

Submission to Inspector in respect of Garden Community Proposal

Introduction

1. My name is Dr Chris Gibson FBNA. I retired 15 months ago as a Principal Planning Advisor with Natural England. I worked for Natural England and its predecessor bodies English Nature and the Nature Conservancy Council for the whole of my 31-year working career, and throughout most of that time I was responsible for seeking to deliver sustainable development solutions through the positive application of the Habitats Regulations. It is one stated intention and purpose of the Habitats Directive to promote sustainable development; it must however be recognised that sometimes there is no available sustainable development solution to issues above a certain magnitude.
2. I hold the degrees of Bachelor of Science in Ecology from York University (1978-1981) and Doctor of Philosophy from the University of East Anglia (1981-1986). I am also a Fellow of the British Naturalists' Association.

Scope of these comments

3. My comments relate to the Habitats Regulations Assessment undertaken in support of new housing provision, particularly to the proposed creation of three Garden Communities, and specifically in relation to impacts of those developments upon the Colne Estuary and its constituent European and international (Ramsar) site designations, the issue that is closest to my area of expertise as a resident of Wivenhoe.
4. I would argue that while not covering the totality of the environmental issues arising through the Plan, my comments focus upon the issues of most crucial significance to the environment, given the proximity of the East Colchester Garden Community to the European Site(s), only some 3km distant from the proposed Garden Community.
5. It must however be recognised that ALL new housing provision is likely to have a significant effect upon the Colne Estuary Sites, given the anticipated zone of impact around the Colne Estuary. And furthermore, other sections of the highly-designated Essex Coast will also be impacted by the whole suite of development proposals.

HRA Procedural matters

6. The HRA appears to have largely been conducted in accordance with current standard practice. There are however a number of omissions/errors/oversimplifications, a representative selection of which is detailed below. While none of these in isolation would necessarily alter the conclusions of the assessment, taken together they do indicate to me that there may be **systematic bias in the assessment away from the precautionary ('worst case') assessment** which is one of the **fundamental principles embedded within the Habitats Directive and Regulations**.

7. Some examples of the places where the HRA does not in my view represent best practice include (all references to document EB/003):
- a. 4.23: to claim that the Outer Thames Estuary SPA is not susceptible to the effects of recreational pressure as it is entirely marine and offshore is wrong. The main interest features (nonbreeding Red-throated Divers) are very sensitive to boat movement of all sorts, including recreational craft. An increased nearby human population will most certainly lead to an increase in the passage of recreational and other boats through the SPA. This impact should not therefore have been screened out of the assessment.
 - b. 6.21: To state that Figure 2 is a map which identifies sensitive areas of the Colne Estuary in terms of nesting, roosting and feeding for qualifying bird species is simply wrong. The map may show those areas which are **most sensitive**, but that must not be allowed to mask the fact that the whole of the estuary is important for one or more qualifying species and that those are all sensitive to recreational and other disturbance.
 - c. From 6.70, mitigation is discussed, although not detailed; the HRA rightly recognises the need for RAMS to be implemented, and for RAMS to be responsive to changes. Whatever the funding mechanism, whatever the agreements between LPAs, the question remains as to how they will be held to it in the future, irrespective of political, social and other changes. It has to have a cast iron guarantee of continued implementation and improvement in light of experience, otherwise the European site(s) will be likely to enter an 'integrity deficit'. This is not legally acceptable. But what mechanism would be available if future mitigation were to fall short. Will every house developed come with a caveat that it may be repossessed and demolished without notice? Clearly it will not: that is precisely the reason why not even outline approval can be given at this stage.
 - d. 6.88 onwards: in the context of provision of open space and green infrastructure, it is correctly recognised that generic provision (as arguably, in the 'within site' green infrastructure). But no discussion then ensues as to the essential attributes of 'near-estuary' targeted provision, or thought as to how that space will be made sufficiently attractive to the person who would otherwise fulfil their recreational needs close to (and causing disturbance to) the SPA birds. The Devil is in the detail, and I am not aware of any precedent where it has been demonstrated that such a large new population so close to a European site can have their recreational demands met successfully and in doing so, avoid an adverse effect upon the European Site.
 - e. 6.97 continues this theme, covering '*the role of open space and GI in providing alternatives to European sites, and that such sites should be designed and managed appropriately to maximise their potential effectiveness in this role*'. Fine words, naturally, but simply not enough. Until detail is known as to what the GI is aiming to achieve, cannot evaluate whether proposals are adequate, nor indeed whether mitigation is physically possible. Until that uncertainty can be eliminated, the Precautionary Principle must dictate that an Adverse Effect upon Integrity cannot be ruled out.

