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By email to: jo.wadey@thanet.gov.uk

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Dear Jo,

Birchington NP – Further consideration regarding the extent to which the BNP meets the Basic Conditions

- 1.1 The Birchington Neighbourhood Plan (BNP) has in general been well prepared and there is a substantial amount of evidence in support of the draft policies. The approach to public engagement and consultation has been undertaken with considerable diligence as evidenced in the Consultation Statement.
- 1.2 On a more detailed assessment in undertaking the examination of the Plan, the extent to which the submission version of the Birchington Neighbourhood Plan (BNP) and the supporting documents meet the Basic Conditions, as set out in the Neighbourhood Planning (General) Regulations 2012, (Regulation 15) there are however some significant issues which give rise to concern. As such following more comprehensive consideration of the submission documents provided to Thanet District Council at the Regulation 15 stage, the Basic Conditions, as required by the regulations and national planning guidance are not met.
- 1.3 I set out my concerns below and the options that appear to be available to the Parish Council as the Qualifying Body.
- 2.0 **Concerns relating to the extent to which the Basic Conditions are not met by the BNP and associated documents submitted to the TDC at the Regulation 15 stage.**
- 2.1 Regulation 15(1) states:

15.—(1) Where a qualifying body submits a plan proposal to the local planning authority, it must include—

- (a) a map or statement which identifies the area to which the proposed neighbourhood development plan relates;
- (b) a consultation statement;
- (c) the proposed neighbourhood development plan; and
- (d) a statement explaining how the proposed neighbourhood development plan meets the requirements of paragraph 8 of Schedule 4B to the 1990 Act.

2.2 My understanding that the documents submitted to TDC at the Regulation 15 stage for pre-examination consultation under Regulation 16 were as follows:

- Submission version of the Birchington Neighbourhood Plan
- Consultation Statement
- Consultation Statement Appendix - Regulation 14 Feedback Report and Analysis
- Basic Conditions Statement
- Birchington Neighbourhood Plan Strategic Environmental Assessment and Habitats Regulations Screening Report
- Birchington Neighbourhood Plan Habitats Regulations Assessment - Appendix
- Notification of Compliance

2.3 Submission of these documents to TDC took place on or about 7th December 2021 and were then the subject of the Regulation 16 Consultation by TDC which closed on 24th February this year.

2.4 Neighbourhood Area Map

2.5 As far as I can ascertain, a map or statement identifying the boundaries defining the neighbourhood area was not provided as a separate document to Thanet District Council. It is perhaps a debatable point as to how the inclusion of the map

defining the neighbourhood area should be “included” in the submission plan proposal to an LPA. Regulation 15(1) explains that the submission requirements should as a minimum be met by four documents, one being the map or statement defining the neighbourhood area. The inference is that these should be four separate documents. The submission of a map showing the neighbourhood area allows all consultees to be in no doubt as to the geographic extent to which the neighbourhood plan relates. The submission version of the BNP itself provides a map showing the neighbourhood area together with a plan of the parish boundary. It is evident that these two plans are identical as to their respective boundaries. I note that Thanet District Council’s website associated with the Regulation 16 consultation also included a map of the designated neighbourhood area. Furthermore, no parties appear to have been adversely affected by any failure to provide a separate map or statement defining the Birchington Neighbourhood Area.

2.6 I conclude on this point that the material provided by the Qualifying Body at the Regulation 15(1) stage adequately included a map defining the neighbourhood area sufficient to meet Regulation 15(1)(a).

2.7 Consultation Statement and submission version of the BNP

2.8 The inclusion of a consultation statement and the submission version of the BNP also meets the requirements of Regulation 15(1) (b) and (c) respectively.

2.9 Basic Conditions Statement

2.10 Of concern is the extent to which the requirements of Regulation 15(1)(d) are met by the Basic Conditions Statement. This requires that the submission material should include “... a statement explaining how the proposed neighbourhood development plan meets the requirements of paragraph 8 of Schedule 4B to the 1990 Act.”

