

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

20th December 2019

Dear Ms Briggshaw

WEALDEN LOCAL PLAN EXAMINATION.

1. The Wealden Local Plan (LP) was published for consultation under Regulation 19 from August to October 2018 and was submitted to the Secretary of State on January 18, 2019. I have now completed the hearing sessions related to Stage 1 of my examination of the Submission version of the Local Plan and I am now in position to set out my conclusions. I am sorry to have to tell you that the submitted plan cannot be taken forward to adoption because it has failed one of the requirements for legal compliance, that of the Duty to Co-operate (DtC). In addition, there are some significant failings in respect of the soundness of the submitted Plan, which are discussed in the text of this letter.
2. The Duty to Co-operate is set out in s33A of the Planning and Compulsory Purchase Act. It requires that each person on whom the duty falls must co-operate in maximising the effectiveness of the preparation of development plans and activities that support or can reasonably be considered to prepare the way for activities that support the preparation of development plan documents. There should be constructive, active and ongoing engagement. Regard must be had to any guidance given by the Secretary of State about how the duty is to be complied with, and in this case the Wealden Local Plan falls to be examined using the 2012 version of the National Planning Policy Framework (NPPF) and the associated Planning Practice Guidance (PPG) as it was submitted to the Secretary of State before January 24, 2019.
3. The NPPF is explicit that the Government expects joint working on areas of common interest to be diligently undertaken for the mutual benefit of neighbouring authorities. Local planning authorities should make every effort to secure the necessary cooperation on strategic cross boundary matters before they submit their Local Plan for examination. Cooperation should produce effective and deliverable policies on strategic cross boundary matters.
4. My central concern in respect of the legal compliance of the plan relates to the lack of constructive engagement with neighbouring authorities and Natural England in respect of impacts on habitats and landscape and in respect of the issue of unmet housing need in Eastbourne.
5. I shall start with the issue of habitats and air quality because the Council's position in this regard had the potential to affect the distribution of development and the willingness to address unmet needs from Eastbourne. It has been clear for several years that the extent and impact of nitrogen deposition has been a significant strategic cross boundary matter in relation to European protected

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

sites. Wealden District includes the Ashdown Forest Special Area of Conservation (SAC) and shares the Pevensey Levels SAC with Rother District Council. The neighbouring Lewes Downs SAC lies within the administrative boundary of Lewes District Council and the South Downs National Park Authority.

6. The Council has been working on an iterative methodology to consider how to identify and model air quality impacts on the Ashdown Forest and other SACs including the effects of nitrogen from road traffic. Within the Habitats Regulations Assessment (HRA), the Council's air quality consultants set out three modelled scenarios of future baseline conditions. Emissions model A represents the existing baseline situation with respect to both emissions per vehicle and emissions released outside of the study area such that, when applied to the future, there will be no improvements to air quality over time; Emissions model B applies partial reductions in emissions relating to vehicle (and other sector) data predicted by Defra; and Emissions model C applies full reductions of vehicle (and other sector) emissions as predicted by Defra.
7. Emissions model B is the Council's air quality consultants own, bespoke, conservative model (CURED 3A) and it does not uncritically accept Defra's anticipated reductions. It is consistent with the precautionary principle established in relation to HRA. The Council's air quality consultant considers it the most likely scenario, and Natural England also accepts it to be the most appropriate Emissions model, set out within the HRA.
8. It would be unreasonable and lacking in scientific credibility to conclude that Emissions model A should be used as the basis on which to model future emissions and to assess impacts on the integrity of the SAC. Emissions model A assumes that vehicle fleet emissions make no improvement over the Plan period, the composition will remain unchanged from that at 2015 and that background emissions remain static. It allows for no emission improvements in conventional vehicles between 2015 and 2028 and assumes no electric vehicles will join the fleet. This is contrary to what is already known. Improvements arising from previous emissions regulations will continue to work through the fleet and further improvements will occur through national and international actions including the Clean Air Strategy and National Emissions Ceiling Directives to reduce background and vehicle emissions, together with the Road to Zero, which would require that by 2040 that no new fully petrol or diesel cars are to be sold within the UK. Whilst there may be other possible influences over nitrogen oxides and ammonia concentrations and nitrogen deposition, there is very little to suggest that such factors would have a significant effect. This position is therefore lacking in scientific credibility.
9. Yet despite this obvious evidential background and against the advice of Natural England, the Council relied on Emissions model A. Natural England and the

