

# CRANBROOK LOCAL PLAN EXAMINATION

## REPRESENTATIONS

### **MATTER 1**

## LEGAL COMPLIANCE

PREPARED ON BEHALF OF WADDETON PARK LTD

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## REPRESENTATIONS

### MATTER 1

#### LEGAL COMPLIANCE

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**1. Issue 1: Overall, has the Plan been prepared in accordance with the relevant legal requirements?**

1.1 Question 1

***What are the relevant strategic matters in relation to the DTC? (Defined as matters having a significant impact on at least two planning areas<sup>1</sup>)***

- 1.1.1 It's the occupation of housing that, by the Council's own evidence, produces unacceptable recreational impacts upon the Natura 2000 sites. Thus, satisfactory mitigation of that requirement (Habitat Regulation compliance) is not a strategic matter. Meeting that housing need is proposed to be done by land wholly within this plan area and mitigation is a matter that should be certain, on that basis, also. Thus HRA compliance (or not) is a matter for the Inspector's determination, having regard to the provisions of Regulation 105(4) of The Conservation of Habitat and Species Regulations 2017.

1.2 Question 4

***Is the plan compliant in relation to the East Devon Local Plan 2016 (EDLP)?***

- 1.2.1 The approach adopted by the Council in the Cranbrook Plan (Cran001), with regard to the delivery of necessary mitigation of recreational impacts upon Natura 2000 sites, is not compliant with the EDLP.
- 1.2.2 SANGS delivery is a fundamental element of the strategy enshrined in the EDLP. As explained in our representations to the Publication Draft, the Council (in order to prevent harm occurring to the integrity of the Exe Estuary and Pebblebed Heaths Natura 2000 sites) are committed to the timely provision of SANGS (in accordance with Strategies 10 and 47 of the EDLP – see EDLP extracts at Appendix 1).
- 1.2.3 Strategy 10 allocates land to accommodate the Clyst Valley Regional Park (CVRP) and confirms that the CVRP will *“take recreation pressure away from more environmentally sensitive locations thereby overcoming concerns arising from application*

*of the Habitat Regulations that would otherwise prevent development from coming forward" (point c), Strategy 10).*

1.2.4 Strategy 10 states that:

*"Of particular relevance to the Habitat Regulations will be the need for continued checks and monitoring to ensure that any mitigation measures for built development, linked to Clyst Valley Regional Park provision, achieve the ends envisaged and offers effective mitigation against adverse impacts that could otherwise occur. Each phase of any development occurring and park provision will be assessed and monitored."*

1.2.5 Strategy 47 requires that mitigation proposals (including those of the 'South-east Devon European Site Mitigation Strategy') to be implemented alongside or ahead of development to safeguard the integrity of European designated wildlife sites and states that:

*"Where mitigation lags behind development it will be a potential indicator that the worth and integrity of European sites could be being eroded. This will provide a policy basis and justification for resisting further development or occupation until effective mitigation is delivered in accordance with past development/occupancy."*

and that:

*"Work will be undertaken to establish effective trigger points or markers against which to formally assess delivery of mitigation and therefore establish a basis to refuse planning permissions with a formal first review planned for April 2018."*

1.2.6 It is therefore clear that, in accordance with the provisions of Strategy 10 and 47, the Council are required to keep the delivery of SANGS under review. This was a key matter in finding the EDLP sound, as made clear by the EDLP Inspector in his report (see paragraph 25 and 121 [of Appendix 2] and paragraphs 4.4-4.12 of our representations to the Publication Draft).

1.2.7 However, contrary to the comments of the EDLP Inspector, and the provisions of Strategy 10 and 47, it is apparent that there has been no review of SANGS provision to date (see letter received from the Council dated 17<sup>th</sup> April 2019 [Appendix 3]). A review which, given the provisions of Strategy 10 and 47, and the findings of the EDLP Inspector, in accordance with the Habitat Regulations, is critical to meeting the District's housing needs in an acceptable manner.