- f. 6.98/6.99 Watercraft disturbance - Code of Conduct. This for me is one of the weakest aspects of anything written around mitigation. It is simply inconceivable that a code of conduct will resolve any issues and counteract wholly the additional pressure arising from the residents of the new settlements. Significantly, for this particular issue, the impact zone extends to all of the proposed Garden Communities (not just the closest East Colchester one), where there is no closer provision for tidal water-based recreation than the Colne Estuary. I can see no evidence that the HRA has undertaken a nuanced assessment to consider such matters in this way.
- g. 6.98/6.99: this section on Watercraft disturbance also make a series of ecological impact assumptions which I consider to be untenable:
- i. Yes, water-borne recreation is and will be more prevalent when the key birds are less likely to be there (at least in maximum numbers). But those periods are not mutually exclusive. The only months when there are likely to be few non-breeding birds present are June and July, and these could be seen as the key months for the breeding features of interest, such as Little Terns.
 - ii. Even in mid-winter we see and hear fast, disturbing craft, travelling both above and below the speed limit. More people in the area, and this will only increase.
 - iii. Looking into the future, as we must for such a long-term proposal as housing, we should also be alert to issues which are likely to change through time. In respect of water recreation, we are already seeing I believe an extension of the 'recreation season', in response to climate change, and this is extremely likely to continue, increasing the temporal overlap between boats and birds, and the potential for direct disturbance of those birds.
 - iv. Also overlooked is the fact that watercraft disturbance has an effect on the supporting habitat for birds, through erosion of the muddy sediments particularly in response to a significant wash. That being the case, it doesn't need a temporal co-occurrence of impact (erosion) and receptor (bird) for an adverse effect to be felt.
 - v. In relation to breeding little terns, they highly sensitive to the impacts of water-based recreation, whether from wash/erosion; disturbance and exclusion from feeding areas; or disturbance or trampling from people getting out of craft in remote breeding locations.
 - vi. While the 'softly-softly' approach of para 6.99 might deliver some benefits, it will not address the problem fully (as is required if it needs to be considered as mitigation). Any code of conduct needs to be supported by strong and effective enforcement, supported by continued surveillance, and that must be guaranteed into the future whatever happens to the funding of Local Authorities, Police etc funding. The Competent Authority cannot legally allow the European

Site(s) to slip into an integrity deficit, whether through design or neglect.

8. Perhaps more importantly, it is clear to me that **the assessment has not been undertaken with due consideration to the overall impact of the proposals**. The plan period to 2033 makes provision only for a proportion of the anticipated final development scale (in the case of ECGC, only around one third of anticipated new homes, are due to be built within the plan period).
9. However it is clear that a strategic level HRA must take into account the whole of the eventual development, beyond 2033. Going beyond 2033, the strategic vision is sufficiently detailed for its impacts (largely relating to the recreational demands of future occupants) to be taken into consideration of HRA at this stage, and that point must be explicitly recognised within the current HRA.
10. To restrict the assessment of environmental effects to the development proposed within the plan period only is therefore both **unlawful** (in the context of the Habitats Regulations, where impacts must be assessed in combination with all other relevant plans and projects – the continuation of development beyond the end of the plan period is one such ‘in combination’ scenario which must be fully assessed) and **misleading**.

HRA Conclusions

11. The conclusion EB/003 6.103 that **the plan, with mitigation, will not lead to an adverse effect upon the integrity of the European sites is not tenable in my view**. Given that the essential part of mitigation (RAMS) needed to reach this conclusion is not yet available, the precautionary principle must dictate that it cannot be assumed that mitigation is both possible and deliverable, and guaranteed into the foreseeable future.
12. The assertion in 6.103 that “*the implementation of recreation strategies is now a widely advocated means of mitigating impacts associated with recreation at European sites. As a result, there is a high degree of confidence in the appropriateness and likely effectiveness of such a measure*” is disingenuous. Yes, the implementation of such strategies is now widely advocated, but the practice and experience of the outcomes of such is lacking, both within this document and I believe in the wider conservation community. Therefore there cannot be a ‘high degree of confidence’, informed by experience (or anything other than wishful thinking) as regards ‘the appropriateness and likely effectiveness of such a measure’.
13. To allow an as-yet-undefined mitigational requirement to sway the conclusion of an HRA to ‘no Adverse Effect on the Integrity of the European Site’ is a perversion of the whole process. Furthermore, it is not helpful to the proposed developers and authorities: if the proposal is green-lighted at this stage, only to be blocked through proper application of the Habitats Regulations at a later stage, the only result will be the wasting of a considerable sum of (at least partly) public money.

