

Report to the Cabinet

Report reference: C-027-2019/20

Date of Meeting: 6 January 2020



**Epping Forest
District Council**

Portfolio: Planning Services – Cllr J Philip

Subject: Implementation of the Local Plan: Update on progress

Responsible Officer: Alison Blom-Cooper (01992 564066)

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Recommendations/Decisions Required:

That the steps being taken to determine planning applications currently held in abeyance be noted.

Introduction and Executive Summary

1. The Council is aware of its legal obligations under the Conservation of Habitats and Species Regulations 2017 (as amended) ("the Habitats Regulations"), specifically, its duties as the 'competent authority' under Regulation 63 concerning the assessment of the implications of plans and projects for the Epping Forest Special Area of Conservation ("EFSAC").

2. As local planning authority, before deciding to grant planning permission for a project involving development likely to have a significant effect on the EFSAC (either alone or in combination with other plans or projects), the Council must make an Appropriate Assessment of the implications of the development for the EFSAC in view of its conservation objectives as a European site. For the purposes of that Appropriate Assessment, the Council must consult Natural England, as the appropriate nature conservation body, and have regard to any representations made by Natural England about the project within such reasonable time as the Council specifies.

3. Applying the precautionary principle and taking account of the conclusions of the Appropriate Assessment, the Council may grant planning permission for the proposed development only after having ascertained that it will not adversely affect the integrity of the EFSAC. When considering whether a proposal will adversely affect the integrity of the EFSAC, the Council must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which permission may be granted.

4. In respect of development management decision-making in the District, Natural England's current advice is that applications proposing new development anywhere within the District which involving an increase in vehicle movements on roads within 200m of the EFSAC are likely, in combination with other plans or projects, to have a significant effect on the EFSAC. As such, before granting planning permission, the Council must undertake an Appropriate Assessment of the project in accordance with its legal obligations under Regulation 63 of the Habitats Regulations.

5. Natural England has strongly advised that any identified in combination impact on the EFSAC is best dealt with by a plan-led strategic solution, as the level of assessment required is considered overly onerous to be dealt with on a case-by-case basis and the most effective forms of mitigation are unlikely to be deliverable by individual applicants.

6. Consequently, in the absence of mitigation and/avoidance measures agreed with Natural England, currently, the Council cannot lawfully grant planning permission for new development that would result in a net increase in vehicle movements. which has resulted in planning applications being held in abeyance pending the identification of an acceptable air quality mitigation strategy to manage the adverse effects of atmospheric pollution arising from additional vehicles using roads in the vicinity of the EFSAC.

7. Taking account of the Inspector's recent advice, the Council has been working hard to identify whether an interim approach can be identified to address the backlog of planning applications pending completion of the additional HRA. To that end, the Council has undertaken a comprehensive review of all the applications held in abeyance and, following a detailed consideration of the development proposed in each application, the Council has concluded that some of the proposals will **not** result in a net increase in vehicle movements and, as a result, can be screened out as having no likely significant effect on the EFSAC. These decisions have now been issued.

8. Working with Natural England, the Council is currently exploring whether a viable interim approach can be identified to enable additional planning permissions to be granted, which includes obtaining legal advice on the lawfulness of any proposed interim approach. This report updates the present position and has been prepared by officers with the assistance of legal advice from Counsel.

Reasons for Proposed Decision

- To ensure that members are kept fully up-to-date on the steps being undertaken by the Council to determine planning applications in accordance with its legal obligations under the Habitats Regulations.

Other Options for Action:

- Not to update members on the steps being undertaken would be contrary to previous commitments to keep Members informed.

Report:

Local Plan progress update

9. The Council submitted the Epping Forest District Local Plan (2011-2033) Submission Version ("the LPSV") to the Secretary of State for independent examination on 21 September 2018. The planning inspector appointed to carry out the examination of the LPSV, Mrs Louise Phillips MA held a series of examination hearings between 12 February and 11 June 2019.

10. Following completion of those hearings, the Inspector provided the Council with written advice dated 2 August 2019 ([ED98](#)), indicating that she considered further proposed Main Modifications ("MMs") of the LPSV to be necessary to make it sound and capable of adoption.

