

**WEALDEN LOCAL PLAN EXAMINATION**  
**OPENING STATEMENT ON BEHALF OF WEALDEN DISTRICT COUNCIL**

**21<sup>st</sup> May 2019**

**Introduction**

1. Wealden District is the largest and most rural District in the County of East Sussex. It covers over 300 square miles and is bounded by seven different Boroughs and Districts and three Counties – Kent, West Sussex and Surrey. Around half of its 160,000 residents<sup>1</sup> live within five main towns – Crowborough, Hailsham, Heathfield, Polegate and Uckfield. However, it is not dominated by any one of them (Wealden is a District with many centres); and the larger towns beyond its boundaries (especially Tunbridge Wells to the north and Eastbourne to the south) exert a significant influence as high order centres.
2. Travel within the District is primarily through the road network, as accessibility by public transport is generally very poor, and the main and strategic roads are, generally, rural single carriageways, with a short stretch of dual carriageway around Hailsham and Polegate.
3. Around two thirds of the District is covered by national landscape designations - the valued landscapes of the High Weald Area of Outstanding Natural Beauty (AONB) and South Downs National Park (SDNP). And there are also two areas in the District which are of national and international ecological importance – Ashdown Forest and Pevensey Levels:
  - a. Ashdown Forest is a European Site, designated as a Special Protection Area (SPA) and Special Area of Conservation (SAC), as well as being a Site of Special Scientific Interest (SSSI), though its current condition is not considered to be favourable; and
  - b. Pevensey Levels is also a SAC and an SSSI and, in addition, a Ramsar Site and National Nature Reserve (NNR), though, like Ashdown Forest, its condition is also considered not to be favourable.

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<sup>1</sup> Population projections (at 2017) show Wealden to have 158,941 population.

4. Both of these sites require specific consideration to be given to any ecological impacts from development under the rigorous approach required by the Habitats Directive, as does a further site beyond the District boundary: the Lewes Downs SAC.
5. These are the principal features which form the backdrop against which the Wealden Local Plan has emerged. They are part of what makes Wealden unique, but they also provide challenges in the Plan-making context. And they set the scene for the main issues which will be discussed at this examination, especially those concerning:
  - a. The duty to co-operate with Wealden's many neighbouring local planning authorities and other prescribed bodies;
  - b. The proper approach to Habitat Regulations Assessment (HRA);
  - c. How (spatially and quantitatively) and when the objectively assessed needs can best be met whilst protecting valued landscapes and the integrity of designated habitats; and whether, accordingly,
  - d. The Plan both complies with the law and is "sound" – being positively prepared, justified, effective, and consistent with national policy.
6. These issues are addressed in detail in the Council's evidence base and in its Matters Statements. In my brief opening remarks, I touch on just some aspects of them in order to set the scene for this examination and the questions which will be discussed.

### **The Duty to Co-operate**

7. So far as the duty to co-operate is concerned, you have seen both the Council's Background Paper (A32) and its written responses to your Qs. 9-17. Put shortly, and for all of the reasons there stated, this Council has fulfilled its legal duty to co-operate with all relevant bodies. True, it has not always been possible to reach agreement, given strongly held differences in view on certain subjects, but the duty to co-operate is not a duty to agree, and the Council has engaged co-operatively throughout the preparation of its Plan.

8. Moreover, the Council will continue to do work collaboratively and positively with all local stakeholders, with a view to protecting together the important habitats and landscapes in and near the District, while still meeting needs. And whilst, for ecological and infrastructural reasons, the Council cannot currently contribute to Eastbourne's unmet housing needs, it will continue to work with its neighbours and other strategic partners to address the impediments to development that currently exist, a matter to which I will return.