2.11 There is no prescribed method for the preparation of a Basic Conditions Statement but the Planning Practice Guidance¹ explains that:

“Regulation 15(1)(d) advises that the Basic Conditions Statement should explain how the proposed neighbourhood development plan meets the requirements of paragraph 8 of Schedule 4B to the 1990 Act. This is confirmed in Regulation 22(1)(e) of the Neighbourhood Planning (General) Regulations 2012 (as amended)) as applied to neighbourhood plans by section 38A of the Planning and Compulsory Purchase Act 2004. The Basic Conditions to be satisfied are:

a. having regard to national policies and advice contained in guidance issued by the Secretary of State it is appropriate to make the order (or neighbourhood plan).

b. having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order. This applies only to Orders.

c. having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order. (The text in italics applies only to Orders.)

d. the making of the order (or neighbourhood plan) contributes to the achievement of sustainable development.

e. the making of the order (or neighbourhood plan) is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area).

f. the making of the order (or neighbourhood plan) does not breach, and is otherwise compatible with, EU obligations.

¹ Planning Practice Guidance, Paragraph: 065 Reference ID: 41-065-20140306 Revision date: 06 03 2014

g. prescribed conditions are met in relation to the Order (or plan) and prescribed matters have been complied with in connection with the proposal for the order (or neighbourhood plan).”

2.12 A useful summary of what needs to be covered in preparing a BCS is set out on page 65 of “Guidance to service users and examiners” prepared by the Neighbourhood Planning Independent Examiner Referral Service (NPIERS), 2014, at Annex 2: Scope of a Neighbourhood Plan Examination – Summary of the Legal Requirements. For assistance and convenience, these requirements are summarised in Appendix 1 below.

2.13 National guidance and Regulations² are clear that in preparing a Basic Conditions Statement, it should demonstrate how emerging policies in the relevant neighbourhood plan generally conform to national and adopted strategic planning policies. I would therefore expect the BCS to contain an explanation as to how in relation to specific national policy and adopted strategic local plan policy how each draft BNP policy broadly conforms to this guidance.

2.14 By contrast, the BCS simply refers to thematic structure of the BNP in the context of the chapters of the Plan rather than by explaining how emerging BNP planning policies conform to policy advice by reference to specific paragraphs in national guidance and at local level, how the Plan policies conform to strategic policy guidance in the adopted Development Plan. The approach in the BCS has been to cross refer to the submission version of the BNP and Appendix A to the Plan where relevant NPPF chapter headings and adopted Local Plan policies are listed. This is insufficient because neither the submission version of the Plan nor its Appendix A assess how the emerging BNP policies conform generally to the NPPF guidance and specific strategic development plan policy.

² Planning Practice Guidance Paragraph: 065 Reference ID: 41-065-20140306 Revision date: 06 03 2014 and The Neighbourhood Planning (General) Regulations 2012, Regulation 15(1) <https://www.legislation.gov.uk/uksi/2012/637/regulation/15/made> *op cit*

- 2.15 Furthermore, there appears to be a lack of appreciation that in meeting the requirements of Regulation 15(1)(d), the BCS is intended to be a self-contained document by which the veracity of the policy content of the neighbourhood plan is demonstrated by explaining how it conforms to national and strategic locally adopted planning policy. As drafted, the Birchington BCS does not in itself provide such validation. In essence, to meet the Basic Conditions requirements, the BCS would require re-casting if those conditions were to be met.
- 2.16 As a development management document, there is likely to be merit through the inclusion of information from the Plan's evidence base within the reasoned justification for each policy. There may similarly be relevance for the inclusion of references to both strategic and non-strategic adopted planning policies in these sections of the Plan, but for the purposes of neighbourhood plan examination the legal requirements, the BCS is unsatisfactory as explained above. As a supplementary point, in demonstrating conformity with strategic Local Plan policies, there are numerous examples where non-strategic Local Plan policies are cited as "key" policies to which the Plan has had regard in its preparation. There is insufficient clarity between strategic and non-strategic adopted local planning policies in the BNP which should be corrected.
- 2.17 Essentially, the structure of the BCS does not provide a freestanding assessment of how the BNP conforms to national and local adopted strategic planning policy, which is necessary to demonstrate the assessment required by statute and regulations for the purpose of neighbourhood examination. It is not appropriate to attempt to provide justification for submission version neighbourhood planning policies in the Plan itself and then cross reference the BCS to the relevant content in the Plan to be the subject of examination as is the case at Birchington.
- 2.18 There are many examples of Basic Condition Statements which have been prepared satisfactorily clearly demonstrating in a matrix format **how** each neighbourhood plan policy conforms generally to national planning guidance and to adopted strategic planning policy. Such a "template" approach would have been likely to prove effective in the preparation of this BCS and subsequent examination