11. The Inspector advised that the Council should undertake additional work which relates to the adequacy of the Appropriate Assessment of the LPSV's implications for EFSAC within the 2019 HRA ([EB209](#)), based upon the objections raised by Natural England and the Conservators of Epping Forest ("the Conservators"). In her advice note the Inspector indicated that she could not conclude beyond reasonable scientific doubt that the Plan will not adversely affect the integrity of the EFSAC.

12. The Council responded to the Inspector's advice on 11 October 2019 ([ED100](#)), setting out its proposals for the programme of additional work required (at paragraph 38 of its response). The purpose of that additional work is to establish the precise form of the proposed MMs required to address the Inspector's concerns about the implications of the LPSV on the EFSAC.

13. On 25 November 2019, the Inspector responded to the Council's proposed programme ([ED102](#)), advising that:

"The steps you propose to take in relation to the HRA are clearly directed to addressing the concerns I have raised and seem to me a reasonable response. There is significant focus on improving confidence in the likely composition of the vehicle fleet and I understand that you propose to use a bespoke prediction of future emissions instead of relying upon the DEFRA 2030 factors. This would seem to serve the purpose of increasing scientific certainty, but I would encourage you to consult with Natural England in relation to the "beyond reasonable scientific doubt" test. I note that the modelling will take account of the changes to the Plan's site allocations referred to in my advice....Your work programme appears to be challenging but realistic and I would be grateful if you could keep me informed of progress."

14. The Council has made good progress with the programme of additional HRA work proposed in paragraph 38 of its response to the Inspector. To date, the Council has undertaken an initial re-run of the air quality modelling using the 'tall deposition velocity rates'. It has also undertaken additional ANPR surveys to provide the most up-to-date and robust bespoke vehicle fleet mix of the traffic using the EFSAC roads. A technical meeting was held in November with Natural England's representatives and expert advisors to discuss the Council's proposed methodological updates and reviews and a further meeting was held in mid December to which the Conservators of Epping Forest also attended. The Council has also sought Defra's views on aspects of the proposed methodological updates via its Air Quality Helpdesk.

15. Thereafter, in accordance with the work programme now approved by the Inspector, the Council intends to undertake the transport modelling and then air quality modelling of various alternative scenarios in accordance with the methodology discussed with Natural England. As soon as the Council has finalised the methodology for that work, it will be shared with the Inspector. A response to the Inspector's recent letter is being prepared and will be available on the Local Plan website in due course.

Progress with outstanding planning applications

16. As stated above (at paragraphs 1 to 8), the Council is aware of its legal obligations under the Habitats Regulations concerning the assessment of the implications of plans and projects for the EFSAC.

17. In view of Natural England's latest advice, the Council currently cannot lawfully grant planning permission for new development that would result in a net increase in vehicle movements through the EFSAC. This has resulted in planning applications being held in abeyance pending the identification of an acceptable air quality mitigation strategy to manage the adverse effects of atmospheric pollution arising from additional vehicles using roads in the vicinity of the EFSAC.

18. Since receiving the Inspector's advice in August 2019, the Council has been working hard to identify whether an interim approach to managing atmospheric pollution impacts on the EFSAC can be identified to address the backlog of planning applications pending completion of the additional HRA work. To that end, the Council has undertaken a comprehensive review of all the applications currently held in abeyance and, following a detailed consideration of the development proposed in each application, the Council has concluded that some of the proposals will **not** result in a net increase in vehicle movements and, as a result, can be screened out as having no likely significant effect on the EFSAC.

19. This review has resulted in 15 applications being identified for determination from the end of November 2019. Release of these permissions will allow the construction of 34 dwellings across a number of schemes, development of a hangar at the North Weald Airfield, and provision of accommodation for 31 nursery workers in two schemes. The list remains under review.

20. Working with Natural England, the Council is currently exploring whether a viable interim approach can be identified to enable additional planning permissions to be granted, which is intended to include obtaining further legal advice on the lawfulness any proposed interim approach once identified.

