside the borough, in accordance with paragraph 178 of the NPPF, as a contingency in the event that Medway's housing need cannot be met at Lodge Hill.

²² Document EX82A, RSPB response to SA/SEA Addendum consultation

²³ *Ibid.* Annex1, paragraph 4

- (a) ii) *Does the SA Addendum meet the requirement established in Heard v Broadland that alternatives must be appraised as thoroughly as the preferred option; and the implications of Cogent Land LLP v Rochford DC and Bellway Homes Ltd (as reported in JPEL issue 2 2013 (pages 170-192)) that an addendum report must be a genuine exercise rather than a mere justification for the decisions that have already been taken.*

The RSPB has previously set out our position on the legal requirements and the two judgments set out above²⁴. Our position has not changed having now reviewed the Final SA/SEA Addendum and it is the RSPB's view that the SA/SEA remains fundamentally flawed.

Appraisal of Alternatives

The Council has failed to adequately consider alternatives²⁵ and has failed to justify assumptions made in relation to those which have been considered²⁶.

The Council has failed to properly consider the potential to mitigate or, as a last resort, compensate for effects of the alternative Options. Whilst the Council makes a cursory attempt to assess this in its Final SA/SEA Addendum²⁷, the consideration cannot be said to be on an equal basis with the consideration at Lodge Hill²⁸.

The Final SA/SEA Addendum also fails to take into account the effects of provision of compensation on agricultural land. It is clear that²⁹ all of the proposed compensation sites could result in loss of agricultural land. This ought to have been factored into any assessment.

Addendum Report

It remains the RSPB's view that the Final SA/SEA Addendum is not "a genuine exercise" and is "a mere justification for the decisions that have already been taken"³⁰. In particular:

- Failure to consult on the issue of MG5 grassland, including:-
 - Scientific evidence which, despite being relied upon and referenced in the Final SA/SEA Addendum, was not included in the Council's consultation documentation³¹;
 - Assumptions are made on the possibility to compensate for MG5 grassland without reference to scientific evidence and having not consulted on the issue of compensation³²; and
 - In making assumptions about the potential to retain MG5 grassland within the development, the Council has failed to provide any details.
- Assertions made around previously developed land (PDL)³³ (see also Question 4 below). The Council rely on previous planning policy rather than the NPPF. The Council do not consider the site to be of high environmental value and that the high environmental value of the site does not

²⁴ Document EX82A, RSPB response to SA/SEA Addendum consultation, Annex 3

²⁵ *Ibid.* Annex1, paragraph 4

²⁶ Document EX83, e.g. pA1-18, objective 1

²⁷ *Ibid.*

²⁸ *Ibid.* 26, pA1-1 to A1-6, objective 1

²⁹ Summary of Nightingale Habitat Creation Opportunities, Executive Summary Report, January 2013

³⁰ *Cogent Land LLP v Rochford DC and Bellway Homes Ltd* [2012] EWHC 2542 (Admin), para 111

³¹ Report of Thompson Ecology, referred to in document EX83 at paragraph 3.16 and pA1-4

³² Document EX83, paragraph 4.14 and pA1-6

³³ *Ibid.* pA2-1, paragraph 1.2

have to be taken into account. This stance is wholly unreasonable and not in accordance with current government policy.

- The Council has failed to assess the wider implications of the interpretation it seeks to apply to Policy CS6, on wildlife sites throughout the borough³⁴. The interpretation has profoundly worrying implications which must be assessed through the SA/SEA.

The RSPB consider that the SA/SEA is not fit for purpose and requires further revision and public consultation.

Question 4 Previously Developed Land

4. *Is the 'very positive' score given to the Lodge Hill option in relation to previously developed land justified?*

No. Most of the site should not be treated as PDL in policy terms because it is either:

- a) not PDL, as defined by the NPPF because it is *land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time; or,*
- b) to the extent that land is PDL as defined by the NPPF, it should not have the benefit of PDL policy priority because it is obviously of high environmental value.

The Final SA/SEA Addendum is fundamentally flawed because it awards significant weight to Lodge Hill being PDL whilst ignoring the policy that such weight should not be given if the land is of high environmental value. The Final SA/SEA Addendum is contradictory because it clearly does acknowledge that the land is of high environmental value³⁵. This is a profound misapplication of planning policy which damages the Final SA/SEA Addendum's credibility.

4(a) *How much of the development area meets the definition of previously developed land set out in Annex 2 to the framework?*

The RSPB has previously set out some calculations of the extent of PDL within the LHSA site based on recent surveys³⁶.

However much of the site is deemed to be PDL, no part of the site that is of high environmental value, including all of that part of the site which is notified as SSSI, should be accorded PDL policy priority.