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

Council's own Air Quality advisers consider Emissions model A likely to over-estimate future vehicle pollutant emissions. In coming to this conclusion, I have carefully considered the advice within Natural England's supplementary advice on conserving and restoring site features relating to the Ashdown Forest SAC and the non-statutory guidance published by the Institute of Air Quality Management in June 2019 that improvements in air quality should not be ignored. I have also considered the legal representations made, but the findings in the Dutch judgements (CJEU C-293/17 and C-294/17) are not equivalent to the issues before me in this case, noting that the reliance on autonomous measures is not in the form of mitigation, and that there is no attempt to avoid the need to engage with the Habitats Regulations. As such, they do not preclude an approach which takes into account anticipated improvements in air quality when establishing the future baseline of emissions over the Plan period.

10. The Council's approach was not justified on any reasonable assessment of the evidence. The Council chose not to follow Natural England's advice in this regard. Whilst the Council may be entitled to take a different view from the advice of a nationally important body and an acknowledged expert in the subject, it needs to support its position with adequate evidence. It did not do so but instead took a position which was in scientific terms lacking in credibility. In coming to this conclusion, I have carefully considered the detailed critique by Professor Sutton of both the Council's and other's evidence. However, it is clear that there is a significant problem with the substantial evidence base which supports the HRA and therefore the LP is not justified even if I had concluded that the DtC had been met.
11. There are other examples of inadequate engagement with Natural England. The Council purchased Natural England's Discretionary Advice Service from the later part of 2017 onwards, to assist in the preparation of its evidence to inform the plan and the HRA. But Natural England's long-standing advice on atmospheric pollution on Pevensy Levels was only accepted late in the day prior to the submission of the LP. The relevant changes both to the LP and Sustainability Appraisal (SA), could have been made before the Regulation 19 consultation version of the plan had been finalised. Moreover, the Council did not liaise with Natural England on the proposed allocations within the LP prior to the Regulation 19 consultation stage and was therefore unable to benefit from its expert advice in considering the impact of the allocations within the High Weald Area of Outstanding Natural Beauty.
12. I now turn to the way the Council approached cross-boundary issues with other authorities. Following the "Wealden judgement" of March 2017, the Ashdown Forest Working Group (AFWG) was formed, which included representatives from Natural England, other local planning authorities and the Council. The first meeting took place in May 2017. The primary role of the working group was to

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

address the in-combination effects of traffic generation arising from proposed development in Local Plans on the Ashdown Forest SAC through the HRA in a robust and co-operative manner.

