

IN THE MATTER OF THE PROPOSED GREATER NORWICH FOOD ENTERPRISE
ZONE LOCAL DEVELOPMENT ORDER AND EIA SCREENING AND HRA
SCREENING

ADVICE

1. I am instructed on behalf of Broadland District Council who propose to designate the Greater Norwich Food Enterprise Zone Local Development Order (LDO). I am asked to advise on the lawfulness of the screening opinions they propose to adopt in connection with the Environmental Impact Assessment Directive and Regulations and the Habitats Directive and Regulations.

BACKGROUND

2. Policy 5 of Broadland's Joint Core Strategy identifies that the rural economy and diversification will be supported by (inter alia):

"the development of a flagship food and farming hub serving the needs of Norfolk and supporting the agri-food sector in and around greater Norwich. This policy is supported by a Supplementary Planning Document which sets out the main considerations that will apply to any proposal for a food and agricultural hub in the greater Norwich area."

3. The Food Enterprise Zone (FEZ) is proposed to be located on an approximately 19 hectare site some 7 miles west of Norwich City Centre. The site is to the west of the village of Easton and to the south of the A47. It is currently agricultural fields and has a net developable area of 16 hectares.
4. It is proposed that the LDO will grant permission for the following uses:

*Agri-tech businesses which make use of the local agri-science base.
Processing of agricultural produce.
Manufacture of food products.*

Storage and distribution of agricultural produce.
Storage and distribution of agricultural products (i.e. have undergone processing).
Storage and distribution of agricultural equipment, machinery and supplies.
Storage and distribution of livestock (e.g. livestock market).
Haulage services related to the above storage and distribution.
Veterinary services.

5. Other general manufacturing office storage or distribution uses will not be permitted by the LDO, although they could be subject to applications for planning permission in the normal way.
6. The LDO will be subject to a series of conditions to the following effect:

Limiting the total combined floorspace to not more 50,000 square metres (gross area).

Reason – In the interests of highway safety and to ensure the satisfactory development of the site.

Ensuring the development accords with the provisions of the Greater Norwich Food Enterprise Zone Design Code.

Reason – To ensure the satisfactory development of the site.

Provision is to be made for the control of noise emanating from the site.

Reason – To safeguard residential amenity.

Provision is to be made for the control of emissions (dust, particulates and odour) emanating from the site.

Reason – To provide adequate protection to the natural environment and to safeguard residential amenity.

Provision is to be made to ensure that all vehicles, cyclists and pedestrians access to the site in a safe and satisfactory manner.

Reason – In the interests of highway safety, to safeguard residential amenity, to provide adequate protection to the natural environment and to ensure the satisfactory development of the site.

Ensuring that a s106 agreement is entered into securing the provision of a routing agreement applying to HGV's

Reason – To safeguard residential amenity

Provision is to be made for the safe and satisfactory disposal of foul and surface water

Reason – To provide adequate protection to the natural environment

Ensuring that a scheme of archaeological evaluation is undertaken and any assets adequately protected

Reason – To safeguard the historic environment

Ensuring that the development secures at least 10% of the development's energy from decentralised and renewable or low-carbon sources.

Reason – To provide adequate protection to the natural environment and to ensure the satisfactory development of the site.

Ensuring that uses approved under the terms of this LDO should seek to maximise water efficiency.

Reason – To provide adequate protection to the natural environment and to ensure the satisfactory development of the site.

7. Broadland District Council has produced in draft form a screening opinion pursuant to the Environmental Impact Assessment Regulations and a screening opinion considering likely significant effects under the Habitats Directive. I have made some specific comments in relation to both documents under separate cover and I assume in this opinion that those points of detail will be addressed prior to adoption of those documents.

LEGAL BACKGROUND

8. By virtue of part III of the Town and Country Planning Act 1990 planning permission for specified operations and uses within a particular area can be granted by a local development order either conditionally or unconditionally. The procedure for making a local development order is set out in part III and Schedule 4A of the 1990 Act and articles 38 and 41 of the Town and Country Planning (Development Management) (England) Order 2015.

EIA Regulations

9. Regulation 29 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 provides (as relevant):

29.— Local development orders

(1) This regulation applies in relation to Schedule 2 development for which a local planning authority propose to grant planning permission by local development order.

(2) Where this regulation applies, the local planning authority shall not make a local development order unless they have adopted a screening opinion or the Secretary of State has made a screening direction.

