BE/29/19/PL – Land west of New Barn Lane, Bersted

Habitats Regulations Assessment

Prepared by Arun District Council

Final Report

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ARUN
DISTRICT COUNCIL

1. HABITATS REGULATIONS ASSESSMENT PROCESS

Legislation

1.1 The primary legislative protection covering International Sites originates from the European Directive 92/43/EEC (the 'Habitats Directive'), which is transposed into UK legislation by the Conservation of Habitats and Species Regulations 2017 (the 'Habitats Regulations') with the key sections of relevance to projects appearing from Regulations 63 onwards. Regulation 63 states that:

"(1) a competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which-

(a) Is likely to have a significant effect on a European site [International Site] or a European off-shore marine site (either alone or in combination with other plans or projects), and

(b) Is not directly connected with or necessary to the management of that site,

Must make an appropriate assessment of the implications of the plan or project for that site in view of the site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required."

National Planning Policy

1.2 Section 15 of the National Planning Policy Framework (NPPF) (July 2018) relates to conserving and enhancing the natural environment, particularly paragraphs 170 and 175 are of particular relevance to International Sites and have been taken into account in the preparation of this Appropriate Assessment.

1.3 Paragraph 176 requires that Ramsar sites are treated as if they are fully designated International Sites for the purposes of considering development proposals that may affect them.

Guidance

1.4 Guidance published by the European Commission entitled 'Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites' (2001) advises on carrying out the stepwise approach to HRA required by Article 6 of the Habitats Directive. This requires that the following stages are undertaken in sequence:

1. Screening the need for an Appropriate Assessment;
2. The Appropriate Assessment;
3. The Assessment of Alternative Solutions; and
4. Assessment where no alternative solutions exist and where adverse impacts remain (also known as the test for "Imperative Reasons of Overriding Public Interest" or IROPI).

Relevant Case Law

<u>Case C-127/02 of the European Court of Justice (ECJ) – The ''Waddenzee'' Case</u>

1.5 The ECJ Waddenzee Case clarified several important points in relation to the correct interpretation of Article 6(3) of the Habitats Directive in particular. This clarification has been helpfully set out in Government Circular 06/05 ''Biodiversity and Geological Conservation''.

1.6 One of the key messages from the ECJ was that, where a plan or project has the potential to affect a Natura 2000 site, an ''Appropriate Assessment'' is necessary:

''….if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either alone or in combination with other plans and projects''

[Paragraph 13 of Circular 06/05 or paragraph 44 of the Waddenzee Judgment]

1.7 The ECJ expanded upon this by saying that:

''…where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.''

[Paragraph 47 of the Waddenzee Judgement]

1.8 Further to the above the ECJ clarified that, once an Appropriate Assessment has been triggered, except in the circumstances outlined in Article 6(4) of the Directive, a plan or project can only be authorised where it will not have an adverse effect on the integrity of the Natura 2000 site, and that:

''That is the case where no reasonable scientific doubt remains as to the absence of such effects''. [Paragraph 21 of Circular 06/05, or paragraph 59 of the Waddenzee Judgement]

<u>The 'Dilly Lane' and 'People over Wind' Judgments</u>

1.9 The High Court, in the judgment of J Sullivan in Hart DC v Secretary of State for Communities and Local Government (2008), has for some time formed the basis of established HRA Practice, insofar as it has determined the approach to the Screening and Appropriate Assessment stages of the HRA process.

1.10 Up until recently the established approach derived from the Dilly Lane Case meant that where impact avoidance and mitigation measures were put forward as integral parts of a plan or project, and where the competent authority was also satisfied that those measures would be effective, deliverable and could be secured, then there was no need for an Appropriate Assessment to be carried out.

1.11 This was because in such circumstances it was considered that the information pertaining to the efficacy of those impact avoidance and mitigation measures represented the 'objective information' referred to by the European Court of Justice (ECJ) in the Waddenzee case (above).

1.12 More recently however, in case C-323/17 of the ECJ (referred to as 'People over Wind'), the ECJ concluded that it was not appropriate to take account of "…measures intended to avoid or

reduce the harmful effects of the plan or project…" at the Screening stage of the HRA process. Although there appear to be some inconsistences between this judgment and previous ECJ case law, until such time as the ECJ may provide further clarification, it will be necessary to consider the efficacy of impact avoidance and mitigation measures such as SAMM through the medium of an Appropriate Assessment in order to ensure compliance with the findings of the judgment.

