HS1.2

Hearing Statement- Main Matter 1 – Legal Requirements and Overarching Issues

Tendring Colchester Borders Garden Community Development Plan Document (DPD)

Wivenhoe Town Council

23.160

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1. Introduction

1.1 Cerda are instructed on behalf of Wivenhoe Town Council to act on its behalf in respect of the Examination into the Tendring Colchester Borders Garden Community DPD.

1.2 The Town Council are a key stakeholder and provided representations to the Regulation 19 consultation, making strong objections to the plan.

1.3 This document has been prepared in response to the Planning Inspectors invitation to provide further statements on the soundness of the plan and other elements of the plan ahead of the Examination in Public which starts on May 7th.

2. Matter 1 Questions and Responses

2.1 ***Question 1*** *– Does the content and timescale for preparation of the DPD accord with the latest version of the Local Development Scheme?*

A Local Development Scheme is required under section 15 of the Planning and Compulsory Purchase Act 2004 (as amended). This must specify (among other matters) the development plan documents (i.e. local plans) which, when prepared, will comprise part of the development plan for the area…….. The Local Development Scheme must be made available publicly and kept up-to-date. It is important that local communities and interested parties can keep track of progress.[1]

The appendix 1 table highlights in red where the respective Local Development schemes of *Tendering* and *Colchester* do not align in terms of description and/or date, as of 16/04/24. As a result, one of the Council's has not met its Statutory Duty/ Legal Requirements.

The content between the two LDS documents is also different, meaning that one of them is not up to date as required by the Act. The Local Development Scheme for Tendring and *Colchester* have different information, and dates for stages to be completed. What can be pieced together from reading both is that the policy relating to the TBGC is running late in being adopted. However, in the Colchester LDS it is suggested that the DPD should have been adopted already. The risks section that if slippage occurs the LDS will need updating. Whereas the Tendering LDS has clearly been updated to reflect the current situation.

The Tendring LDS *states* that:

(3.4) '*The DPD is meant to provide significantly more implementation detail to Section 1 policies to further assist in facilitating the planning application process for the Garden Community.*' This is not the case for many elements, in particular infrastructure essential to the sustainability of the project there is little detail of works required outside of the site and what the operational aspect will be and cost. In other words, we are no further forward in evidence terms than we were at the section one hearing years ago. Additionally, the on-site infrastructure for the RTS reads like a list of suggestions rather than defined policy burden, so defers cross boundary, strategic matters contrary to the requirements of the soundness test in relation to paragraph 35(c) of the NPPF.

The Colchester LDS States that *a Development Plan Document (DPD) is being prepared to further guide development on the Tendring Colchester Borders*

[1] Paragraph: 003 Reference ID: 61-003-20190315 - Revision date: 15 03 2019

Garden Community. The DPD, once adopted by the Council, will include the location and scale of land uses alongside the required infrastructure. The scope of requirements and what the DPD will deliver is different.

(3.7) *'Infrastructure delivery plans identify each piece of infrastructure that is needed and set out the mechanism for delivering these items'*. The mechanism for delivery of the link road is not *defined* either in funding terms, the physical delivery of phase two or triggers determining its completion based on housing numbers. Although Housing Infrastructure Funding of £100 million has been secured this only covers phase one, so the LDS does not align with the details provided in the DPD.

(3.9) *'CIL is optional and not currently utilised by the Council in favour of bespoke Section 106 Agreements with developers. CIL could however be an alternative option, which the Council may consider. As such, it is included in the LDS programme with indicative timescales.' We* were under the impression a review of whether to move to CIL or any other alternative to S106 was meant to happen prior to the adoption of the DPD. It certainly does not make clear in the DPD that other planning gain systems will come into force if adopted which would cover this review not having taken place.

The plan is not consistent *with* national policy and is unsound.