14. At EB/003 7.14, the overall conclusion is that ‘The current approach being taken by the North Essex Authorities in addressing the key issues, particularly the strategic and collaborative approach, and working closely with Natural England, is advocated and deemed to be the most appropriate and pragmatic approach in ensuring that the HRA Report is sound.’. It should be noted that **‘pragmatism’ plays no defined role in any of the tests of the Habitats Regulations**, and that if that ‘pragmatic approach’ weakens the evidence that a development can be undertaken sustainably (as I believe to be the case here), it represents a procedural perversion of the HRA process, and therefore **leaves any decision in favour of such a development open to legal challenge**, through High Court proceedings and/or by reference to the European Court of Justice.
15. EB/003 7.14 then goes on to its final conclusion: *“In conclusion, providing that key recommendations and mitigation requirements are adopted and implemented the Strategic Section 1 for Local Plans will not result in adverse effects on the integrity of European sites either alone or in-combination.”*. I must simply reiterate here that the mitigation measure needed to be adopted and implemented to reach this conclusion, are simply not know, there is no indication how they can be delivered, nor even that it is physically possible to deliver the mitigations (remembering that ‘partial; mitigation’ is not mitigation, and is insufficient). **If mitigation is not possible, all assurances that mitigational requirements will be delivered are worthless.**

Mitigation

16. As noted above, the ‘favourable’ conclusion of the HRA relies wholly upon effective mitigation being available, possible and deliverable. I argue below that this is not necessarily the case, and that there needs to be an appropriate level of certainty that mitigation will be delivered and that it will be successful, in order for the conclusion of no AEOI to be reached.
17. One element of mitigation identified at this stage is the provision of green infrastructure within the development, and the ‘creation’ of a country park of some 70 ha, based around Salary Brook and Churn Wood (as noted in the section on Mitigation Provided by the Local Plan, at para 3.18 of the HRA Report EB/003).
18. While such provision is to be welcomed, it cannot be the case that the whole of the benefits of the ‘new’ country park can be offset against the harm resulting from the proposals. Put simply, the core areas of Salary Brook and Churn Wood are already present and already deliver some of the benefits claimed against future development. The intended benefits of the ‘within development’ green infrastructure are twofold: supporting and enhancing local biodiversity, and providing a high quality greenspace for recreational purposes. As Public Open Space Salary Brook and its surroundings are already a *de facto* country park; and Churn Wood, as a Local Wildlife Site and recognised Ancient Woodland already benefits from a degree of protection in respect of its biodiversity. Those existing values and attributes cannot reasonably be claimed as offsetting the adverse effects of the development. **Simply rebranding existing green open space as Country Park is not mitigation.**

19. While the existing green infrastructure could be enhanced (for biodiversity and/or recreation), and those added benefits could be claimed in mitigation, there is no detail presented to suggest how those added benefits will be realised, how they will be funded.
20. And crucially, there is no evidence presented as to how the twin objectives of biodiversity benefits and recreational benefits will be reconciled in a relatively small area in the context of a very substantial local human population increase of 20,000 or more once the strategic vision is completed. Enhancements for recreation may actually work against enhancement for biodiversity, for example, if they attract too many people and the biodiversity is insufficiently resilient.
21. A second key aspect of mitigation, of particular significance in the HRA context, is the reliance upon the as yet uncompleted RAMS (Recreational disturbance Avoidance and Mitigation Strategy). Within-development green infrastructure will not in itself absorb all recreational pressures: especially given the proximity of the Estuary, the 'lure of the sea' will undoubtedly be so strong as to override the potential attractions of the country park, and lead to an increase in recreational demands (and thus impacts) on and around the European Sites.
22. Typically, it might be expected that a RAMS would identify a suite of measures necessary to offset the harm to the European site. This is likely to include provision of additional 'green recreational space' close to the impacted site, and a range of visitor management measures to prevent additional visitors to the actual European site, on foot, with dogs, on bicycles and on various water craft, having an adverse effect upon the interest features, directly (eg through erosion) or indirectly (eg through disturbance).
23. Until the RAMS is complete, it is not possible to evaluate the necessary scale of provision of such measures. However, I have little faith in some of the measures hinted at. The suggestion at EB/003 6.99 that waterborne activities can be mitigated through publicising a Code of Practice at launch points is frankly laughable, and certainly not a mitigational activity which can be given any significant credence in the context of the HRA.
24. The plan also needs to provide certainty that those measures will be fully delivered, in respect of funding etc, and also the availability of powers (eg compulsory acquisition of land to create diversionary near estuary greenspace) which would be deployed for example in the absence of landowner willingness.
25. And perhaps more importantly, until the plan is produced, it is not possible to evaluate whether it is actually possible at all to mitigate fully against the adverse impacts arising from the recreational pressures which would arise throughout the whole of the period (beyond 2033) until the Garden Village development 'vision' is completed.
26. It may provide impossible to deliver full mitigation in either or both components of a typical disturbance mitigation strategy:
 - a. A visitor management programme must be adhered to. We already have for example legal speed limits on the estuary, and an enforcing agency (Police),

yet still we have regular breaches of those regulations by waterborne members of the public. So with many more people in the vicinity, we will undoubtedly have more breaches, and this will have an adverse effect upon the features of interest of the sites. Assurances around staffing and funding for enforcement could go some way towards allaying those concerns, but can we be sure that any commitments entered into now will in fact be respected in perpetuity? If they are lost in the mists of time, we will not be able then to depopulate the Garden Community in order to support the natural environment. The legislation applicable now indicates that there must be no foreseeable impact upon the integrity of the site, and that this as with all aspects of the Directive comes with the safety net of the precautionary principle.