13. The AFWG is an important vehicle to share evidence and to enable the individual competent authorities to undertake effective plan making on a strategic and cross boundary basis with particular reference to the Ashdown Forest SAC. It provides, in theory, the opportunity for each local planning authority to work cooperatively with each other, on an ongoing basis and in a constructive manner to maximise the effectiveness of plan preparation. The AFWG membership also includes Natural England, who, as the Government's adviser, has a significant role in advising and being consulted upon the individual local authorities' HRAs and who, had, since the 'Wealden judgement', revised, and subsequently published, its internal advice re air quality matters.
14. The Council holds significant amounts of data which could potentially be of use to other local planning authorities in producing their evidence base and would support work on the strategic cross-boundary matter of air quality, with particular reference to impacts on the Ashdown Forest. However, the Council did not share the information on a constructive basis with all its fellow members of the AFWG. It redacted evidence, and initially withheld the specific location of transects and air quality monitors. Moreover, it only gave one week for the other AFWG members to look at the redacted document prior to its wider publication, giving little time for constructive engagement.
15. The reason given to withhold the full detailed information was that monitors had been vandalised and sabotaged in the past and this could happen again if the locations were made public. The Council would not even share detailed information with other authorities on a professional in-confidence basis, arguing that the locations would still be vulnerable to any Freedom of Information requests. However, since Natural England was allowed access to the data it was clearly illogical not to share the information with the other councils on a similar basis.
16. By repeatedly refusing to release data, the Council did not work constructively or in the spirit of cooperation. The other members of the AFWG had a legitimate interest in being able to interrogate, comment on, understand and potentially influence Wealden's evidence base which relates to a strategic matter of significant cross boundary significance. This active lack of cooperation is underlined as Natural England was allowed access to the data yet others in the AFWG were not.
17. The Council did eventually release some of the redacted information a month after the Air Quality Monitoring Reports were published. It provided the locations

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

of the air quality monitors, where they were not co-located with ecological monitoring sites. However, by this time any opportunity for constructive input into the documents had passed. Moreover, not all the information was shared.

18. In August 2017 the members of the AFWG, including the Council, agreed to produce a Statement of Common Ground (SoCG). This would potentially have provided an opportunity for the Council to signal where it considered that it had cogent reasons to legitimately disagree with the approach of Natural England and other local planning authorities, and to increase a shared understanding of the technical issues between the different parties in relation to atmospheric pollution, vehicle emissions and its potential impacts on the integrity of the SACs. The production of the SoCG was to be facilitated by the Planning Advisory Service and to be completed and agreed by January 2018. The deadline slipped and a further deadline was set of March 29, 2018 but by that date the Council considered that it was not in a position to sign; it wished to raise further issues and to take further advice from its consultants. It eventually offered to sign the SoCG just before the South Downs National Park Authority was due to submit its submission plan to the Secretary of State, but this was too late for that plan given that the SoCG had been amended by the other parties to it following the Council's decision not to sign.
19. It would have been useful to all parties that the Council's position was accurately presented in the SoCG and that the technical differences between the parties were clear. It was stated in the minutes of the November 2017 AFWG and in various emails that where a party disagreed, the text within the SoCG would need to be concise and to the point but this did not occur. The Council's insistence on significant amounts of text being inserted into the document ensured that it was not in a position to sign at the appropriate time.
20. Lewes Downs SAC falls outside Wealden's administrative boundary and lies within Lewes DC and the South Downs National Park. The Pevensey Levels SAC extends into neighbouring Rother District. Through the AFWG, Eastbourne together with Lewes and the South Downs National Planning Authority had previously made the Council aware of the differences in opinion as to the potential impacts of changes in air quality on the SACs. However, in the production of this plan, none of the neighbouring authorities in which the SAC lie were directly asked to be involved with, and to engage constructively with the individual Air Quality studies relating to Lewes Downs and the Pevensey Levels SAC other than through the provision of data to inform the traffic modelling. Nor was there active engagement with the individual local authorities prior to the Regulation 19 consultation to consider how or if any mitigation was required and to consider any implications, including on viability, and how this would impact on other infrastructure requirements. It was not until Regulation 19 consultation stage that the Council determined that changes in air quality would not result in

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

an adverse effect on the integrity of the Pevensey Levels SAC and prepared a proposed main modification to remove the relevant references from the LP. However, no update was made to the SA. Not directly approaching the Councils earlier, or even Natural England, demonstrates a lack of active, constructive and ongoing engagement.