by encouraging a consideration and explanation of how the draft BNP policies meet the requirement of national and local adopted planning policies.

2.19 I am somewhat perplexed that the Basic Conditions Statement does not adequately demonstrate how conformity of BNP policies with national and strategic local planning policy would be achieved. This is because it appears that considerable work was undertaken in the preparation of the BNP tracking changes to the NPPF and then checking that the emerging BNP policies conformed to evolving national planning guidance. This is explained in paragraph 11 of the BCS as follows:

"11. First drafts of this Neighbourhood Plan were prepared in the autumn of 2019. From the beginning these included reference to the NPPF published in February that year. Each of the draft policies in the Plan was cross-referenced to the relevant chapter of the NPPF as part of a "conformity" statement. As the Plan developed constant checks were made to ensure that the references were correct. Final amendments were made in October 2021 to reflect changes introduced in the new NPPF in July 2021."

2.20 It may be possible that the depth of analysis undertaken by this process could yet provide the evidence to demonstrate general conformity of each submission version policy in the BNP with relevant policy guidance in the NPPF. Unfortunately, such work was not carried over and included in the preparation of the submission version of the BCS showing how the draft BNP policies conform to national planning guidance.

2.21 I am similarly concerned that the BCS has been prepared without an adequate conformity assessment. It is evident that BPC has taken advice from AECOM the multi-disciplinary consultancy with considerable expertise in advising qualifying bodies in the preparation of draft neighbourhood plans. The submission version of the Plan notes that AECOM were appointed in November 2020 to review and assist with the preparation of policy development. Paragraph 17 of the BCS states:

“Following adoption of the Local Plan by the LPA in July 2020, the Neighbourhood Plan team continued with drafting the policies. The Plan was then submitted to the planning consultancy AECOM for review, and they submitted their report “Evidence Base and Policy Development in April 2021. This provided a detailed critique of the draft Plan and its policies, and how they complied with both the NPPF (2019) and the Local Plan (2020).”

2.21 Unfortunately, AECOM's report does not appear in the list of evidential documents cited in the preparation of the BNP.

2.22 Compatibility with EU obligations

2.23 EU obligations against which the BNP needs to be assessed for breaches and compatibility are:

- the European Convention on Human Rights;
- Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (The Strategic Environmental Assessment (SEA) Directive); and
- Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (The Habitats Directive).

2.24 The European Convention on Human Rights

2.25 At page 10 of the BNP, an overview of the preparation of the neighbourhood plan is set out in a series of bullet points. The last of these provides a qualification concerning the need to demonstrate compliance with all relevant EU obligations, *“Where Brexit legislation has incorporated these into UK law”*. This is incorrect. Although the UK has left the European Union, it is still a participant in the European Convention on Human Rights (ECHR). This commitment was established before the current Trade, and Cooperation Agreement was finalised at the end of 2020. In 2019, the political declaration (PD) agreed between the EU and the UK, outlining the shape of the future relationship stated under 'core values and rights', *“The future relationship should incorporate the United Kingdom's continued commitment*

to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR". The PD also stated, "The Parties agree that the scale and scope of future arrangements should achieve an appropriate balance between rights and obligations.... It should also be underpinned by long-standing commitments to the fundamental rights of individuals, including continued adherence and giving effect to the ECHR..." As such, this stance set the scene for the EU-UK Trade Agreement and cemented the UK's commitment to the ECHR. The UK remains bound by this international treaty. To avoid any ambiguity, the qualification to the last bullet point on page 10 of the BNP should be deleted.