The Grace and Sweetman Case

1.13 The above approach was confirmed in the July 2018 Grace and Sweetman case (C-164/17). In this case the ECJ ruled that a project resulting in the loss of land within a European site which could support the qualifying feature(s) cannot be mitigated by measures designed to improve the capacity of other areas of the European site to support those feature(s). Such a project must therefore fail the 'appropriate assessment test at Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. If the project must proceed for imperative reasons of overriding public interest, such measures may be required to compensate for the loss of area within the European Site, as per Article 6(4).

1.14 In light of the above it is the view of the LPA that as there is no proposal to remove land from the SPA, ECJ ruling C-164/17 is not relevant to this application (see discussion at paragraph 5.52).

Screening Likely Significant Effects

1.15 The purpose of the initial screening stage is to determine whether the proposals will give rise to a 'likely significant effect' (LSE). If an LSE can be ruled out, the proposals are deemed to pass the screening stage. However, if an LSE is identified, or uncertain, the competent authority must proceed to the next stage and carry out an Appropriate Assessment of the proposals, in light of the conservation objections of the International Site in question.

The Appropriate Assessment Stage

1.16 The purpose of the Appropriate Assessment (AA) is to further analyse likely significant effects identified during the screening stage, as well as any effects which were uncertain or not well understood and taken forward for assessment in accordance with the precautionary principle. The AA evaluates the implications of the plan or project, either alone or in combination with other plans and projects, in light of the conservation objectives of the affected International Site.

1.17 The AA stage includes a test of whether the plan or project proposals will result in significant adverse effects on site integrity which can be defined as;

In Combination Effects

1.18 Other plans or projects being prepared or implemented in the area may have the potential to cause negative effects on the integrity of International Sites. These effects may act in combination with the effects of this application, potentially leading to a likely insignificant effect becoming significant. It is therefore important to consider whether this application could contribute to effects generated by other plans and projects.

2. Background Information

Consultation with Natural England

2.1 Natural England (NE), the Government's statutory adviser on nature conservation in England, has been consulted on the proposals. The Courts have determined on several occasions that the views of NE as the statutory nature conservation advisory should be given 'great weight' unless a 'cogent explanation' is given for not doing so. NE has advised ADC in the following correspondence (see Appendix 1)

• NE Consultation response dated 1st April 2019

2.2 In NE consultation response dated the 1st April 2019, NE have confirmed that they have "No objection subject to mitigation". The advice provided in summary was as follows;

• This application will result in a net increase in residential accommodation, impacts to the Pagham Harbour Special Protection Area (SPA) and Ramsar Site may result from increased recreational disturbance.

• Your authority has measures in place to manage these potential impacts through the agreed strategic solution which we consider to be ecologically sound.

• Subject to appropriate financial contributions being secured, NE are satisfied that the proposal will mitigate against the potential recreational impacts of the development proposed.

• NE advise is that this proposed development, and the application of these measures to avoid or reduce the likely harmful effects from it, may need to be formally checked and confirmed by your authority, via an appropriate assessment in view of the European Site's conservation objectives and in accordance with the Conservation of Habitats & Species Regulations 2017 (as amended).

• This is because the recent People over Wind Ruling by the Court of Justice of the European Union concluded that, when interpreting article 6(3) of the Habitats Directive, it is not appropriate when determining whether or not a plan or project is likely to have a significant effect on a site and requires an appropriate assessment, to take account of measures intended to avoid or reduce the harmful effects of the plan or project on that site.

• NE advises that it is a matter for your authority to decide whether an appropriate assessment of this proposal is necessary in light of this ruling.

• NE notes that the Environment Officer has suggested a number of enhancements that should be secured. We would like to support the inclusion of these enhancement measures.

Consultation with other Parties

2.3 The other relevant statutory consultation response received were as follows;

• Environment Officer, Chichester District Council (CDC) response dated 13th March 2019.

2.4 In summary these comments were as follows;

"<u>Bats</u>

The lighting scheme for the site will need to take into consideration the presence of bats in the local area and the scheme should minimise potential impacts to any bats using the trees, hedgerows and buildings by avoiding unnecessary artificial light spill through the use of directional light sources and shielding.