21. Moreover, it was only halfway through the Regulation 19 consultation that the Council arranged a general briefing session on the HRA. As part of this session, a package of mitigation measures was discussed. These were linked to the SACs which fell within the neighbouring authorities. These mitigation measures included collecting a tariff which would go towards offsetting the alleged impacts of the atmospheric pollution on the two SACs. This session was too late for the local planning authorities to undertake meaningful engagement as the policies had already been drafted.
22. I turn now to the approach the Council took in respect of unmet housing needs in Eastbourne Borough. Eastbourne is a severely constrained borough, both physically and due to significant infrastructure limitations to growth. It is commonly accepted, including by the Council, that Eastbourne is unable to meet all its housing and employment needs. It lies within Wealden's Housing Market Area and shares a Functional Economic Market Area. As such, there is a close functional and geographical relationship between the two local planning authorities.
23. Its unmet housing and employment needs are strategic priorities. The Framework and PPG are explicit that local planning authorities should meet their own housing need and meet the needs of other authorities in the same housing market as far as is consistent with the policies set out in the Framework. This includes policies for the protection of the built and natural environment.
24. Work began on the Wealden Local Plan in early 2015, including meetings with neighbouring local planning authorities. Consultation took place on the Issues, Options and Recommendations Plan for six weeks in October 2015. At this point the proposed plan period was to run from 2013 to 2037 and the emerging plan specifically included additional housing to cater for some of Eastbourne's unmet needs.
25. However, by the March 2017 draft version of the LP, the end date of the proposed Plan period had been brought forward from 2037 to 2028 and the Council no longer intended to provide for any of Eastbourne's unmet housing needs. A DtC meeting took place in January 2017 between officers at Wealden and Eastbourne, where amongst other matters, housing matters were discussed, and in the Council's DtC evidence, three individual meetings are cited where the Council outlined its OAHN and its housing target to Eastbourne. However, the

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

evidence indicates that there was no meaningful discussion about how Eastbourne's unmet needs could be met. The change in the plan period and the presentation of constraints were simply presented to Eastbourne without proactive discussion from Wealden Council about how the issue of unmet needs could be addressed within the original plan period. There is no sign that there was any meaningful discussion of scenarios or alternatives.

26. Eastbourne requested a further meeting in early January 2018 so as not to delay its plan making and to discuss a SoCG. After further requests, a meeting eventually took place in May 2018. Whilst this was before the formal Regulation 19 consultation had commenced, the Council did not respond constructively to Eastbourne's requests to engage. This meeting provided limited opportunity to influence the plan as by this time the LP was virtually finalised. It is clear from the email correspondence that the Council did not intend to constructively engage at this meeting for the mutual benefit of the two authorities but took the meeting simply as an opportunity to exchange information. This approach is reiterated in the language used within the Council's response to my Matters, Issues and Questions relating to the DtC. It appears these meetings, rather than being an opportunity to work collaboratively to address and find strategic solutions to overcome the serious obstacles to delivering development both in Wealden and in Eastbourne, were a forum to communicate the constraints which the LPA considered would prevent them from helping. For example, at the November 2017 meeting, which Eastbourne instigated to request a joint planning approach for the HMA of Eastbourne and Southern Wealden, the Council 'explained' or 'EBC were also made aware' of the nature of the constraints preventing it from taking on some of Eastbourne's housing needs. This is not indicative of constructive engagement.
27. Eastbourne had requested at the May 2018 meeting that a SoCG be formulated between both councils. The Council did not take up this opportunity to demonstrate effective cooperation and replied that a 'statement of working together' was a more appropriate approach. A draft Memorandum of Understanding between Eastbourne and the Council was circulated amongst officers on 11 December 2018. This sets out an approach for future cooperation between the councils but to my knowledge it is yet to be agreed. It was produced at a very late stage well after the closure of the Regulation 19 consultation and has therefore not had member approval. Even if the document had been signed, its initiation at such a late stage in the plan making process is not indicative of active, ongoing constructive engagement.
28. The PPG states that the outcomes of cooperation should be considered, not just whether local planning authorities have approached others. There was no constructive engagement to address the substantive strategic matter of Eastbourne's unmet housing needs, which remain for now unmet.