1.2.8 It is plain that no review has been carried out – that is a breach of the EDLP. The Inspector will note that an FOI request has been made seeking clarity in respect of this matter [Appendix 4]. The

relationship of strategic responsibility of the Council to SANGs in order to facilitate timely housing delivery is clearly set out in the EDLP. As Strategy 47 clearly states:

*“habitat mitigation will form the first draw on CIL funds”*

and;

*“To help ensure and secure timely delivery of mitigation, specifically SANGS, the Council has the option of exercising Compulsory Purchase order powers to ensure the availability of land.”*

1.2.9 Cran001 does not propose any substantive changes to the provisions of Strategy 10 or 47 (see Appendix 1 to Cran001). No changes are proposed to Strategy 10. The only change proposed to Strategy 47 is to the population multipliers quoted and the references made to CIL (since a nil rate is now proposed for Cranbrook).

1.2.10 Despite the narrow scope of the proposed changes listed it appears (following a review of Cran001 and its evidence base) that the SANGS delivery strategy now proposed by the Council, and set out in CB15, is actually predicated on a fundamentally different approach to HRA mitigation than that considered by the EDLP Inspector and enshrined in the EDLP. That approach was plainly strategic, as Strategy 47 states:

*“Through this strategic approach monies collected through CIL, negotiated separately through Section 106 agreements or potentially otherwise paid or contributed through other means will address mitigation requirements.”*

1.2.11 CB15 only seeks to ‘safeguard’ land for SANGS, whereas Strategy 10 allocated land for the CVRP, and identifies the SANGS potential of large parts of the CVRP.

1.2.12 CB15 sets out an expectation that applications for the provision of SANGS will be accompanied by an appropriate delivery, enhancement and mitigation strategy, including a masterplan and details of the financial arrangements necessary to deliver future management, thereby passing the delivery burden of undefined and unallocated land parcels to the developer, whereas the CVRP delivery was plainly underwritten by CIL contributions and other funding streams.

1.2.13 The ‘potential’ SANGS to be safeguarded are essentially residual areas of land in the control of developers (i.e. those that are not suitable for development) rather than sites identified specifically for their ability to deliver suitable SANGS. This, in our view, represents a piecemeal approach to SANGS suitability

assessment and delivery (as opposed to the plan led approach that is enshrined in the EDLP).

- 1.2.14 Plainly it's not for the Council to pick and choose which elements of the DP that they wish to consider or ignore – the plan must be read as a whole. As the Supreme Court put the point (in *Tesco*, UKSC 13, Appendix 5):

*"planning authorities do not live in the world of Humpty Dumpty; they cannot make the development plan mean whatever they would like it to mean."* (paragraph 19).

- 1.2.15 Strategies 10 and 47 were critical to the EDLP being found sound and cannot be eschewed. Cran001 is not therefore compliant with the EDLP.

1.3 Question 5

***What would be the implications for the plan delivery of the continued protection of the green wedges identified in the EDLP?***

- 1.3.1 Strategy 8 (Development in Green Wedges) of the EDLP is not absolute and does not preclude development unless:

*"..... it would add to existing sporadic or isolated development or damage the individual identity of a settlement or could lead to or encourage settlement coalescence."*

- 1.3.2 The Preferred Approach Masterplan, dated October 2017, stated that:

*".....Although development encroaches into the green wedge to the north of Rockbeare its location maintains a clear visual separation between Rockbeare and Cranbrook which is the purpose of the green wedge. Strategy 8 in the Local Plan which covers green wedges allows for development where settlement coalescence would not result."* (page 18)

- 1.3.3 In a report to the Strategic Planning Committee (SPC) dated 20<sup>th</sup> March 2018 [Appendix 6] (with particular regard to our client's site) that:

*"The inclusion of land in the Rockbeare Neighbourhood Plan Area as part of the Cranbrook Plan, including within the green wedge, would allow for a more coherent pattern of development when assessing Cranbrook and its relationship with London Road whilst still retaining the character of Rockbeare and preserving views out of the village as development would be obscured from Rockbeare due to land form."* (page 17)

and that:

*“The decision to propose to allocate land within these areas for development at Cranbrook arises from careful consideration of the evidence documents which support the preferred approach and the consensus of responses to the Issues and Options Consultation in 2016.” (page 17)*

1.3.4 It is therefore clear that there are sites outside of those proposed in the current version of Cran001 that have potential for development despite their location with the green wedge.