The hedgerows on site are used by bats for commuting and foraging and will need to be retained and enhanced for bats. This will include having a buffer strip around the hedgerows and during construction fencing should be used to ensure this area is undisturbed. Any gaps should also be filled in using native hedge species to improve connectivity. Where any hedge is to be removed as detailed within the survey, new hedgerow should be planted. Conditions should be used to ensure this.

<u>Reptiles</u>

To ensure the site remains unsuitable for reptiles, continued management of the site must take place to ensure reptile habitat does not develop onsite. If this is not possible then a precautionary approach should be taken within the site with regards to reptiles.

<u>Nesting Birds</u>

Any works to the trees or vegetation clearance on the site should only be undertaken outside of the bird breeding season which takes place between 1st March – 1st October. If works are required within this time an ecologist will need to check the site before any works take place (within 24 hours of any work taking place).

<u>Enhancements</u>

There are a number of enhancements we would like to see onsite including some of the following;

- *Any trees removed should be replace at a ratio of 2:1;*
- *Wildlife pond;*
- *Wildflower meadow;*
- *Filling any gaps in tree lines or hedgerows with native species;*
- *Bat and bird boxes installed on the site;*
- *Grassland areas managed to benefit reptiles; and*
- *Log piles onsite."*

3. Screening of Likely Significant Effects

Introduction

3.1 This section sets out Stage 1 of the HRA, Screening. It describes the application site and development proposals, and explores the potential impacts generated by the development that could give rise to a likely significant effect (LSE) on Pagham Harbour SPA/Ramsar.

Description of the Application Site

3.2 The below description of the application site is drawn from the Habitats Regulations Report (6767.IHRA.vf2) submitted in support of the application.

3.3 The application site is located to the west of the village of North Bersted, near Bognor Regis. Existing residential development is situated to the east of the Application Site, with Newbarn Lane forming the eastern boundary. To the north is a caravan park, with farmland situated to the south and west of the application site.

3.4 The application site previously comprised a pasture field, with some scattered scrub and ruderal vegetation in addition to a small strip of amenity grassland. Hedgerows are present along the southern and western boundaries of the field, whilst a treeline is situated beyond the northern boundary.

3.5 The site benefits from planning permission for the construction of 90 dwellings under reference BE/142/15/OUT with reserved matters having been approved under reference BE/77/17/RES. Development has commenced on the implementation of the 90 unit scheme. A subsequent variation of condition was submitted under reference BE/18/17/PL relating to conditions 3 and 23 and the vehicular access imposed under reference BE/142/15/OUT.

Description of Development

3.6 Linden Homes Ltd have applied for planning permission for 99 units through the amendment of the previously approved scheme. The description of the development is as follows:

"Erection of 99 No. dwellings together with landscaping, open space & associated works. Access to be taken from New Barn Lane."

3.7 The proposal is not directly connected with or necessary to the management of Pagham Harbour SPA/Ramsar and as such must be the subject to HRA.

Potential for Likely Significant Effects on Pagham Harbour SPA/Ramsar

3.8 The application site is situated approximately 4.4km away from the Pagham Harbour SPA/Ramsar site at its closest point. Other European/internationally designated sites are located at greater distances. The Chichester and Langstone Harbour SPA/Ramsar site and the Solent Maritime Special Area of Conservation (SAC) are located approximately 8km to the west of the application site. The Solent to Dorset Coast potential SPA (pSPA) boundary overlaps that of Pagham Harbour with the boundary drawn to mean high water. There are no other such sites within 10km of the application site.

3.9 In relation to the Chichester and Langstone Harbours SPA/Ramsar site and the Solent Maritime SAC, it is considered that given the distances involved, the development proposals would not be likely to give rise to a significant effect on these sites, when the project is considered alone or in combination with other plans or projects. This conclusion is supported by the "Interim Policy Statement on Development and Disturbance of Birds in Special Protection Areas and identified Compensatory Habitats" document (April 2014) published by Chichester District Council. It is stated that:

"Through the Solent Disturbance and Mitigation Project (SDMP), Councils across the Solent have identified a 'zone of influence' surrounding the Chichester & Langstone Harbours SPA/SAC site that extends to 5.6km from the Special Area of Conservation (SAC) boundary. Accordingly the Council will consider planning applications which fall within the zone as set out below."

