

Dr Chris Gibson

23/06/2023

Dear Sirs

Tendring/Colchester Garden Community Regulation 19 Consultation

Further to your email consultation dated 12/05/2023, please find below my comments to the question of whether the **Plan** is Legally Compliant, Sound and Complies with the Duty to co-operate.

My legitimacy for comment is provided by the fact that:

- a. I am a resident of the Wivenhoe waterfront (and already suffering from high levels of antisocial behaviour especially from motorised water-users).
- b. I am a naturalist and ecologist of some local renown, and have observed on many occasions the adverse effects of recreational pressures (even in the absence of this very significant local development) upon the wildlife features of importance of the Colne Estuary. The estuary and its wildlife benefits from the very highest levels of recognition and protection under national and international law (designated as SSSI, SPA, SAC and Ramsar Site), and indeed has very recently been proposed for inclusion in the East Atlantic Waterbird Flyway World Heritage Site.
- c. And by virtue of my career in statutory nature conservation, working exclusively for Natural England and its predecessor bodies, until I took early retirement some 7 years ago, I have a very long (some might say unparalleled) history in using, interpreting, implementing and developing guidance on the most important suite of legislative provision for such situations, the Habitats Regulations.

My comments here relate specifically to the question of legal compliance and soundness. My submissions to previous stages of the plan explain many of these points in fuller detail, and also refer to my additional contention that, for example, the required Strategic EIA standards were not adhered to, with the failure to explore all options at the wider strategic context, referring only to sites that were 'offered' as part of a call for sites ('opportunity driving strategy' rather than 'strategy determining opportunity'). I remain firmly of the view that this misstep at the earliest stage represents **a potentially fatal flaw** in the whole scheme.

In respect of the specifics of the present consultation, **it is my contention that, on the basis of law and legal precedent, it is clear that the Plan is NOT Legally Compliant. And on the basis of this lack of compliance, the Plan must therefore be found unsound.** Below is my justification for this position.

1. It is a matter of common ground that being so close (only some 3km at the nearest point) to the designated site, the vulnerability and sensitivity of the site to additional recreational pressures means that the Plan would have a **Likely Significant Effect** and that it cannot be concluded that it can be **ascertained that it will not have an Adverse Effect Upon the Integrity** of the Habitats Regulations site (note that the emboldened phrases refer specifically to the tests of soundness, acceptability and sustainability embodied within the legislation).

2. That being the case, the plan can proceed only if **mitigation measures** are provided that will with certainty remove the adverse effects of the plan in perpetuity.
3. The only other exception is if the plan is deemed to be of national significance. No determination has been made to that effect, and indeed it has never been put forward as a Nationally Significant Infrastructural Project, the clear implication being that this route for delivering the legal approval for the plan cannot be pursued further.
4. The **mitigation measures** proposed to remove the **Adverse Effects on Integrity** concentrate on two approaches, of:
 - a. The creation of interceptive or diversionary green infrastructure in order to divert and absorb the additional recreational pressures away from the Habitats Regulations Site. While this may have some success (with for example dog walking, biking etc), equally clearly the 'lure of the coastal path' will render the provision of generic greenspace partially ineffective, and then there are also those activities (eg jet skiing) than could only be carried out on the estuary.
 - b. Setting up a Recreational Access Management Scheme on and around the Habitats Regulations site (involving some wardening and information provision, and monitoring) to inform and encourage sustainable use. I would contend that such a scheme is ALREADY necessary (practically and legally) to try to prevent the deterioration of the site under the current levels of recreational use.
5. However, to allow the plan to proceed, the deployment of a RAMS approach must benefit from a requisite degree of **certainty** that it **will reduce impacts** to a level whereby they no longer represent an Adverse Effect on Integrity, and that there is a guarantee that such measures would be delivered **in perpetuity**, long after developers' contributions have been exhausted, and immune to the vagaries of politics on public finances (this of course can never be known, and therefore such an insecure approach cannot be relied upon to implement a legal requirement).
6. In respect of certainty that a RAMS approach will work, it would be useful if there were any definitive evidence that it does. Such schemes (with monitoring) have been operation now for up to 15 years in parts of the country (indeed, I was involved in setting some of them up) and yet there is still no published evidence that such schemes have actually offset the harm caused by human factors impacting a site. The burden of proof required for an authority to 'ascertain' that a plan will not have an adverse effect upon a Habitats Regulations site: case law and precedent have concluded that the degree of certainty is close to that required in criminal cases ('beyond reasonable doubt') rather than the normal test in civil cases ('on the balance of probabilities').
7. **In other words, the legal requirements are such that it is wholly insufficient to determine that a mitigation scheme 'might', or even 'should' be successful. It must be possible to demonstrate that it 'will' be successful, otherwise the risk to the Habitats Regulations site is such that the development, as a matter of law cannot be allowed to proceed. The Precautionary Principle is paramount.**