1.3.5 Paragraph 11 a) of the Framework requires plans to seek opportunities to meet the development needs of their area and be sufficiently flexible to adapt to rapid change. In our opinion, the absolute protection of the green wedge is only likely to inhibit flexibility and prevent the ability of the plan to adapt to rapid change, which could, in turn, harm the delivery of housing.

1.4 Question 7

***Is the Local Plan legally compliant with respect to Sustainability Appraisal [SA]?***

1.4.1 In our view, the Local Plan is not legally compliant with respect to SA.

1.4.2 Having regard to the provisions of Part 4, paragraph 8(5) of the Local Plan Regulations (and as explained in our response to Matter 2, Issue 3, Question 26) the Sustainability Appraisal (Cran057) is fundamentally flawed due to the confusion inherent in the emerging ‘developer led’ approach that the plan is taking to SANG delivery (contrary to that enshrined in the EDLP) and its failure to undertake any robust assessment of the SANGS strategy proposed in Cran001 against that set out in the provisions of the EDLP (in particular Strategies 10 and 47).

1.4.3 Cran057 does not properly engage with the necessary subject matter and, critically, fails to consider the implications that a lack of certainty in this regard would have on the effectiveness of the plan in delivering housing in a timely manner, without adverse impacts on the Natura 2000 sites.

1.5 Question 8

***Is the Local Plan legally compliant with respect to Habitats Regulations and any requirement for Appropriate Assessment [AA]?***

1.5.1 Appropriate Assessment (AA) is a process and it is the responsibility of examination to reach a determination on this matter, having regard to the available evidence, in order that a clear conclusion on the point can be reached, as required in accordance with the provisions of Regulation 105(4) of The Conservation of Habitats and Species Regulations 2017 (thus enabling the plan to proceed to adoption or not). The HRA Assessment document (Cran 020) is not determinative.

1.5.2 That document has clearly been concluded on the understanding that the strategic approach set out in the EDLP, and underwritten by CIL/CPO is continuing:

*“By making a proportionate financial contribution, the need for complex individual mitigation to be designed and implemented for each development project is removed.”* (paragraph 3.11, page 41)

1.5.3 The document is bland and unclear on assessing delivery and certainty:

*“The document should be seen as a live document that is reviewed at appropriate points in SANG delivery.”* (paragraph 3.18, page 43).

1.5.4 And it points to another document ‘SANGS Delivery Strategy 2013-2031’ (Cran021). That document is devoid of any proper assessment of the suitability of any of the land being considered for SANGS (instead we find those criteria in emerging policy CB15). Some of the land identified is, having regard to those criteria, plainly unsuitable for that use (for example the block of land immediately south of the rail line and wholly within the fluvial flood zone [see Cran017]). We therefore conclude that some of the land controlled by developers and proposed for SANGS is unsuitable for that purpose. The issue of delivery of suitable SANGS to mitigate, in a timely manner, the impacts arising from housing completions is therefore significantly greater than set out by the Council.

1.5.5 Cran021 (Figure 1) identifies a directly securable shortfall in quantum terms (even discounting the unsuitability point that we make in the paragraph above).

1.5.6 This shortfall is expected to be addressed by other land owners providing land (paragraphs 2.4). This expectation is naïve. Financial contributions are mentioned (at paragraph 2.6), but no information is provided about where, when and how such contributions will lead to actual SANG delivery. At paragraph 3.1 it becomes clear that:

*"it is expected that their shortfall will be met within the areas of land safeguarded for SANGS through the Plan, and the acquisition and establishment costs borne by the respective developer."*