### **The HRA**

9. Turning to the HRA, environmental considerations have been at the heart of the Council's approach to its Plan, and appropriately so given the importance of the habitats at issue.
10. It is the Council, of course, that is the competent authority under the Habitats Regulations, and it is therefore a matter for its judgment whether the Local Plan will (alone or in combination) adversely affect the integrity of the European Sites. Given the precautionary approach required by the Habitats Directive<sup>2</sup>, the HRA (A35) is an exceptionally rigorous piece of work, supported by the latest science.
11. You will have seen that Natural England have suggested that the Council's approach has been ultra-precautionary, and that the development proposed under the Plan could be brought forward without mitigation of air quality impacts. The Council has, of course, had careful regard to Natural England's views. However, and as I now come on to, there are cogent reasons to disagree with Natural England in this case<sup>3</sup>, set out in detail in Appendices 12 to 12c of the HRA and the Council's responses to Qs. 18-31.
12. One important area of disagreement between the Council and Natural England<sup>4</sup> concerns the appropriate scenario for air quality modelling, and in particular the extent to which

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<sup>2</sup> Under which the Council must be satisfied beyond a reasonable scientific doubt as to the absence of any such effect – see: the Council's answer to Q.26.

<sup>3</sup> A competent authority may disagree with Natural England if it has cogent reasons for doing so, and may err in law if it follows erroneous advice from Natural England: see: *Wealden DC v SSCLG* [2017] EWHC 351 (Admin); and *R (Mynydd y Gwynt Ltd) v SSBEIS* [2018] PTSR 1274.

<sup>4</sup> And adjoining neighbouring authorities which have adopted Natural England's position

predicted decreases in nitrogen pollution as a result of autonomous measures (i.e. measures not part of the Plan) may be taken into account in the HRA<sup>5</sup>.

13. In this regard, the *Joined Cases* C-293/17 and C-294/17 are of central importance in that they have made it clear both that:

- a. Autonomous measures to reduce nitrogen levels may only be taken into account if the expected benefits are certain at the time of the appropriate assessment (i.e. if there is no reasonable scientific doubt as to their effectiveness); and that
- b. Development giving rise to additional nitrogen emissions cannot ordinarily be approved if, taking into account only those measures in respect of which sufficient scientific certainty does exist, the sites in question are still being harmed by being overloaded with nitrogen – being above the critical thresholds<sup>6</sup>.

14. Applying these principles to this Plan, the following points arise:

- a. First, whilst Wealden do expect that future reductions in emissions will probably occur in result of autonomous measures, they do not consider this to be sufficiently certain for those reductions to be taken into account when making its appropriate assessment; and
- b. Second, even if the autonomous measures were taken into account in making the appropriate assessment<sup>7</sup>, the critical levels and critical loads for nitrogen for the Ashdown Forest SAC and Lewes Downs SAC would remain in a state of exceedance.

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<sup>5</sup> The Council modelled three emissions scenarios: Scenario A: which assumed no change in emissions per vehicle from 2015 (the Council's favoured scenario); Scenario B: the CURED 3A emissions model of Wealden's own consultants (AQC), which assumes emissions per vehicle fall between 2015 and 2028 in line with existing regional, national and international initiatives (i.e. autonomous measures) (the Scenario Natural England considers should be used); and Scenario C: DEFRA's EFT V8.0.1 (2018c) model, which assumes greater levels of reductions through autonomous measures based on Department for Transport forecasts.

<sup>6</sup> Even if deposition declines overall.

<sup>7</sup> That is to say if the outcomes of the Scenario B (and, indeed, even the Scenario C) model were permitted to be taken into account.

15. For both of these reasons, and the much fuller reasons set out in the HRA itself, the Council's reliance on Scenario A<sup>8</sup>, and its judgment that mitigation of air quality impacts on the Ashdown Forest and Lewes Downs SACs is required, are fully justified by the approach of the *Joined Cases*, and by the precautionary approach required by the Habitats Directive. Moreover, and as explained in the following section, such mitigation is fully secured by the Plan<sup>9</sup> - in a manner that is not only legally compliant, but also sound and sensible.

### **How to Meet Needs**

16. There is an undeniable tension between Government policy significantly to boost the supply of housing, and meet the District's other development needs as well, whilst protecting both designated habitats (as required by law) and valued landscapes (in accordance with the NPPF). However, the Council propose to address that tension positively:

- a. First, the Local Plan directs development away from the Ashdown Forest, Lewes Downs, Pevensey Levels and AONB<sup>10</sup>, and towards sustainable locations which reduce the need to travel by car (including through the innovative "Core Areas" policy, allowing organic growth in more suitable locations); and
- b. Second, reflecting the need for mitigation measures, the Local Plan includes Policies AF1, AF2, EA2 and SWGA7<sup>11</sup>, in order to ensure that the integrity of the European Sites is not adversely affected.