2.26 Helpfully, paragraph 4 of the BCS acknowledges that the neighbourhood plan should be compatible with the European Convention on Human Rights. At paragraph 26, the BCS avers that this is the case, although without justification. There is no further reference as to how the BNP conforms to this requirement.

2.27 The Strategic Environmental Assessment Directive and the Habitats Directive

2.28 By contrast, the BCS satisfactorily shows how the EU requirements concerning compatibility with:

- Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (The Strategic Environmental Assessment (SEA) Directive); and
- Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (The Habitats Directive) are met by reference to the Birchington Neighbourhood Plan Strategic Environmental Assessment and Habitats Regulations Assessment Screening Report, October 2021.

2.26 Prescribed conditions

2.27 There are two other basic conditions that apply in addition to those set out in the primary legislation. These are set out in Regulations 32 and 33 of the

Neighbourhood Planning (General) Regulations 2012 (as amended). The first is relevant to the making of neighbourhood plans, the second to the making of Development Orders and therefore not pertinent to the examination of the BNP. Regulation 32 requires that the making of the neighbourhood plan does not breach the requirements of Chapter 8 of Part 6 of the Conservation of Habitats and Species Regulations 2017, which set out the habitat regulation assessment process for land use plans, including consideration of the effect on habitats sites. (See Schedule 2 to the Neighbourhood Planning (General) Regulations 2012 (as amended) in relation to the examination of neighbourhood development plans.) This requirement is currently set out in Regulation 9 of the Conservation of Habitats and Species Regulations 2017 which sets out duties for relevant public authorities to exercise their nature conservation functions in compliance with, or with regard to, the requirements of the Habitats Directive and the Wild Birds Directives. It provides a broad summary of the key obligations under the European Union (EU) Nature Directives: EU Wild Birds Directive 2009/147/EC and the EU Habitats Directive 92/43/EEC.

2.28 The Basic Conditions statement makes no reference to this prescribed condition and there is no explicit reference to it in TDC's "Birchington Neighbourhood Plan Strategic Environmental Assessment and Habitats Regulations Assessment Screening Report, October 2021. In relation to Regulation 9 of the Conservation of Habitats and Species Regulations 2017, the duties required of the District Council under Regulation 9 have been met in the preparation of the screening report although a direct reference to this prescribed condition should have been made in the BCS.

2.29 Other legal requirements

2.30 Whether the draft order complies with the provision made by or under sections 61E(2), 61J and 61L.

2.31 Section 61E(2) relates to development orders. Section 61J concerns "excluded development" as defined in section 61K, notably county matters such as minerals development and waste management. Nationally significantly infrastructure projects also fall within the definition of excluded development and thus have no

place in neighbourhood plans. Unfortunately, the Basic Conditions Statement is silent on the matter of excluded development. The BCS should explicitly confirm that the submission version of the Plan does not include policies relating to excluded development assuming this is the case. In the Overview section of the submission version of the BNP, reference is made to the fact that there are no minerals or waste management sites within the designated neighbourhood but no comment as to national infrastructure projects. The point that is missed is that an assessment and confirmation that none of the policies in the BNP relate to such excluded development is required, to satisfy the requirements of the Town & Country Planning Act s61K.

3.0 Next steps

3.1 There are essentially two options before the Parish Council in the light of the information above:

- i) Allow the examination to be formally concluded, or
- ii) Withdraw the BNP without concluding the examination

3.2 The examination is formally concluded

3.3 Under this scenario, the examination report would be completed, the conclusion being that the Basic Conditions are not met and that therefore the Plan should not proceed to referendum. Birchington Parish Council would then decide whether to prepare a further plan or abandon the whole project.

