

Neutral Citation Number: [2014] EWHC 406 (Admin)

Case No: CO/3796/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2014

Before :

THE HONOURABLE MR JUSTICE SALES

- -

Between :

Ashdown Forest Economic Development Llp	**Claimant**
- and -	
(1) Secretary of State for Communities and Local Government	**Defendants**
(2) Wealden District Council	
(3) South Downs National Park Authority	

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- -

David Elvin QC & Charles Banner (instructed by **King Wood Mallesons LLP**) for the **Claimant**
Richard Kimblin (instructed by **the Treasury Solicitor**) for the **First Defendant**
James Pereira & David Graham (instructed by **Wealden District Council**) for the **Second and Third Defendants**

Hearing dates: 4/2/14-5/2/14

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Approved Judgment

Mr Justice Sales :

Introduction

1. This is a claim under section 113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to quash, in whole or in part, the Wealden District Core Strategy Local Plan ("the Core Strategy"). The Core Strategy forms part of the statutory development plan for the administrative areas of both the Second Defendant, Wealden District Council ("WDC"), and the Third Defendant, South Downs National Park Authority ("SDNPA"). WDC had the main role in preparing the Core Strategy for adoption. It was adopted by WDC and SDNPA jointly on 19 February 2013.

2. The Claimant is an umbrella organisation representing the interests of a number of major landowners in the area covered by the Core Strategy, whose property interests are affected by the Core Strategy. In particular, the Core Strategy places limits on building development in the general area covered by it and also specific restrictions in relation to building development in an area within 7 km of the boundary of Ashdown Forest, which is a protected site within the area covered by the Core Strategy. The landowners would like greater opportunities to develop their land by building on it than the Core Strategy allows for.

3. Ashdown Forest is designated as a Special Area of Conservation under the Habitats Directive (Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) and the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"). It is also designated as a Special Protection Area under the Birds Directive (Directive 2009/147/EC on the conservation of wild birds) and the Habitats Regulations.

4. The Core Strategy was adopted by WDC and SDNPA after an extensive iterative process of consultation and refinement, including an examination in public before an Inspector (Mr Moore, appointed by the Secretary of State, the First Defendant), at hearings in January and February 2012 and on 6 September 2012. The Inspector's Report on the Core Strategy pursuant to section 20 of the 2004 Act was issued on 30 October 2012. It made certain recommendations, subject to compliance with which the Inspector found the Core Strategy to be "sound" and cleared it for adoption by WDC and SDNPA.

5. In order to protect Ashdown Forest to the level required by the Habitats Directive, the Birds Directive and the Habitats Regulations, the draft Core Strategy submitted for examination by the Inspector WDC included an overall housing requirement for the area covered by the Core Strategy of 9,600 in the period to 2030 and proposed measures of particular control in relation to new development close to the Forest in the form of a prohibition on new development within 400m of the edge of the Forest (to limit predation by domestic cats and so forth) and a requirement that for new development within 7 km of the Forest suitable alternative natural green space ("SANG") should be provided. The purpose of the proposed SANG requirement was to limit housing development in proximity to the Forest, with a view to limiting

recreational visits to the Forest to a level which would not place excessive strain on the bird wildlife in the Forest.

6. The overall housing requirement figure of 9,600 in the draft Core Strategy was a considerable reduction below the then current figure of 11,000 contained in another planning document, the South East Plan. The South East Plan was the regional spatial strategy for the South East which had been promulgated under the 2004 Act prior to the removal of the layer of regional strategy planning by amendment of that Act by the Coalition Government. The Government announced in July 2010 that regional strategy plans were to be revoked. However, the South East Plan was only formally revoked with effect from March 2013, after adoption of the Core Strategy in issue in these proceedings.