- b. It is likely that additional near estuary green space will be required to absorb new visitor pressure before it is able to impact upon the SPA. The location and delivery of such space must be guaranteed in all respects, but the question must be asked will there be any actual space to do that? Landownership matters aside, is there sufficient near estuary space to be able to deliver all the off-site mitigation that is needed? And in this context the need for mitigation/ compensation sites for other plans and projects (especially the EA Shoreline Management Plan) is crucial. It is not possible simply to merge such requirements into one space: SMP mitigation/compensation would have to be targeted at providing habitat/species features; Garden Community mitigation would have to be targeted at creating appropriate space for visitors, to deflect them from damaging the SPA. The two objectives are not mutually compatible.

Implications

27. The uncertainties regarding the necessary scale and deliverability of mitigation are manifest. I do not believe therefore that this can be relied upon at this stage. The implication of this is clear: a conclusion of no AEOI (taking into account mitigation) cannot logically be reached when the availability, scale and practicability of possible mitigation measures are unknown.
28. The only logical conclusion therefore is **that it cannot be ascertained that the plan will not have an adverse effect upon the integrity of the European sites.** I would point out at this stage that **the HRA process is determinative**, rather than some other assessments (eg Sustainability Appraisal, Strategic Environmental Assessment) which are 'merely' informative.
29. Therefore, the plan can be permitted to proceed **only** if
 - a. it is determined that this development in this place in this way is in the national interest ('imperative reasons of overriding public importance' IROPI), **and**
 - b. There are **no alternatives**, in respect of location, type of development etc, **and**
 - c. **Full compensatory measures** which will ensure the overall coherence of the suite of internationally important sites into the future, without even temporary

reduction, are identified, planned, funded and delivered before any development can proceed.

30. None of these issues have been addressed or detailed in the supporting information.
31. I would however offer the following comments. It is quite feasible that the promoters would be able to argue that house-building at the proposed level benefits from IROPI. But what is absolutely clear is that it cannot be argued that this number of dwellings **in these particular places** benefit from IROPI. **The national interest is served wherever the houses are built.**
32. It follows therefore that the 'plan or project' cannot be circumscribed to these specific locations. This of course then raises the question of alternatives, which must be no worse for the natural environment (specifically European Sites) than the current proposals. The search for alternative locations cannot be constrained to the Colchester fringes, nor the areas covered by the promoting authorities. **Unless the promoting authorities can argue successfully that the housing development of this magnitude NEEDS to be delivered in this location, it must fail.**
33. And in respect of the compensatory measures which would be needed to be delivered, similar concerns to those in para 13-23 above,(relating to provision of mitigation measures), although the need for spatial conformity with the location of harm is less critical, given the purpose of compensatory measures 'to secure the coherence' of the international suite of sites, as opposed to the purpose of mitigation to avoid an adverse effect upon the integrity of the impacted site.
34. I should also point out that there is also abundant case law which has determined that in respect of a strategic plan, assessment cannot just be kicked down the road into the future, to be applied at the plan delivery stage. **A further HRA is required at that time.** To allow this strategic plan to move forward on the basis of no AEOL now, for it only to be prevented following HRA at a later plan delivery stage, would benefit nobody, least of all the scheme promoters.

NE position

35. I recognise that Natural England has agreed with the developers that with mitigation the plan is not likely to have an adverse effect upon the European Site(s). With all due respect, I maintain that this conclusion is highly premature, and should at the very least wait until the RAMS is completed, in order that the likelihood of actually being able to deliver full mitigation can be properly evaluated.
36. It should be noted that Natural England has recently acquired a 'Growth Duty', and that it is therefore required to support the Government's growth agenda, through its role in supporting sustainable development. Natural England no longer operates as an independent watchdog charged solely with the defending the natural environment.

37. In my view the response from Natural England reflects the position alluded to above, and is at best highly premature, if not totally inadequate and misleading in respect of safeguarding key natural environmental attributes.

Future geopolitical situation

38. While it might be argued that as these regulations reflect EU law, they are not relevant. But nothing could be further from the truth. Brexit may never happen. And if it does, our Government has committed to retain all environmental protections that we have at the moment. And even if it sought to weaken those protections, the need for regulatory equivalence in order to keep trading with the EU bloc will surely mean that we must assume the environmental protections and tests we have now, and which developments must address, will be retained into the foreseeable future.