Options being considered

a) Offsetting

21. Having addressed the category of applications involving development not likely to have a significant effect on the EFSAC (above at paragraphs 16 to 19), the Council's work to identify whether an interim approach can be identified to address the backlog of planning applications pending completion of the additional HRA work continues. In particular, the Council is seeking to identify a viable basis upon which it can lawfully ascertain that granting planning permission for the development proposed in the undetermined applications, or a proportion thereof, will not adversely affect the integrity of the EFSAC.

22. The Council and its expert advisors have commenced work to investigate whether the evidence underpinning the 2019 HRA can be reviewed and adapted to ascertain whether the modelled scenarios in the 2019 HRA accurately reflect current 'real world' circumstances in the District, when compared against the evidence now available.

23. That work involves an interrogation of the data underpinning the Air Quality Impact Assessment ("AQIA") undertaken by AECOM as part of the 2019 HRA to inform an assessment of net increases against net reductions in the Annual Average Daily Traffic ("AADT") using the roads and key junctions within the EFSAC. Subject to the outcome of those investigations, it may be possible to devise a mechanism that, potentially, may provide a reasonable approach to 'offsetting' AADT. This would involve demonstrating that some of the applications currently held in abeyance could be granted permission on the basis that doing

so would not increase the predicted level of AADT from sources other than the planned growth in the LPSV.

24. Progress on this work is at an early stage and, on the information presently available, it is impossible to assess whether such an approach could form the basis of a viable mechanism by which the Council, as competent authority, having regard to the conclusions of the mandatory Appropriate Assessment could be satisfied with sufficient certainty that granting planning permission would not adversely affect the integrity of the EFSAC.

25. For the avoidance of doubt, before planning permission is granted for any development likely to have a significant effect on the EFSAC (either alone or in combination with other plans or projects), including the applications presently held in abeyance, the Council must make an Appropriate Assessment of the implications of the specific project under consideration. In this context, that potentially could be done by completing a single Appropriate Assessment that will apply to the determination of multiple planning applications and, if necessary, project-specific Appropriate Assessments before granting individual planning permissions. Either way, even if the Council is able to identify a viable mechanism for granting planning, which is by no means certain, that mechanism cannot be used at the screening stage of the HRA process to avoid undertaking an Appropriate Assessment.

26. At all times, the Council must follow the correct approach to the application of Regulation 63 of the Habitats Regulations, as identified and clarified by the CJEU in a series of decisions issued in 2018. Necessarily, as part of any Appropriate Assessment the Council must formally consult Natural England and take proper account of the representations received before granting planning permission.

27. Even if the Council can identify a robust evidence-based justification for granting planning permission, relying upon a mechanism such as 'AADT offsetting' currently being investigated, should Natural England advise the Council that it does not consider there to be sufficient evidence or information to ascertain that that granting planning permission would not adversely affect the integrity of the EFSAC, as competent authority, the Council cannot reject Natural England's scientific expert opinion unless the Council's Appropriate Assessment includes an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the plan or project on the site concerned.

28. Recently, Natural England has responded to the Council's request for informal initial feedback on an outline proposal for high-level strategic approach described above (at paragraphs 23 to 27). Although that response explained why Natural England could not support the Council's outline proposal, the reasons given demonstrate that Natural England had erroneously assumed that the Council was unaware of its legal obligations under the Habitats Regulations and was contemplating granting planning permission new development without undertaking a strategic-level Appropriate Assessment of the proposed interim approach (that would qualify as a *plan* for the purposes of Regulation 63), upon which Natural England must be consulted.

29. Otherwise Natural England's response was constructive and positive, making clear that Natural England are keen to work with the Council to identify a solution to address the planning permission currently held in abeyance. To that end, the response also informed the Council that Natural England is currently exploring alternative options for allowing some new development to come forward before the EFDLP is adopted, without adversely affecting the integrity of the EFSAC.

b) Partial permission

30. The Council has also considered whether other decision-making options could be used to grant planning permission for a reduced form of development in certain cases. Having considered the matter carefully and having taken legal advice, officers have concluded that it is not lawfully possible to grant planning permission in respect of development but not all of the development described in an application, or grant planning permission subject to planning conditions or a section 106 planning obligation restricting the delivery of development pending the identification of measures to avoid adverse effects on the integrity of the EFSAC.