7. Although the Inspector found that the figure of 11,000 for the overall new housing requirement in the South East Plan remained the appropriate figure for new housing needs in the area, he considered that the lower figure proposed by WDC for inclusion in the Core Strategy was justified by reason of environmental constraints in relation to the need to protect Ashdown Forest from the detrimental effects of traffic pollution associated with increased density of population in the area. For separate reasons which are not the subject of challenge he reduced WDC's proposed figure of 9,600 to 9,440. The Inspector also considered that the 7 km SANG zone and 400m development exclusion zone were appropriate, and required that they be promoted from discussion in explanatory text in the draft Core Strategy to be incorporated into a formal policy statement in the approved version of the Strategy, in policy WCS12 (Biodiversity).

8. The Claimant challenges the lawfulness of the adoption of the Core Strategy on four grounds:

    i) Ground One: In relation to the statement of overall housing requirement in the Core Strategy as adopted, the Inspector reached an irrational and illogical conclusion, contrary to the approach he should have adopted in compliance with national policy guidance as to his role in examining a development plan, that the lower figure of 9,440 was justified. He erred in accepting WDC's contention that a risk of environmental damage to Ashdown Forest arising from the impact of nitrogen and nitrogen oxide pollution from traffic ("nitrogen deposition") associated with housing development at a higher figure meant that the objectively assessed need for 11,000 new homes in the relevant period could not be met. He should have found that WDC had not carried out sufficient investigations to determine whether in fact the higher, objectively assessed housing requirement figure could have been accommodated without undue risk of environmental damage to the Forest. He should have required WDC to undertake further work to see whether an overall new housing requirement of up to 11,000 could be accommodated and included in the Core Strategy, and until that work was done should have treated the draft Core Strategy as unsound and not properly capable of adoption. The unlawfulness in the approach and conclusion of the Inspector

prevented the adoption of the Core Strategy by WDC and SDNPA from being lawful. Mr Kimblin appeared for the Secretary of State to defend the Inspector against this allegation of unlawfulness in his approach and Mr Pereira, for WDC and SDNPA, adopted his submissions in relation to this Ground;

ii) Ground Two: Again in relation to the statement of overall housing requirement in the Core Strategy, the steps taken by WDC to investigate whether the figure of 9,440 was justified were inadequate to comply with its obligations under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") and the domestic regulations which implement that Directive, the Environmental Assessment of Plans and Programmes Regulations 2004 ("the Environmental Assessment Regulations"), which required it to examine reasonable alternatives to the plan which it chose to adopt and to explain its choice;

iii) Ground Three: Again in relation to the statement of overall housing requirement in the Core Strategy, WDC failed to carry out an appropriate assessment as required by regulation 61(1)(a) of the Habitats Regulations and the Habitats Directive regarding the impact on Ashdown Forest of nitrogen deposition; and

iv) Ground Four: In relation to the 7 km SANG zone, the adoption of Policy WCS12 was contrary to the SEA Directive and the Environmental Assessment Regulations, in that there was no assessment of the relative environmental impacts of a different radius or of alternative means of mitigating the additional recreational pressure on Ashdown Forest arising from new development.

9. Mr Pereira presented the submissions for WDC and SDNPA in relation to Grounds Two, Three and Four. The Secretary of State made no submissions in relation to those Grounds, since they were not directed against the Inspector (even though, presumably, in theory they might have been, as further grounds on which it might have been said that the Inspector ought to have found that the Core Strategy had not been lawfully prepared and was unsound).

Legal Framework

(i) The 2004 Act

10. The Core Strategy qualifies as a "development plan document" for the purposes of the 2004 Act. Once such a core strategy is adopted by a local planning authority, it becomes part of the statutory development plan of that authority. This has the result that planning applications must be determined in accordance with the core strategy, as in relation to other parts of the statutory development plan, unless material considerations indicate otherwise: section 38(6) of the 2004 Act.

11. A core strategy also sets the framework for drawing up other, lower level and more detailed parts of the statutory development plan of a local planning authority. Here, the relevant local planning authority is WDC.