17. Given the importance of Policies AF1 and AF2 to the Local Plan, it will, I hope, assist if I make ten short points about them at the outset.

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<sup>8</sup> See footnote 5 above

<sup>9</sup> The Council's judgments that recreational and disturbance impacts on the Ashdown Forest SPA and hydrological impacts on the Pevensey Levels SAC and Ramsar Site also require mitigation are also justified, as explained in the HRA, and mitigation for such impacts is also fully secured under the Plan.

<sup>10</sup> Except, so far as the AONB is concerned, as necessary to meet identified local needs in an acceptable way.

<sup>11</sup> Along with other environmental policies.

18. First, the question as to whether mitigation is required<sup>12</sup> is for Wealden as competent authority; they are entitled to disagree with Natural England; and their decision to do so is only challengeable upon the grounds of *Wednesbury* unreasonableness. In these regards, Wealden are convinced that there is insufficient scientific certainty that the autonomous measures will be as effective as Natural England assume<sup>13</sup>, so that air quality mitigation is required; but even if there is room for disagreement on that, it cannot possibly be argued that Wealden has reached a decision which is *Wednesbury* irrational, nor that it has failed to give cogent reasons for disagreeing with Natural England.
19. Second, even if it was considered that Wealden were wrong to disagree with Natural England, the Local Plan would still satisfy the Habitats Directive - the mitigation would simply bring net improvements which Natural England consider to be beneficial<sup>14</sup>.
20. Third, the question as to whether the air quality mitigation strategy under Policy AF2 is sufficient to allow a conclusion of no adverse effect is, likewise, a matter for the Council's judgment, and that judgment is robustly justified for the reasons given in the HRA and in answer to Qs. 29 and 35.
21. Fourth, Policies AF1 and AF2 are drafted so as to ensure that any development which would risk an adverse effect on the integrity of the Ashdown Forest and Lewes Downs SACs cannot come forward - development is contingent on a delivery mechanism being in place.
22. Fifth, the Council's approach is therefore entirely consistent with the Habitats Directive, and legally compliant, and is so even if the Council is incorrect in believing that mitigation

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<sup>12</sup> And as part of that the question as to whether there is sufficient scientific certainty about the effects of the autonomous measures for them to be taken into account.

<sup>13</sup> It appears to the Council (from meetings with Natural England) that Natural England rely upon the reductions caused by the autonomous measures because they are premised on DEFRA's predictions.

<sup>14</sup> See: the HRA, Appendix 12, at page 727: "We welcome WDC's commitment to working with Natural England and other stakeholders in developing locally targeted measures through SNAP that can address all sources of atmospheric nitrogen pollution at a site level."

is required. That means that the issues concerning Policies AF1 and AF2 can only go (if they go anywhere) to “soundness”<sup>15</sup>.

23. Sixth, assuming Wealden are right to disagree with Natural England, there are only three potential courses of action which it could take:

- a. It could plan for considerably less than its objectively assessed needs, meaning that there would be a considerable housing shortage when national planning policy is significantly to boost housing supply<sup>16</sup>; or
- b. It could delay the Local Plan and the delivery of much-needed housing, when housing is needed as soon as possible, and seek to satisfy the Article 6(4) IROPI requirements; or
- c. It could adopt its current approach under Policies AF1 and AF2, seeking to satisfy objectively assessed needs, but subject to policies which:
  - i. Require developers to contribute towards a mitigation strategy; and
  - ii. Prevent development from taking place unless and until sufficient scientific certainty exists, with the mitigation measures, that it will not adversely affect the integrity of any designated site<sup>17</sup>.

24. Seventh, Wealden prefers the third option for compelling reasons - it offers the prospect of speeding up much needed development, but without risking any compromise to the integrity of designated sites.

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<sup>15</sup> As above, if Natural England’s position that mitigation is not required by the Habitats Directive is applied, Policies AF1 and AF2 remain sound since the mitigation brings net improvements which Natural England rightly consider to be beneficial.

<sup>16</sup> See: NPPF 2012 paragraph 47.