31. In a recent planning appeal concerning land at 13-15a Alderton Hill, Loughton (PINS Ref: APP/J1535/W/18/3203410), the planning inspector refused to grant planning permission subject to a *Grampian* condition precluding any development until the Air Quality Mitigation Strategy to be prepared alongside the EFDLP has been adopted at which point any of its requirements relevant to the scheme would be implemented. The Inspector did not consider that to be an acceptable solution to allow a positive conclusion to the Appropriate Assessment due to the lack of certainty as to what the strategy may contain. The Inspector also concluded that, whilst a financial contribution towards strategic solutions would be simple to deliver (and was included in a unilateral undertaking), any implications for the scheme itself may cut across the permission, requiring changes to proposed.

32. The Inspector also recognised that the use of a Grampian condition "would set a clear precedent for over 70 embargoed schemes in the district as at 28 August which have resolutions to grant planning permission subject to the Air Quality Mitigation Strategy" and that there "would be no arguable reason to resist issuing these and further permissions with the same condition which would prevent the Council having the ability to review their merits when the EFDLP is finally adopted and the air quality strategy put in place." This, the Inspector concluded "could prejudice the planning of the district in the light of the need to protect the integrity of Epping Forest SAC."

33. For the same reasons, it would not be possible for the Council as competent authority under the Habitats Regulations to conclude that individual development proposals, in combination with other plans and projects, would not have an adverse effect on the integrity of the EFSAC. That approach concurs with the current advice from Natural England and recent CJEU decisions.

c) Other authorities

34. The Council has taken account of similar circumstances in other local planning authority areas, including the current moratorium on development in Hampshire. In June 2019, a group of local 13 authorities known as the Partnership for South Hampshire ("PUSH"), including Portsmouth City Council, were forced to stop granting planning permissions for new housing and tourism developments following updated legal advice from Natural England. The issue of concern is the potential adverse effect of nitrate on the integrity of European sites within the Solent caused by nitrate and phosphorus pollution arising from sewage generated from new development. Natural England has advised that new development in the Solent region should only be permitted if they are nutrient-neutral, particularly in relation to nitrates.

35. In collaboration with Natural England, Portsmouth City Council has prepared a nitrates credit system to create a medium-term solution, by which the Council seeks to create a bank of nitrate credits which can be used to permit new development. The Council has begun installing bath, showers and low-flush toilet cisterns across its stock of council homes, to

reduce the amount of water going into the sewer network thereby reducing the environmental impact of the homes. The City Council considers that upgrades to the council homes will generate enough credits to allow the construction of more than 500 homes a year.

36. Another PUSH authority, Havant Borough Council, has approved a Position Statement on Nutrient Neutral Development, which puts in place mechanisms for development to achieve nutrient neutrality. For development on sites currently used for agricultural purposes, there must be an aim to achieve nutrient neutrality on-site. However for development on non-agricultural sites, particularly brownfield sites, this is not possible. The Position Statement sets out how development proposals should consider the issue and requires applicants to submit a European Site avoidance and mitigation checklist as part of the information needed to determine relevant planning applications.

37. Recently, Havant Borough Council has prepared a nitrogen budget in line with the methodology and supplementary advice from Natural England and Southern Water, using the best scientific evidence available, which considers all development currently proposed as part of the emerging Havant Borough Local Plan 2036. However, the emerging plan has yet to be submitted to the Secretary of State for independent examination and it remains to be seen whether the inspector appointed in due course to examine the plan will support the Council's approach.

38. Having considered these and other examples of how other authorities are dealing with these similar circumstances, the identification of a comprehensive solution to address the current moratorium on development likely to have a significant effect on the European sites in the Solent region is proving to be very difficult. The PUSH authorities have conceded that finding solutions to reduce nutrient discharge is a shared task and that collectively, and as individual local authorities, PUSH members are working hard with Natural England, the Environment Agency, Ministry of Housing, Communities and Local Government (MHCLG) officials, water companies and others, to develop both short-term and medium/long-term solutions.

39. It is important to note, however, that the circumstances in the Solent region are not identical to the issues concerning the impact of new development on the EFSAC. Specifically, acceptable avoidance and mitigation measures have yet to be identified to ensure that new development in the District will not adversely affect the integrity of EFSAC.