2.2 ***Question 2*** *– Has the DPD consultation complied with the Statement of Community Involvement and public consultation requirements in the Town and Country Planning (Local Plan) (England) Regulations 2012?*

Regulation 20 stage on page 18 of the Statement of Community Involvement states that "*Representations on the published draft document are sent to the Councils for consideration and analysis to be published in a consultation statement.*"

Wivenhoe Town Council representations to the DPD Reg 19 consultation were altered and summarised by the local authorities without consent, reducing the significance of our key issues such as the deliverability of the link road and the viability of the scheme, both absent from any of the summaries that were available for the public or the inspector to view. Consequently, no evidence of any analysis has been published on these points in the consultation statement. This significantly prejudiced and distorted our representations. The invitation to submit to the consultation clearly stated that we could respond directly via *one* electronic copy as well as the use of the portal and the Statement of Community Involvement (SCI) does not set any limits to restrict the scope of issues which the public can raise representations on. Therefore, we do not see how this complies with a fair and reasonable consultation and with respect to paragraph 1.4 of the SCI and there is no evidence that the Council has listened to or seriously considered our comments and suggestions. Additionally, none of the evidence base promoted the concept of delivering the link road in phases, or the conditions that would need to be satisfied to trigger the second phase, denying us opportunity to respond on this critical infrastructure element. Essex County Council (ECC) have now stated in their CPO statement of case for the upcoming public enquiry, that all traffic modelling done for the Highways Infrastructure (HIF) fund application and the DPD evidence base cannot be relied upon ahead of the transport studies completed by the developer that will be produced alongside any planning application. Therefore, the evidence we consulted on failed to present "all the relevant Local Plan documents"[2] on the Councils website as required in the Executive Summary of the SCI. The plan is not consistent with national policy and is unsound.

[2] Tendering Statement of Community Involvement (SCI) July 2020

2.3 ***Question 3*** *– Has the DPD been subject to a Sustainability Appraisal (SA) and have the requirements for Strategic Environmental Assessment been met? Is it clear how the SA influenced the final plan and dealt with mitigation measures?*

This isn't a final plan, the DPD states that the plans are indicative and subject to further master planning. The developer made it clear in their submissions, they do not intend to follow the policy *map* in terms of land use. This element would need securing firstly before any judgment can be reached on if it has met a strategic environmental assessment. The SA produced was predetermined by the full delivery of a link road and a fully funded RTS to be found the most sustainable site. Now this invented infrastructure is no longer part of the scheme the assessment is no longer valid and does not justify the approach taken in the DPD. The sec 1 inspector (Mr Roger Clews) in his letter of 8 June 2018 noted: *'99 Without more evidence to show that the necessary transport infrastructure for the GCs could be provided viably and in a timely fashion, the strong positive scores for the chosen strategy in respect of sustainable travel behaviour and accessibility are unwarranted.'*

The SA does not directly address the issue of the impact of increased traffic on the A133 both on journey times and air pollution. Additionally, assessment was carried out to look at options on land use south of the A133, but this assessment seems not to have influenced the decision to isolate sports facility for the new settlement the other side of a dual carriage way. The site south of the A133 isn't accessible by existing public transport or part of the RTS route. It could lead to flood lit multi story indoor facilities right next to a registered park, leading to the destruction of a coalescence with Wivenhoe and the town's setting.

In the updated Sustainability Appraisal (SA), the Option 3 paragraph 7.8 referred to in these extracts was for a *masterplan* option with no development south of the A133.

2.4 ***Question 4*** *– Have the requirements for appropriate assessment under the Habitats Regulations been met? Have the results of the Habitats Regulations Assessment been carried forward in the DPD?*