³⁴ See Question 1(c) above and Document EX82A, RSPB response to SA/SEA Addendum consultation, Annex 1, paragraph 3(c)

³⁵ Document EX83, paragraph 6.5

³⁶ Document EX82A, RSPB response to SA/SEA Addendum consultation, Annex 1, paragraph 1

4(b) Should the scoring be tempered by the Framework's core planning principle that reusing previously developed land should be encouraged, provided that it is not of high environmental value?

Please refer to Question 4 and 4(a) above. The Council seem to argue in their Final SA/SEA Addendum that the biodiversity importance of the site is taken into account within the consideration of SA Objective 1 (biodiversity) and therefore to take into account the "high environmental value" of the site in relation to PDL would amount to double counting. This position is irrational and is not in accordance with core planning principles set out in the NPPF. It is also inconsistent with the Council's approach to other considerations within the Final SA/SEA Addendum³⁷.

**Royal Society for the Protection of Birds
May 2013**

³⁷ Document EX83, e.g. pA1-25, Objectives 1 and 2, air quality

Appendix 1

RSPB comments on GGKM Summary of Nightingale Habitat Creation Opportunities Executive Summary Report (January 2013)

In the absence of the full report the RSPB does not comment on the individual proposals, but has significant concerns over the conclusions presented. These concerns might be addressed by the full report, but equally, the full report may reveal further flaws.

The RSPB therefore makes the comments below in good faith on the basis of the information which has been disclosed, and in the brief time available, but reserves the right to make further comment if and when the full report is disclosed.

Levels of “certainty”

It is unclear whether sites are afforded a “high”, “medium” or “no” level of certainty based on (i) “*certainty of landowner interest*” as described in the Summary of Findings (page 3) (ii) “*certainty regarding the creation and sustaining of habitat for breeding nightingale*” in the case of sites 6 and 7, or (iii) the supposed “*ability to create and sustain a new breeding nightingale population*” in relation to sites 8 and 14.

It should be noted that in relation to nightingale habitat creation, each of the caveats mentioned in the BTO report and subsequent advice³⁸ are relevant to any proposed nightingale compensation site. These caveats will limit the “*certainty*” one can apply to any potential site.

Based on the information provided, several of the proposed sites *could potentially* attract nightingales, ***if the right conditions are satisfied*** (and subject to all of the caveats listed in the BTO report and subsequent advice). However it is clear, when taking into account those caveats, that “high” certainty cannot be attributed to the deliverability of compensation for nightingales at any site. The statements made in the table in relation to sites 8 and 14 in particular are therefore grossly misleading and a vast overstatement of the certainty of creating “*a new breeding nightingale population*” at any location.

Expert advice

In his email of 29 October 2012 Dr Tom Tew of the Environment Bank Ltd Explained that “*The criteria for site selection should serve to complement expert opinion rather than replace it; for instance, a site appearing to meet all criteria might be felt to be 'wrong' by experts for an unusual reason not captured by criteria, whilst a site that fails one or two criteria might be felt to be 'right' because it was outstanding in other respects. The search for a perfect and exhaustive list of a priori criteria is a dangerous one*”.

Without the benefit of the full Report it is difficult to ascertain what criteria for selecting sites were used or whether BTO, as experts, have been consulted on the sites identified, as Dr Tew suggests.

³⁸ Document EX60, p7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20/21, 22, 23, 25, 26, 28, 29, 30, 31, 32, 33 and 34, Document EX61, Chris Hewson response, paragraphs 3, 4 and 5

Acquisition of Land

There is very little detail about the practicality of site acquisition. This leaves a great deal of uncertainty:

- No indication is given as to the extent to which landowners have expressed their willingness to provide sites. One assumes that if negotiations had been taking place on options or other contractual arrangements, the Council would have made the Inspector aware.
- Where land is recommended for consideration of “a rental option”, no indication is given as to whether landowners expressed their views about the length of rental which would be available. Particularly in circumstances where one is considering the destruction of a protected site, one ought to secure the future of that site in perpetuity
- No indication is given as to the likely cost of acquiring the proposed sites. There is a very real question about the delivery of the development if the cost of acquiring the compensatory land renders the development economically unviable. The cost of providing compensatory habitat will not stop at acquisition, but will also extend to habitat creation and long term management and monitoring.
- The publication of this report may have a negative effect on the cost implications of the proposed compensation. Landowners may charge a premium for their land if it becomes clear that the delivery of Lodge Hill may be dependent on the acquisition of ransom sites.
- Both proposed sites described with “*medium level of certainty*” are owned and operated by the Ministry of Defence. In relation to the first, BB West and Dibgate the table states that “*it would seem that operational use could be reviewed*”. In relation to the second, Shoeburyness, the table states that “*no purchase or rental agreement is required – thus minimising risk*”. The RSPB does not agree that the absence of a purchase or rental agreement would minimise risk in relation to creating and sustaining nightingale habitat. Indeed simply altering operational requirements at these sites would provide no security as to the establishment and future maintenance of nightingale habitat.

**RSPB
April 2013**