12. The Secretary of State has given policy guidance in relation to this process in the National Planning Policy Framework issued in March 2012 ("the NPPF"), which replaced a range of previous policy guidance documents. The NPPF includes a presumption in favour of sustainable development. Paragraph 47 of the NPPF requires local planning authorities (amongst other things) to identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements, with a view to boosting significantly the supply of housing. The extent of identification of deliverable sites required by this paragraph depends on the size of the housing requirement identified in a local planning authority's core strategy. One effect of the incorporation of the lower housing requirement figure in the Core Strategy, therefore, is that WDC will work to identify a lower level of specific deliverable sites in its other plan documents, which has a negative effect on the ability of local landowners to obtain planning permission for new developments on their land.

13. The NPPF includes the following guidance at paragraphs 158-159:

> "*Using a proportionate evidence base*
>
> 158. Each local planning authority should ensure that the Local Plan is based on adequate, up-to-date and relevant evidence about the economic, social and environmental characteristics and prospects of the area. Local planning authorities should ensure that their assessment of and strategies for housing, employment and other uses are integrated, and that they take full account of relevant market and economic signals
>
> *Housing*
>
> 159. Local planning authorities should have a clear understanding of housing needs in their area. …"

14. At the time when the Core Strategy was drawn up, subjected to examination in public and adopted, the 2004 Act required a local planning authority to have regard to the regional strategy for its area in drawing up its own development plan documents: section 19(2)(b). Section 24(1)(a) provided that such local development documents "must be in general conformity with" the regional strategy. Hence WDC was required to have regard to the South East Plan when drawing up the Core Strategy and the Core Strategy was required to be "in general conformity" with the South East Plan. The South East Plan identified the housing requirement for WDC's area for the period to 2030 as 11,000 homes.

15. The notion of "general conformity" of local development plans with a regional strategy imports a limited degree of latitude for local plans to depart from what is set

out in a regional strategy: see *Persimmon Homes (Thames Valley) Ltd v Stevenage B.C.* [2005] EWCA Civ 1365; [2006] 1 WLR 334.

16. Section 20 of the 2004 Act provides for independent examination of development plan documents. A local planning authority must submit every development plan document, when it believes it is ready, to the Secretary of State for independent examination. The examination is carried out by an inspector appointed by the Secretary of State. Section 20(5) provides in relevant part as follows:

> "(5) The purpose of an independent examination is to determine in respect of the development plan document–
>
> (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b) whether it is sound …"

17. The inspector may make recommendations for modifications to a development plan document to make it sound.

18. Paragraph 182 of the NPPF provides as follows:

> "*Examining Local Plans*
>
> 182. The Local Plan will be examined by an independent inspector whose role is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and whether it is sound. A local planning authority should submit a plan for examination which it considers is "sound" – namely that it is:
>
> - *Positively prepared* – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;
>
> - *Justified* – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;
>
> - *Effective* – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities;

> - *Consistent with national policy* – the plan should enable the delivery of sustainable development in accordance with the policies in the [NPPF]. …"

19. Under Ground One, the Claimant submits that the Inspector failed properly to follow the guidance in the NPPF in arriving at his conclusion that the Core Strategy as ultimately adopted was sound, and that his conclusion was illogical and irrational.

20. Section 113 of the 2004 Act provides in relevant part as follows:

> **"113 Validity of strategies, plans and documents**
>
> (1) This section applies to–
>
> …
>
> (c) a development plan document; …
>
> (2) A relevant document must not be questioned in any legal proceedings except in so far as is provided by the following provisions of this section.
>
> (3) A person aggrieved by a relevant document may make an application to the High Court on the ground that–
>
> (a) the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with.
>
> (4) But the application must be made not later than the end of the period of six weeks starting with the relevant date.
>
> (5) The High Court may make an interim order suspending the operation of the relevant document–
>
> (a) wholly or in part;
>
> (b) generally or as it affects the property of the applicant.
>
> (6) Subsection (7) applies if the High Court is satisfied–
>
> (a) that a relevant document is to any extent outside the appropriate power;
>
> (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.
>
> (7) The High Court may—

(a) quash the relevant document;

(b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.

(7A) If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.

(7B) Directions under subsection (7A) may in particular—

(a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;

(b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;

(c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);

(d) require action to be taken by one person or body to depend on what action has been taken by another person or body.

(7C) The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

…

(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document.