(3) Paragraphs (4) to (6) apply where—

(a) the local planning authority adopts a screening opinion; or

*(b) the Secretary of State makes a screening direction under these Regulations,
to the effect that the development is EIA development.*

(4) The local planning authority shall not make a local development order which would grant planning permission for EIA development unless—

(a) an environmental statement has been prepared in relation to that development; and

(b) the authority has first taken the environmental information into consideration, and they state in their decision that they have done so.

10. Schedule 2 development is defined in regulation 2 as:

development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where—

(a) any part of that development is to be carried out in a sensitive area; or

(b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development;

11. Screening opinion is defined to mean:

a written statement of the opinion of the relevant planning authority as to whether development is EIA development

12. EIA development is defined as:

“EIA development” means development which is either—

(a) Schedule 1 development; or

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location;

13. Schedule 2 of the Regulations provides:

2.

The table below sets out the descriptions of development and applicable thresholds and criteria for the purpose of classifying development as Schedule 2 development.

<i>Column 1</i>	<i>Column 2</i>
<i>Description of development</i>	<i>Applicable thresholds and criteria</i>
<i>7 Food industry</i>	
<i>(a) Manufacture of vegetable and animal oils and fats;</i>	<i>The area of new floorspace exceeds 1,000 square metres.</i>
<i>(b) Packing and canning of animal</i>	

<i>and vegetable products; (c) Manufacture of dairy products; (d) Brewing and malting; (e) Confectionery and syrup manufacture; (f) Installations for the slaughter of animals; (g) Industrial starch manufacturing installations; (h) Fish-meal and fish-oil factories; (i) Sugar factories.</i>	
<i>10 Infrastructure projects</i>	
<i>[(a) Industrial estate development projects;</i>	<i>The area of the development exceeds 5 hectares.</i>

14. Schedule 3 identifies selection criteria for screening schedule 2 development.

15. The Planning Practice Guidance (PPG) provides some assistance on when development might be considered to be EIA development. As relevant it provides:

<i>Development type</i>	<i>Schedule 2 criteria and thresholds</i>	<i>Indicative criteria and threshold</i>	<i>Key issues to consider</i>
<i>INDUSTRIAL and MANUFACTURING DEVELOPMENT</i>			
<i>4 Production and processing of metals 5 Mineral industry 6 Chemical industry (unless included in Schedule 1) 7 Food industry 8 Textile, leather, wood and paper industries 9. Rubber industry</i>	<i>The area of new floorspace exceeds 1,000 square metres. Except for 6(c) – (c) Storage facilities for petroleum, petrochemical and chemical products: (i) The area of any new building or structure exceeds 0.05</i>	<i>Operational development covers a site of more than 10 hectares. Smaller developments expected to give rise to significant discharges of waste, emission of pollutants or operational noise.</i>	<i>(i) development involves a process designated as a ‘scheduled process’ for the purpose of air pollution control; (ii) the process involves discharges to water which require the consent of the Environment Agency; (iii) the installation would give rise to the presence of</i>

	<i>hectare; or (ii) more than 200 tonnes of petroleum, petrochemical or chemical products is to be stored at any one time.</i>		<i>environmentally significant quantities of potentially hazardous or polluting substances; (iv) the process would give rise to radioactive or other hazardous waste; or (v) the development would fall under Council Directive 96182/EC on the control of major accident hazards involving dangerous substances (COMAH)*.* The need for a consent under other legislation is not itself a justification for Environmental Impact Assessment.</i>
10. INFRASTRUCTURE PROJECTS			
(a) Industrial estate development projects;	The area of the development exceeds 5 hectares.	Site area of the new development is more than 20 hectares.	Potential increase in traffic, emissions and noise.

16. Screening has to take place on a precautionary basis.

17. It is well established that when a Local Planning Authority are adopting a screening opinion the presence of conditions is relevant to the authority assessing whether there are likely significant effects of the development (Gillespie v. First Secretary of State [2003] Env. L.R. 30) provided that the proposed remedial measures' nature, availability and effectiveness were established and uncontroversial. It is also clear that any challenge to the conclusion an authority reach in a screening opinion will be judged by the Court on a normal public law basis, so provided the authority have taken

all matters properly into account and reached a rational judgment on those matters the Court is unlikely to interfere.

Habitats Regulations

18. Regulation 78 of The Conservation of Habitats and Species Regulations 2010 provides:

78.