An Appropriate Assessment (AA) has been undertaken, and concluded rightly that it is not possible to exclude an adverse effect on integrity of the international site without mitigation (largely – but not exclusively based on increased recreational disturbance arising from so many new residents in close proximity to the International site. However, the result of the HRA have not been satisfactorily carried forward to the DPD. As absolute reliance is placed on the mitigation associated with the Recreational Access Management Scheme, an approach that has no empirical evidence that it will work to offset harm to the international site. The legal test is that mitigation can only be considered mitigation under the Habitats Regulations if the mitigation proposals will work (not 'might' work, or 'could' work – the appropriate level of certainty is at or around the legal test of 'beyond reasonable doubt'). There is no published evidence to show that this level of certainty is available, nor anything to suggest that it will have mitigation effects in perpetuity (necessary as the impacts kick in particularly once full occupancy is achieved). Also, the section 1 policy SP1 2.4 stipulated that *'To mitigate for the loss of off-site habitat, the AA identified the need for wintering bird surveys for the Tendring/Colchester Borders Garden Community as part of any project level development proposals and master planning.'* As no wintering bird survey has been produced, we do not believe the requirement or policy can be met.

Unless *further* evidence is produced relating to visitor surveys, the Council does not know what type or size of SANG is required. The plan is not consistent with national policy or positively prepared and is unsound.

2.5 ***Question 5*** *– Has the preparation of the DPD complied with the Town and Country Planning (Local Plan) (England) Regulations 2012?*

The Town and Country Planning, (Local Planning) (England) Regulations set out the process of plan making and augments the Planning and Compulsory Purchase Act 2004. Section 38 (5) of the Act states *"If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document"* the regulations go further stating that a local plan must be consistent with the adopted development plan. Where there is conflict between the requirements of the Section 1 plan and this DPD, the requirements of the DPD would take precedence. As an example, (there are others), Policy SP8 of the Section 1 plan requires that both the built and public realm executes the highest quality planning, design and management and GC Policy 3 reduces the requirement to ensure that new buildings and structure are "well designed". Because the DPD is not consistent with the adopted Section 1 Local Plan it does not comply with the Town and Country Planning (Local Plan) (England) Regulations 2012. The plan is not consistent with national policy and is unsound.

2.6 ***Question 6*** *– Does the 'policies map' correctly illustrate geographically the application of policies of the DPD?*

No, the policy map provides no certainty because it's labelled as only indicative and subject to future master planning. E.g. the route through the GC is still not set and there are 2 different positions shown for the park and choose. It also doesn't give a position for travellers site. The plan is not effective and is unsound.

2.7 ***Question 7*** *– Does the DPD accord with national policy for plan making in the NPPF, specifically:*

Does the DPD contribute to the achievement of the three dimensions of sustainable development – economic, social, and environmental

No, because the DPD development requirements are less restrictive than set out in the Section one plan which has already been tested against the principles of sustainable development and the DPD lacks sufficient details.

In order for it to satisfy the economic benefit there would need to be evidence that jobs can be delivered on site and that infrastructure is co-ordinated. However, the employment area to the northeast cannot be delivered as no one has control of the land and the RTS and link road doesn't connect to it. Also, the current position of both the university and the council that could consider some kind of joint venture on the knowledge gateway area, is that they are not able to invest due to the financial risk and general financial situation. This is highly unlikely to change to meet the targets set in the plan period. The issue of Suitable Alternative Natural Greenspace (SANG) to mitigate visitor impacts to nearby RAMSAR/ European protected sites is unresolved and might mean significant acquisition of land.

Environmentally this site would be rejected if the SA was re-done without a link road. And under the current NPPF additional weight would be placed on it being grade 1 arable land. The plan must deliver the infrastructure the evidence demonstrates is required which can help to minimise pollution and make effective use of land.

To meet the social objective a sufficient number and range of homes would need to be provided but the lack of infrastructure planning is a significant risk to delivery of up to 2500 homes. The plan is not consistent with national policy, justified or positively prepared and is unsound.

2.8 ***Question 8*** *– Has it been positively prepared 'in a way that is aspirational but deliverable? (paragraph 16 of the NPPF)?*

No not sufficiently aspirational to accord with the requirements of the Section one plan and in its the current form is not deliverable because there is no plan for delivering all of the infrastructure required and is explored further in our other statements.