40. The Council is also aware of other local planning authorities in England which have similar issues, such as Herefordshire Council, and will continue to explore with other competent authorities and with MHCLG whether there are other appropriate ways to manage this issue.

Local Plan HRA Update

41. The Council and its advisors are in discussion with Natural England to agree an updated methodology for the additional HRA for the Local Plan examination. Amongst other things, that work involves undertaking additional traffic, ecological and air quality assessments to address and overcome the Inspector's concerns about the adequacy of the 2019 HRA. The purpose of that work is to identify the additional proposed MMs of the LPSV to enable its adoption, which will include the production of the Air Quality Mitigation Strategy proposed by the Council.

42. That additional HRA work could also inform the formulation of an interim approach to managing atmospheric pollution impact on the EFSAC. However, for the reasons explained,

it is necessary for the Council to work with Natural England and attempt to secure its agreement to the updated methodology for the additional HRA work before it is commenced. As such, it is unlikely that the outcomes necessary to inform the potential identification of an interim approach to managing atmospheric pollution impacts on the EFSAC will be available until about April 2020.

43. Accordingly, at this stage it is impossible to predict whether a robust evidence-based justification for granting planning permission pending the adoption of the EFDLP, or whether Natural England would agree that an interim approach relying upon that justification constitutes sufficient evidence to ascertain that that granting planning permission would not adversely affect the integrity of the EFSAC. In accordance with the recent CJEU decision in the '*Dutch cases*' (joined cases C-293/17 and C-294/17), an appropriate assessment cannot not take into account the existence of conservation, preventative, or autonomous measures, if the expected benefits of those measures are not certain at the time of that assessment.

Obtaining further legal advice

44. The Council will continue working with Natural England and other partners to identify whether there is a robust evidence-based mechanism to justify granting planning permission before the adoption of the EFDLP. Subject to the matters addressed above, in due course, it may be necessary and appropriate for the Council to take further legal advice about the lawfulness of any proposed justification for granting planning for new development before the additional HRA work has been completed and the Local Plan Inspector has considered and agreed any proposed MMs relating to the EFSAC.

Resource Implications:

The work to support an updated HRA for the Local Plan is covered by the local plan budget. Obtaining further legal advice may result in additional fees being incurred over and above the current budget.

Legal and Governance Implications:

The Council is required by national legislation to prepare and maintain an up to date Local Plan to set out the strategic priorities for the area and the policies that address these and must also comply with the Habitat Regulations. The Council is aware of its legal obligations under the Conservation of Habitats and Species Regulations 2017 (as amended) ("the Habitats Regulations"), specifically, its duties as the 'competent authority' under Regulation 63 concerning the assessment of the implications of plans and projects for the Epping Forest Special Area of Conservation ("EFSAC").

As local planning authority, before deciding to grant planning permission for a project involving development likely to have a significant effect on the EFSAC (either alone or in combination with other plans or projects), the Council must make an Appropriate Assessment of the implications of the development for the EFSAC in view of its conservation objectives as a European site. For the purposes of that Appropriate Assessment, the Council must consult Natural England, as the appropriate nature conservation body, and have regard to any representations made by Natural England about the project within such reasonable time as the Council specifies.

Safer, Cleaner, and Greener Implications:

The delivery of a Local Plan and specifically a Mitigation Strategy to address the impacts of recreational pressure and air quality on Epping Forest Special Area of Conservation will contribute to safer, cleaner, greener objectives by planning for sustainable development.

Consultation Undertaken:

The Council is consulting with Natural England on the proposed methodology to undertake the traffic and air quality modelling to inform the updated HRA and on mechanisms whereby prior to its completion planning decisions for new development in the District can be determined.

Background Papers:

- 2019 Habitat Regulations Assessment
- Inspector's advice note dated 2 August 2019
- Council's response 11 October 2019
- Inspector's note of 25 November 2019

Risk Management:

The Council needs to make progress to update the HRA in order to be able to grant planning permission for development in the District and protect the impact of growth on the Epping Forest Special Area of Conservation. Accordingly, a detailed work programme has been drawn up and is being regularly monitored with updates being provided to the Inspector.