<sup>17</sup> A policy ‘lock’, therefore, no different in principle to one which releases allocated sites for development only after infrastructural capacity to accommodate the same has been secured.

25. Eighth, even if it were considered that the air quality mitigation strategy is not sufficiently certain to enable development to be brought forward immediately, the risks to deliverability over the Plan period would be limited. In particular:

- a. Wealden not only have a strong incentive to deliver a mitigation strategy<sup>18</sup>, they will be able to exert very considerable control over it<sup>19</sup>;
- b. That strategy will be precisely targeted and closely monitored so that it can be readily amended to meet local needs<sup>20</sup>;
- c. That strategy will be effective whether or not autonomous reductions do in practice eventuate; and
- d. If they do eventuate, and this results in the loads/levels for the European Sites falling below their critical loads/critical levels, such that “headroom” is created, the mitigation strategy would need to achieve less<sup>21</sup>.

26. Ninth, there is nothing “unsound” about such an approach – it is eminently “sound”:

- a. It accords with decided law, and the precautionary principle, through securing the earliest possible release of land for much-needed development without compromising designated sites of ecological importance;
- b. Of the three possibilities set out at paragraph 23 above, it is the only one that offers the prospect of the Local Plan delivering the right housing at the right time; and
- c. Whilst there is inherent uncertainty about the extent to which emissions will reduce in result of national policies and strategies, the requirement for a Wealden mitigation strategy explicitly acknowledges and addresses that uncertainty.

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<sup>18</sup> To enable land to be released for development.

<sup>19</sup> Unlike the autonomous measures upon which Natural England rely.

<sup>20</sup> Whereas national strategies will not change solely because of impacts at Ashdown Forest or Lewes Downs, the Wealden mitigation strategy can, and will, be.

<sup>21</sup> Indeed, depending on the extent of the headroom created by autonomous measures, it might not be required at all on Article 6(3) grounds, but would still secure beneficial improvements, consistent with the net gain principle.

27. And tenth, Wealden therefore commend Policies AF1 and AF2 to you as to be an exemplar of positive, evidence-based, Plan-making for any Authority which finds itself heavily constrained by sites of ecological importance but in need of substantial development. They form a vital part of a Plan which is properly cognisant of the importance of securing, with the requisite degree of scientific certainty, the integrity of designated habitats, whilst genuinely endeavouring to meet objectively assessed needs in accordance with the imperatives of the NPPF<sup>22</sup>, and as soon as possible.

28. As I have already noted, there are also infrastructural impediments that stand in the way of promoting more development at this particular stage, notably the need to consider an offline A27 or equivalent. No funding currently exists for that improvement and it would be unsound to plan for development which cannot yet be delivered. The Council is taking active steps to secure funding, working cooperatively with its neighbours and other key stakeholders, and as and when funding is secured, that can be fed in to a review of the Plan (which under the current NPPF is required within 5 years). In the meantime, adopting this Plan now will enable development control in this sensitive and constrained District to be plan-led, which is precisely as it should be in a plan-led system.

### **Conclusions**

29. For all of these reasons, together with those set out in the extremely substantial evidence base before you, Wealden consider its Plan to be both legally compliant and sound, indeed emphatically so<sup>23</sup>:

- a. “Positively prepared”: the Plan seeks to meet objectively assessed needs as soon as possible whilst recognising and ensuring that environmental conditions are not worsened at protected sites;

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<sup>22</sup> And without prejudicing at all, through an early review of the Plan (as required for all Plans by paragraph 33 of the NPPF 2019), the option of going through the IROPI procedures if monitoring under the policies does demonstrate any substantial problem with delivery.

<sup>23</sup> On application of the tests set out in paragraph 182 of the NPPF 2012

- b. "Justified": the Plan is the most appropriate strategy to adopt when considered against the only other alternatives available, under-provision or delay and IROPI;
- c. "Effective": the Plan should be deliverable over its period (certainty is not required, or ever possible, but the prospects here are good); and
- d. "Consistent with national policy", the Plan should enable the delivery of sustainable development to meet the needs of the District in accordance with the policies in the Framework but without compromising either valued landscapes or sites of profound ecological importance.

30. I therefore commend the Plan to you.