Local development orders

A local development order may not grant planning permission for development which—

(a) is likely to have a significant effect on a European site or a European offshore 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 the site.

19. This provision brings into domestic law Article 6(3) of the Habitats Directive. The following propositions of law apply in relation assessment under article 6(3):

- a. The language of Article 6(3) of the Habitats Directive (brought into domestic law by inter alia regulation 102 of the Habitats Regulations) focuses on the end result of avoiding damage to European Sites and carrying out an appropriate assessment for that purpose (NANT v Suffolk Coastal District Council [2015] EWCA 88 at [63]).
- b. A risk that there will be a significant effect is sufficient and a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (Waddenzee C-127/02 at [44]).
- c. A third party alleging that there was a risk that could not be 'excluded on the basis of objective information' must produce credible evidence that there was a real as opposed to hypothetical risk that must have been considered (Boggis v Natural England [2009] EWCA Civ 1061 at [37]).

- d. Unlike in relation to EIA/SEA, there is no formal 'screening' stage in the Habitats Directive (R Champion v North Norfolk District Council [2015] UKSC 52 [35]). Where it is not obvious, however the competent authority will decide whether the trigger for appropriate assessment is met (Champion [41]).
- e. A decision maker deciding whether a plan or project is likely to have a significant effect (or whether it cannot be ruled out) may take into account steps taken to mitigate that risk (R. (on the application of Hart DC) v SSCLG [2008] EWHC 1204 [54] to [76]).
- f. Where a decision maker has relied on the presence of mitigation measures to conclude that there would be no likely significant effect the question is whether there was "*sufficient information at that stage to enable the [decision maker] to be duly satisfied the proposed mitigation could be achieved in practice*" and as to the "*achievability of the mitigation*" NANT v Suffolk Coastal District Council [2015] EWCA 88 at [72].

20. It has been repeatedly emphasised that a body carrying out a Habitats Regulations Assessment is entitled to put a great deal of weight on the views of NE. In DLA Delivery v Lewes District Council [2015] EWHC 2311 Foskett J said at [32]:

"There is a well-established principle that a decision-maker should give the views of a statutory consultee considerable weight which, of course, for this purpose includes NE in the Habitats Regulation Assessment ('HRA') process: see, e.g., Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin) [72]; R (Akester) v Department for Environment, Food and Rural Affairs, above, at [112]; Ashdown Forest Economic Development LLP v SSCLG, Wealden District Council [2014] EWHC 406 (Admin) at [110]."

DISCUSSION

21. Broadland District Council has produced screening opinions pursuant to both the EIA Regulations and in connection with the Habitats Directive.

22. In both screening opinions Broadland have identified the range of activities that may be permitted on site. In both instances they have then considered potential impacts of those activities, in relation to the EIA screening they have considered the potential impact of the activities on the environment generally and in relation to the HRA screening they have considered the impact of the activities on European sites which have the potential to be impacted by the development.

23. I have not seen any suggestion by any third party that there are any potential impacts from the development that Broadland have failed to consider in either the EIA or the HRA screening.

24. In my view Broadland's is an appropriate and lawful approach.

25. In relation to the EIA screening opinion Broadland have given specific consideration to the criteria identified in the PPG. In my view this is a lawful approach because Broadland have not solely considered those criteria but other possible impacts.

26. In both screening opinions Broadland take into account the impacts of a suite of conditions they propose to attach to the LDO in considering whether the LDO will give rise to likely significant effects. Those conditions are in my view standard conditions whose effectiveness in controlling the impacts of the development can be predicted.

27. The taking into account of conditions is, as set out above, lawful. In my view the Council can properly reach the judgement that with the imposition of those conditions there will be no likely significant effects.

28. It is also of considerable importance that statutory consultees including Natural England have considered the approach of and the content of the screening opinions. The authorities make it clear that a Court will place significant weight on the views of Natural England and other statutory

consultees in concluding whether a Local Planning Authority's approach is lawful. I understand that Natural England have not raised any concerns about the content or conclusions of the screening opinions.

CONCLUSION

29. In my view the approach taken by Broadland to the HRA and EIA screening of the LDO is in accordance with the relevant legislation and cases I have identified above. The judgement that they have reached that there will be no likely significant effects is one that is open to them.

30. If I can be of any further assistance please do not hesitate to contact me.

CLARE PARRY
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13th September 2016