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

29. The trigger for the review of the Plan under draft Policy WLP 13 provides a framework for considering Eastbourne's unmet housing needs in a future iteration of the plan, but those acknowledged needs have not been dealt with at the right time, which is now. Work on common areas of interest has not been diligently undertaken by the Council for the mutual benefit of the District and neighbouring authorities.
30. On the issue of broader co-operation, it is notable that my conclusions in regard to the Council's inadequate record in terms of engagement under the DtC are endorsed by the representations of 5 neighbouring local planning authorities: Rother District Council, Eastbourne Borough Council and a group who put forward a joint representation: Lewes District Council, South Downs National Park Authority and Tunbridge Wells Borough Council. They argued that the Council had failed to meet DtC in relation to air quality matters, cross boundary impacts on the SACs, Eastbourne's unmet housing and employment needs, and strategic infrastructure. On December 20, 2018 the Council's Director and Deputy Chief Executive Planning wrote to these authorities asking that they withdraw their objections in relation to the DtC, citing examples of recent actions that had been taken following the receipt of the Regulation 19 representations. However, the sending of such a letter at such a late stage in the process, less than a calendar month before submission, setting out examples of the Council's actions and requesting that the respective Councils withdrew their objections, does not remedy the failure throughout the preparation of the Plan to engage with these authorities. All five Councils have maintained their position.
31. Having regard to all the above, it is not possible to escape the conclusion that, had the Council properly engaged with and heeded Natural England's advice and had the Council properly involved itself in a constructive discussion with neighbouring authorities about both the impacts of the plan and the ability to help in meeting Eastbourne's unmet housing need, the overarching development strategy of the submitted LP – the planned quantum and distribution of development, and whether the Council considers itself to be in a position to be able to take any of Eastbourne's unmet housing needs – could have been different. As has been shown, the Council chose not to accept the advice of Natural England in respect of emissions modelling but selected a model which failed to take into account known factors influencing future emissions. This approach, by overstating future emissions and hence likely effects on the Ashdown Forest and potentially other SACs, has had the potential to magnify constraints, constrain development potential and so inappropriately influence possible development scenarios. The Council has not been transparent when presenting these constraints to Eastbourne Council and other authorities. It has not actively shared its evidence base and addressed key cross-boundary issues with other authorities in a timely manner (including contributing meaningfully to

Wealden District Council Local Plan Examination

Inspector: Louise Nurser BA(Hons) Dip UP MRTPI

Programme Officer: Lynette Benton

lynette.benton@wealden.gov.uk - Mobile: 07977 415678

SoCGs) and has not worked collaboratively in jointly addressing the implications of the reduction of its plan period and has not engaged in constructive discussion in respect of the distribution of development and the accommodation of Eastbourne's unmet needs.

32. In conclusion, I consider that the Council has not undertaken constructive engagement with neighbouring authorities. The absence of such engagement means the submitted plan has not been shaped by an adequate consideration of the strategic issues discussed above, nor has the Council adequately engaged with neighbouring authorities to assist in their plan-making processes.
33. The Duty to Co-operate places a legal duty on local planning authorities to engage constructively, actively and on an ongoing basis to maximise the effectiveness of Local Plan preparation in the context of strategic cross boundary matters. If a local planning authority cannot demonstrate that it has complied with the duty at the independent examination of their Local Plans, then the Local Plan will not be able to proceed further in examination. I am sorry to have to tell you that it is my conclusion that the Council has failed in this legal duty and that the submitted plan cannot proceed further in examination. Whether you would choose to withdraw the Plan or await a detailed report, which is unlikely to add further detail than set out above, is a matter for you to consider and for you to advise me via the Programme Officer.
34. I have asked that the Programme Officer posts a copy of this letter on the website. However, I am not inviting comment from other examination participants.

Yours Sincerely

Louise Nurser

INSPECTOR