- 1.5.7 The live document/review point is repeated (at paragraph 3.2). The Council have already made clear their lack of respect for the existing DP provisions on this matter, so there can be little certainty that any such unspecific review will be carried out in a timely manner. An AA determination must be made via this examination, not a some 'live point' in the future.
- 1.5.8 The approach set out in Cran021 document contrasts sharply with:
- that strategic approach proposed and considered by the EDLP Inspector (see paragraph 25, Appendix 2)
  - that re-confirmed approach in this plan (see SOCG [Cran061, page 15], HRA document [Cran020, paragraph 3.11] and Appendix 1 to Cran001)
- 1.5.9 The strategic approach, based upon land allocation (as opposed to safeguarding) and the underwriting of that approach by the Council, was key in the EDLP being found sound. The Council are committed to that approach and have not sought to vary it via the submission of this plan. The delivery responsibility for implementing European protected sites mitigation rests with the Council.
- 1.5.10 However, on their own evidence, it is plain that they are seeking to walk away from their clearly set out (and enshrined in the DP and various other documents that form the evidence base to this plan) SANG provision role (which clearly extols the utilisation of a first draw of CIL and the use of CPO powers).
- 1.5.11 For the reasons set out in our response to Question 4, for Appropriate Assessment to be successfully completed, there must be certainty that suitable SANGS can be provided before the occupation of development, in accordance with the EDLP (specifically Strategies 10 and 47) that this plan does not seek to vary (except on a narrow, numeric, point).
- 1.5.12 However, the Council's evidential abandonment of the strategic approach to SANG enshrined in the EDLP and the embracing of the 'developer remnant' approach, set out in CB15/Cran021, lacks both candour and rigor, and provides no certainty in relation to the timely delivery of necessary mitigation.
- 1.5.13 The 'thrown together' nature of the Council's revised approach is evident since they admit that:

*"Where possible an attempt has been made to ensure that each of the primary land owners within the development are able to deliver SANGS on land under their control....With such an approach to delivery however it is important that adjoining parcels should be so designed that they function together as a larger whole. Without such connection there is a risk that areas would otherwise comprise isolated pockets of green space and fail to deliver the necessary mitigation"* (paragraph 3.103, our underlining)

- 1.5.14 There's no certainty that such connection will occur with such a 'developer led' approach. As the Council admit, when considering overprovision:

*"In such a scenario the approach helps to reduce the potential for any one landowner to be beholden on others where a ransom situation could otherwise ensue."*

- 1.5.15 And the Council clearly state (paragraph 3.104) the off-site payment method is now proposed as an 'exceptional circumstance', as opposed to the norm (as the HRA evidence assumes, and as was put to the EDLP Inspector and is enshrined in the EDLP).

- 1.5.16 In our opinion it is plain that, paying particular regard to the proposals submitted by the Council, and the evidence before this examination, adverse impacts on the integrity of the Exe Estuary and Pebblebed Heaths Natura 2000 sites cannot be ruled out with any certainty. It is not therefore possible to reach a positive conclusion in respect of AA.

## 1.6 Question 9

***Does the Plan make it clear, as required by Part 4, paragraph 8(5) of the Local Plan Regulations, which parts of the existing development plan it will supersede?***

- 1.6.1 Appendix 1 to Cran001 'Status of Policies' confirms which parts of the existing development plan that Cran001 will supersede.
- 1.6.2 With regard to Strategies 10 and 47 Appendix 1 confirms that Cran001 will not supersede Strategy 10 and will supersede Strategy 47 specifically only in part:

*"where reference is made to different population multipliers per dwelling and where reference is made to CIL at Cranbrook (or implied by reference to it being with the West End) as Cranbrook will be funded by S106 contributions".*

## **2. Issue 2: Is the Plan's preparation compliant with the Duty to Co-operate [DTC] imposed by Section 33A of**

**the Planning and Compulsory Purchase Act 2004 (as amended) [PCPA]?**

2.1 Question 14

***What, if any, is the synergy between this plan and the Greater Exeter Strategic Plan (GESP)?***

- 2.1.1 There isn't any synergy between Cran001 and the GESP, but there perhaps should be in light of the deficiencies that we have identified in respect of the Council's approach to HRA (see response to Questions 4, 8 and 9 above)?
- 2.1.2 It is apparent from the letter received from the Council (dated 17th April 2019) [Appendix 3] that any review of Strategies 10 and 47 of the EDLP is being done so primarily via the Greater Exeter Strategic Plan (GESP) process. Since the Council's revised approach to Habitat Mitigation is non-compliant with the EDLP then we question whether Cran001 is premature to the outcome of the GESP?