



Department for Levelling Up, Housing & Communities

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Dear Nick,

Thank you for your email of 4 May, concerning a request for an opinion under Regulation 107(3) as to whether or not its emerging draft Local Plan policy PLP5 for Tipner West and Horsea Island East gives rise to Imperative Reasons of Overriding Public Interest (IROPI).

We have been giving the request careful consideration, noting as per your letter that this submission appears to be the first of its kind to be made to a UK Secretary of State since leaving the European Union.

We do not believe we can give you the opinion that you seek at this time. I recognise that this will be highly frustrating for you, and want to assure you we have not taken this decision lightly. We are cognisant of the carefully researched and thorough 107(3) request you have made, and the care your authority has taken to ensure the nature conservation sites which you are responsible for protecting are factored into the decision-making process at the earliest possible stage.

However, we consider that the request made is asking the Secretary of State to do something not contemplated in law nor practicably possible.

Your letter of 18 August responding to issues raised by RSPB England and the Hampshire & Isle of Wight Wildlife Trust (HIWWT) refers to guidance on applying the Habitats Regulations which states that, the alternatives test, the IROPI test and the habitat compensation test will to some extent be applied contemporaneously given the linkages between them. We agree with that position insofar as an IROPI finding is also assessing the balance of harm to the protected site, and so would consider the extent to which that harm will be compensated.

However, the guidance also states (at para 19) that there ought to be a sequential approach to the tests, referring to:

“...the requirement that the competent authority’s decision demonstrates that alternative solutions have been ruled out before considering justifying a plan or project on IROPI grounds.”

In our view the Department cannot at this stage provide an IROPI opinion because yourselves as the plan-making authority must first be satisfied there are no alternative solutions. If there is an alternative that would achieve the same objective (in this case marine employment and supporting housing and infrastructure as identified in the City Deal), then there can be no IROPI. Likewise, if there is no IROPI there is no justification for an article 6(4) derogation and thus no need to consider whether the harm can be compensated for (the third test).

In addition, at this stage, the final parameters of any derogation are unknown because there is incomplete information on available alternatives, environmental harms, and whether those harms are capable of being compensated for. As a result, the Secretary of State is not in a position to assess and weigh the public interest of the plan against the harm to the integrity of the national sites.

Cumulative effects from other development set out in the plan could also have implications on the adverse effects of this specific allocation. The balance of harm against benefits would be incomplete and legally flawed if the Secretary of State issued an opinion without that information.

Ultimately, in our view while it is entirely understandable for the request to have been made at this stage, to reach a decision on IROPI at this part of the process and in these circumstances would be premature. The stage at which it should be possible to make an assessment would be when there is a finalised alternatives assessment, a completed assessment of the implications of the plan for the integrity of the sites concerned, and a proposed compensation strategy. It is the Department’s view that, assuming these matters have been addressed, there is no bar to PCC or the Secretary of State considering the question of IROPI prior to the examination in public of the Local Plan. Were the examination in public process to subsequently reveal another satisfactory alternative, then IROPI and compensation assessments would need to be revisited.

In an attempt to assist with further consideration of the proposal, we have however sought to provide a clarification of what could be relevant IROPI factors. In principle, we consider that the provision of housing (and affordable housing) is capable of justifying IROPI. We also consider that, at the stage where it is appropriate to give an opinion, the consideration of whether IROPI exists would need to be made against the full package of public benefits associated with the scheme – your request refers additionally to matters including flood risk, contaminant leachates and employment for example.

In considering these matters we have also recognised a number of potential issues in terms of the appearance of propriety in light of the DLUHC Secretary of State’s extensive powers of intervention and his role overall in the planning process now and in the future. For example, the extent to which an opinion given by the Secretary of

State in relation to the plan allocation might fetter future discretion at the stage on which an application for determination comes forward, requiring a second opinion on IROPI under reg. 64 of the Habitats Regulations. We will give further consideration to putting in place arrangements to ensure that any opinion given in future meets necessary propriety requirements.

Yours sincerely,

Andrew Lynch