From its inception the link road has been presented as a strategic upgrade necessary to alleviate existing and future traffic congestion. This was the basis for the Housing Infrastructure Fund Business Case, that states: -

'A link road which connects between the A120 and A133 is required to provide additional highways capacity to directly serve the Garden Community and to relieve existing pressure from the local road network around the site's environs, thus providing capacity to accommodate growth. Provision of a full link road - rather than a spine road – is required for this site's inclusion in Local Plans, thus facilitating delivery of new homes.'

In the Infrastructure delivery phasing and funding plan (IDP) it says *'The A120-A133 Link Road received planning permission in 2021 and is scheduled to open in 2026. Its objective is to support growth at the Garden Community, manage congestion in this wider locality and improve connectivity'*. It is also drawn in full on all the DPD policy map and all traffic modelling is based on it being built in full.

However, ECC have not secured phase two funding, deferring setting a timescale for its completion by saying it will be informed by future transport reports and not the ones they have sponsored to date. (We note that no traffic modelling is available for the non-linking scheme.) Also, they are unable to confirm what it will cost to construct it. Currently the overspend on the road included in the viability assessment is set at 21million. However, a split-level junction alone could cost between 50 and 100 million. The inspector may want to ask for an up-to-date estimate of the total. The information must be available to ECC and is vital for the credibility of phase 2 delivery promises.

To get an early idea of the likely cost we offer the following examples:

- A19 / A184 Tescos Junction - £79.8m
- A19 Downhill Lane Junction - £54m
- A47/ A11 Thickthorn Junction - £91.2m

Given that ECC do not see phase two being built until after 2033 and the HIF funding will either be spent or returned by 2026, this means that both the costing and raising of funds for phase two is entirely down to the contractor. As they have no experience of road building at this scale, have limited capital resources, and

have not committed to funding in any legally binding format this make delivery highly uncertain.

Although there is a memorandum of understanding (MOU) in place with Latimer regarding funding for the road it provides limited comfort as:

- They will commit to the road when "practically and financially possible to do so" (there is no agreement to secure the recovery of the £64million HIF funding). The MOU concludes 'Nothing in this MOU, or in any other document referred to in it shall be legally binding'.

- Latimer is Clarion's housebuilder subsidiary which pays intercompany interest at SONIA + 5.5%. Latimer has net assets of around £48m which is not enough to support any promises for delivery on the scale required without phasing.

Another concern is that ECC do not have full control of all the land needed to build the link road and have only producing CPO's orders to acquire land for the first phase.

Unresolved concerns with Highways England, and landowners who are refusing to sell, are also significant hurdles to the completion of phase 2.

The full link road is also critical for meeting the employment needs of the site. Without it there will be no access to the University of Essex from the A120 and no access to the new employment area from anywhere.

The cost of SANG mitigation is unknown and might make the scheme unviable to deliver. The plan is not consistent with national policy, justified or positively prepared and is unsound.

2.9 ***Question 9*** *– Is the DPD consistent with the NPPF in all other respects? Or if not, what is the justification for any inconsistency?*

The expectations of quality are different between the Section One Local Plan and the DPD, expectations are not clear. The DPD does not sequence infrastructure provision or ensure that it is provided ahead of or in tandem with the development it supports and fails to comply with paragraph 73 of the NPPF. The DPD does not plan for sustainable development so is not in accordance with the NPPF. For all of the reasons set out the plan is not positively prepared, justified, effective or consistent with national policy and is unsound.

2.10 ***Question 10*** *– Are there any policies within the DPD which are Strategic Policies, and should they be identified as such?*

The DPD lacks the detail that you might expect in a non-strategic policy document, and it defers to future master plans or design codes instead of providing some of these details in the DPD. Many of the policies are broad such as GC Policy 2: Nature Part D which repeats national Biodiversity requirements. Section 8 in particular repeats other legislation or are strategic requirements for all development across the borough.