3.4 Withdraw the BNP without concluding the examination

3.5 I have considered whether it would be feasible to suspend the Plan to allow the redrafting and restructuring the BCS but that alone would not be sufficient as changes to the structure and content of the Plan itself would also be required. Accordingly, I consider the only alternative option would be for the Plan to be withdrawn. In such circumstances I would not issue an examination report. The Parish Council might then revise the BNP, recast the BCS and update the Consultation Statement. It is likely that this would be a more economical means of



revising the BNP and the supporting documents. Legal advice would be necessary to determine the stage of Plan preparation that would be appropriate. This would probably be at pre-submission stage (Regulation 14). The current draft policy content would probably be capable of being saved as the evidence base would largely remain relevant, subject to some updating.

3.6 I would be pleased to discuss this with you further and with Members of the Steering Group if this would assist. I look forward to hearing from you.

Yours sincerely,

Jeremy Edge BSc FRICS MRTPI
Partner

Appendix 1

Scope of a Neighbourhood Plan Examination – Summary of the Legal Requirements³

The scope of the legal requirements, including the ‘basic conditions’ an examiner must consider, is set out in Paragraph 8, Schedule 4B to the Town and Country Planning Act 1990 (as amended) (‘the 1990 Act’).

Table 1: Scope of the Examination

Paragraph 8 (1) The Examiner must consider:

(a) *Whether the draft [neighbourhood development plan*] meets the basic conditions (see sub paragraph (2)) [paragraph 8(2)],*

*Note: References to the draft ‘order’ in Paragraph 8 should be read as references to the draft ‘neighbourhood development plan’ by virtue of s.38A(3) of the Planning and Compulsory Purchase Act 2004 (as amended) (‘the 2004 Act’). Therefore, the following matters relating to “orders” must be considered by the examiner:

8 (1) The examiner must consider the following—

(a) whether the draft neighbourhood development order meets the basic conditions (see sub-paragraph (2)),

(b) whether the draft order complies with the provision made by or under sections 61E(2), 61J and 61L,

(c) whether any period specified under section 61L(2)(b) or (5) is appropriate,

(d) whether the area for any referendum should extend beyond the neighbourhood area to which the draft order relates, and

(e) such other matters as may be prescribed.

³ (Source: Annex 2 of “Guidance to service users and examiners”, prepared by NPIERS, 2014.)

(2) A draft order meets the basic conditions if—

(a)having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,

(b)having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order,

(c)having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order,

(d)the making of the order contributes to the achievement of sustainable development,

(e)the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),

(f)the making of the order does not breach, and is otherwise compatible with, retained EU obligations, and

(g)prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order.

(3) Sub-paragraph (2)(b) applies in relation to a listed building only in so far as the order grants planning permission for development that affects the building or its setting.

(4) Sub-paragraph (2)(c) applies in relation to a conservation area only in so far as the order grants planning permission for development in relation to buildings or other land in the area.

(5) In this paragraph “ listed building ” has the same meaning as in the Planning (Listed Buildings and Conservation Areas) Act 1990.

(6) The examiner is not to consider any matter that does not fall within sub-paragraph (1) (apart from considering whether the draft order is compatible with the Convention rights).

(b) *Whether the [draft neighbourhood plan] complies with the provisions made by or under [s.38A and s.38B of the 2004 Act*],*

* Note: References in Paragraph 8 (1)(b) to s.61E(2); s.61J and s.61L of the 1990 Act are replaced by s.38A and s.38B for the purposes of neighbourhood development plans by virtue of s.38C(5)(b) of the 2004 Act.

Key provisions under s.38A and s.38B include:

s.38A(1) Any qualifying body is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development plans.

s.38B(1) A neighbourhood development plan -

(a) must specify the period for which it is to have effect,

(b) may not include provisions about development that is excluded development [defined in s.61K of the 1990 Act], and

(c) may not relate to more than one neighbourhood area.

s.38B(2) Only one neighbourhood development plan may be made for each neighbourhood area.

(c) Disapplied by virtue of s.38C(5)(c) of the 2004 Act.