3.10 Therefore, given that the application site falls outside of the 5.6km zone of influence identified within the 'Interim Policy Statement on Development and Disturbance of Birds in Special Protection Areas and identified Compensatory Habitats" document (April 2014) published by Chichester District Council, no further consideration is required in relation to potential effects on the Chichester and Langstone Harbours SPA/Ramsar site and the Solent Maritime SAC.

3.11 In relation to the Solent to Dorset Coast pSPA, which would be classified in order to protect foraging species of Tern Sterna sp., given the distances involved and the nature of the Development Proposals no disturbance effects Tern species using this pSPA would occur. On this basis no further consideration is therefore required.

3.12 The Arun Local Plan HRA Stage 2 Report (June 2016) identified a potential effect for the West of Bersted strategic allocation (which is located adjacent to the application site) upon Pagham Harbour SPA through disturbance.

Disturbance

3.13 For disturbance impacts, the ALP HRA Screening Report discusses how the 2013 ALP HRA concluded that *'residential allocations within 5km of Pagham Harbour SPA/Ramsar site would be the principle source of additional visitors to the International Site and would hence result in a risk of adverse effects on site integrity'*. Also, that *'mitigation measures recommended in the 2013 HRA were subsequently incorporated into the Publication ALP (October 2014) as Policy ENV DM2'*.

3.14 The Local Plan HRA Screening Report confirmed that the West of Bersted Strategic Allocation is one of the potential new (residential) development allocations located within 5km of the SPA/Ramsar and concluded that the West of Bersted development was likely to be deliverable in compliance with Policy ENV DM2.

3.15 Whilst, the application site is situated outside of the West of Bersted allocation the allocation boundary is situated immediately adjacent to the western and southern boundaries of the site. Therefore, the conclusions within the ALP HRA Screening Report are relevant to the consideration of likely significant effects from this development.

3.16 The conclusions drawn within the ALP HRA Screening Report rely upon the joint scheme of mitigation to avoid individually insignificant effects from the scheme contributing to a combined likely significant effect.

3.17 It was identified within Natural England's consultation response dated 1st April 2019 that the application will result in a new increase in residential accommodation, impacts to the Pagham Harbour SPA/Ramsar Site may result from increase recreational disturbance. It was also stated that measures are in place to manage these potential impacts through the agreed strategic solution which we consider to be ecologically sound. Subject to the appropriate financial contributions being secured.

Screening Conclusion

3.18 The ECJ (People over Wind) ruling means that impact avoidance and mitigation measures should now be considered at the AA stage. It is no longer possible to rule out a LSE where such measures are relied upon. Instead, taking the assessment through to the AA stage is necessary to explore whether any contribution toward an adverse effect on the integrity of the site can be ruled out.

3.19 In summary, it is considered that disturbance impacts arising from the proposed development will not trigger a LSE on the Pagham Harbour SPA/Ramsar alone, but there is potential for a LSE on the SPA/Ramsar in combination with other plans and projects. This is considered in detail in the AA later in this report.

4. Appropriate Assessment

Qualifying Features

4.1 The Qualifying Features of the Pagham Harbour Special Protection Area are identified by Natural England as;

• A046a *Branta bernicla bernicla*; Dark-bellied brent goose (Non-breeding)
• A151 *Philomachus Pugnax*; Ruff (Non-breeding)
• A193 *Sterna hirundo*; Common tern (Breeding)
• A195 *Sterna albifrons*; Little tern (Breeding)

4.2 The Conservation Objectives for the Pagham Harbour SPA/Ramsar are identified as;

"Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring;

• *The extent and distribution of the habitats of the qualifying features*
• *The structure and function of the habitats of the qualifying features*
• *The supporting processes on which the habitats of the qualifying features rely*
• *The population of each of the qualifying features, and,*
• *The distribution of the qualifying features within the site."*

4.3 The species of birds for which the Pagham Harbour SPA/Ramsar is designated are susceptible to disturbance. Therefore, it is necessary to consider means by which the in combination disturbance of birds with the Pagham Harbour SPA/Ramsar can be mitigated.

Impact Pathway - Disturbance

4.4 The Arun Local Plan HRA – Appropriate Assessment Report considered the impact pathway of alone and in combination effects of disturbance on Pagham Harbour SPA/Ramsar. It was identified

that population growth associated with residential development brings with it the prospect of additional visitor pressure on European sites.