2.11 ***Question 11*** *– Do the policies in the DPD provide a clear indication of how a decision maker should react to a development proposal?*

There is a disparity between Section 1 policy and that in the DPD. Where the language gives considerable flexibility for interpretation, and which would require decision makers to conclude that there is a conflict and that the DPD would be favoured for a decision to be lawful. Leading to confusion and which puts decision makers at risk, because decision makers (both officers and Cllrs) could be open to Judicial Review if they relied on adopted strategic policies, this is also in the context of the need to grant permissions to meet targets for securing HIF grant funding which for members not directly connected to the area would be a more significant issue. are already under pressure on this project to make certain decisions to continue to secure the HIF grant money for the project. This pressure creates a significant conflict of interest for many of the joint committee members who are ECC Cllrs and could prejudice a non-policy compliant planning application being accepted.

There are a lot of optional policies relying on the word “should”, decision makers might believe that developer must adhere to the policies, but in many cases they will be able to challenge the necessity of them.

Appendix 1 – LDS Timetable

Indicative Timetable for TCB DPD Production			
STAGE (Tendering Description)	Tendering LDS (Feb 2024) Timetable	STAGE (Colchester Description)	Colchester LDS Timetable
Studies & Document Preparation	Winter 2020/21 – Winter 2021/22 (Completed)	Document Preparation	Winter 2020/21 to Winter 2021/22
Member approval of draft DPD	Spring 2022 (Completed)	Member Approval –Draft DPD	Spring 2022
Draft DPD Reg 18 Consultation	Spring 2022 (Completed)	Draft DPD consultation	Spring 2022
Reg 19 Document Preparation	Summer 2022 - Winter 2022/23 (Completed)	Summarising representations to consultation, draft a response & make amendments to the plan	Summer 2022 to Winter 2022/23
Member approval of submission Draft DPD	Spring 2023 (Completed)	Member approval submission document for consultation	Spring 2023
Submission DPD Reg 19 Consultation	Summer 2023 (Completed)	Submission DPD consultation	Summer 2023
Submission of Reg 19 DPD and Summary of Comments Received to Secretary of State	Summer 2023 (Completed)	Submission of DPD and summary of comments received to Secretary of State	Summer 2023
Examination in Public (EiP)	Spring 2024	Independent examination	Autumn 2023
Inspector's Report / Consultation on Modifications	Summer 2024	Inspector's report and Consultation of modifications	Winter 2023
Adoption (Full Council)	Winter 2024	Adoption	Winter 2023 into early 2024
Timetable for review	This will be reviewed and updated as necessary.	Timetable for review	The AMR will assess the effectiveness of the policies and allocations. The DPD will be reviewed as required after adoption, with the review period being within 5 years.

Appendix 2 – The Environmental Assessment of Plans and Programmes Regulations 2004

Environmental assessment for plans and programmes: first formal preparatory act on or after 21st July 2004

5.—(1) Subject to paragraphs (5) and (6) and regulation 7, where—

(a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and

(b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3),

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which—

(a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC(**1**).

(3) The description is a plan or programme which, in view of the likely effect on sites, has been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive.

(4) Subject to paragraph (5) and regulation 7, where—

(a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;

(b) the plan or programme sets the framework for future development consent of projects; and

(c) the plan or programme is the subject of a determination under regulation 9(1) or a direction under regulation 10(3) that it is likely to have significant environmental effects,

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

(5) Nothing in paragraph (1) or (4) requires the carrying out of an environmental assessment for—

(a) a plan or programme the sole purpose of which is to serve national defence or civil emergency;

(b) a financial or budget plan or programme; or

(c) a plan or programme co-financed under—

(i) the 2000-2006 programming period for Council Regulation (EC) No. 1260/1999; or

(ii) the 2000-2006 or 2000-2007 programming period for Council Regulation (EC) No. 1257/1999.

(6) An environmental assessment need not be carried out—

(a) for a plan or programme of the description set out in paragraph (2) or (3) which determines the use of a small area at local level; or

(b) for a minor modification to a plan or programme of the description set out in either of those paragraphs,

unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, or it is the subject of a direction under regulation 10(3).

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(1) O.J. No. L 175, 5.7.1985, p.40. The amending Directive is at O.J. L73, 14.3.1997, p.5.