4.5 Impacts associated with disturbance of birds from recreation can lead to behavioural or physiological responses, with possible effects on survival and breeding success due to reduced feeding time and additional flights. Disturbance can be caused by a variety of activities, including walkers, dogs, boats, bait diggers, and the distance and scale will influence the response.

4.6 Pagham Harbour SPA/Ramsar is important for supporting both overwintering birds (waders and wildfowl) and breeding birds (terns) and disturbance impacts differ for these groups. Wintering birds are vulnerable to interruption to foraging and roosting, breed birds to predation or trampling of nests.

4.7 Two visitor surveys have been carried out at Pagham Harbour (2006 and 2012) to obtain site baseline data on recreational behaviour. The analysis of postcode data, using a method agreed with Natural England, aimed to establish the distance travelled by visitors to Pagham Harbour SPA/Ramsar. The conclusion of this survey work was that most visitors travelled from within 5km to visit the SPA/Ramsar site. Therefore, a 5km avoidance and mitigation zone around Pagham Harbour SPA/Ramsar was adopted.

4.8 The Arun Local Plan allocates at least 4,180 dwellings within 5km of Pagham Harbour SPA/Ramsar alongside smaller unallocated sites which will come forward within the built-up area boundary. This level of residential development is likely to increase the number of regular visitors to the SPA/Ramsar. The cumulative increase in disturbance from people and dogs is likely to adversely affect populations of breeding terms (through reducing breeding success) and overwintering Brent Geese, black-tailed godwit, ruff and pintail (by reducing winter survival rates), thereby undermining the integrity of the SPA/Ramsar.

4.9 Therefore, each plan and project will need to avoid or mitigate its respective contribution. Avoidance and mitigation measures were incorporated into Local Plan policy ENV DM2. This policy requires new development resulting in a net increase in dwellings within 5km of Pagham Harbour SPA/Ramsar to make financial contributions towards a Strategic Access Management and Monitoring (SAMM) package and provide for accessible natural greenspace on site.

4.10 An interim strategic framework and tariff-based system for collecting contributions to the SAMM package was agreed between Arun District Council, Chichester District Council, Natural England and the RSPB in 2015. The tariff was at this time set at £1,275 per additional dwelling and funded projects within the following areas:

• Wardening and visitor management;

• Dog projects, including provision of information e.g. codes of conduct;

• Interpretation and signage; and

• Monitoring.

4.11 By virtue of the housing numbers proposed within the Arun Local Plan there was a requirement for wardening to increase from 0.5 to 1.5 full-time equivalent positions. However, In view of the increased housing numbers the tariff reduced per net additional dwelling to £871.

Applicant's Impact Avoidance and Mitigation Strategy

4.12 The applicant proposes the following avoidance and mitigation measures in the submitted 'Information to enable a Habitats Regulations Assessment (Appropriate Assessment) of the impacts on the Pagham Harbour Ramsar / Special Protection Area [pursuant to Regulation 63 of The Conservation of Habitats and Species Regulations 2017]'.

• Recreation disturbance impacts – Payment of a strategic access management and monitoring (SAMM) tariff and provision of suitable greenspace within the development.

4.13 The developer has confirmed that contributions to SAMM through payment of the tariff will be made in line with local policy. Given that Natural England is satisfied that the SAMM Mechanism will be effective, it can be safely concluded that potential effects arising as a result of the proposed development will be cancelled. Therefore, the development will not give rise to adverse effects on Pagham Harbour SPA/Ramsar due to increased recreational access.

4.14 Inclusion of 0.58ha of open space on site will provide an open space resource on site which will provide recreational opportunities for walkers and dog walkers. Therefore, the development accords with policy ENV DM2 in the Arun Local Plan, which requires on-site and off-site mitigation measures for the Pagham Harbour SPA/Ramsar.

4.15 The avoidance and mitigation strategy identified by the Applicant is considered to be robust and would meet the tests set by consideration under Appropriate Assessment.

4.16 The SAMM project is established policy following agreement by Arun District Council, Chichester District Council, Natural England and the RSPB in 2015 and was tested at the subsequent Local Plan EiP and can be delivered.

Conclusion

4.17 The proposed mitigation measures are considered to result in the avoidance and mitigation of an adverse effect on the integrity of Pagham Harbour SPA/Ramsar site, alone or in-combination with others plans and projects.