(11) References to the relevant date must be construed as follows–

…

> (c) for the purposes of a development plan document (or a revision of it), the date when it is adopted by the local planning authority or approved by the Secretary of State (as the case may be); …"

21. In *Blyth Valley BC v Persimmon Homes (North East) Ltd* [2008] EWCA Civ 861; [2009] JPL 335 the Court of Appeal held that the ground of challenge in section 113(3)(a) "in effect amounts to an assertion that the adoption of the document in question was ultra vires, and it brings into play the normal principles of administrative law" (per Keene LJ at [8]).

22. It is common ground that the Claimant has proper standing to bring this challenge and that the challenge is brought within time.

(ii) The Habitats Directive, the Birds Directive and the Habitats Regulations

23. The Habitats Directive and the Birds Directive have been implemented in domestic law by the Habitats Regulations. The Directives and the Regulations provide for development plans and projects to be screened before adoption to determine whether they might pose a risk of harm to protected sites, and if it is determined that they may create a risk of harm an "appropriate assessment" of the extent of the harm and whether it is acceptable or can be mitigated is required before the plan or project is adopted.

24. The relevant provision in the Habitats Regulations is regulation 61, which provides in relevant part as follows:

> "**61. Assessment of implications for European sites and European offshore marine sites**
>
> (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of

> the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.
>
> (4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given. …"

25. Regulation 61 applies in relation to the adoption of the Core Strategy. As described in greater detail below, WDC carried out a screening exercise in relation to the relevant policies proposed for the Core Strategy and determined that at a stipulated housing requirement figure of 9,600 the increase in traffic from development in its area would not pose a significant risk of harm to the Ashdown Forest protected site. WDC also assessed that with the protective measures including the 7 km SANG zone, additional impact from recreational visitors to the Forest from new development in its area would be kept within reasonable bounds and would not create significant additional risk to the protected site. As a result of the screening exercise, therefore, WDC determined that it was not necessary to carry out an "appropriate assessment" under regulation 61 in relation to its proposals for the Core Strategy.

26. On the other hand, if a higher housing requirement figure were included in the Core Strategy, there would have been a risk of harm arising from nitrogen deposition associated with increased levels of traffic in relation to development in the area and it would have been necessary to proceed to carry out an "appropriate assessment" before a policy with such higher level of housing requirement was included in the Plan.

27. Regulation 61 is directly relevant to Ground Three. The Claimant maintains that WDC acted in breach of that regulation and the Habitats Directive in the way in which it carried out the screening exercise, in that it failed to have regard to the

cumulative effect of the Core Strategy in combination with other plans, which the Claimant says would have shown a decline in nitrogen deposition rates which would have permitted accommodation of a higher housing requirement figure in the Core Strategy.

(iii) The SEA Directive and the Environmental Assessment Regulations

28. The SEA Directive was promulgated to supplement and extend effective protection of the environment beyond that achieved by the Environmental Impact Assessment ("EIA") Directive (Directive 85/337/EEC). The SEA Directive, requiring environmental assessment of strategic development plans, is designed to ensure that there is an environmental assessment in relation to adoption of such plans, that is to say, at a planning stage before site specific applications are made and decided in the context of constraints which may be imposed as a result of such strategic plans. As the European Commission has pointed out, the EIA Directive and the SEA Directive "are to a large extent complementary: the SEA is 'up-stream' and identifies the best options at an early planning stage, and the EIA is 'down-stream' and refers to the projects that are coming through at a later stage" (*Report on the Effectiveness of the Directive on Strategic Environmental* Assessment, 2009, section 4.1).

29. The recitals in the SEA Directive include the following:

> "Whereas:
>
> (1) Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development. …
>
> (4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.
>
> (5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in

which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

(6) The different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment. …

(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, Member States should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes.

(10) All plans and programmes which are prepared for a number of sectors and which set a framework for future development consent of projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, and all plans and programmes which have been determined to require assessment pursuant to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, are likely to have significant effects on the environment, and should as a rule be made subject to systematic environmental assessment. When they determine the use of small areas at local level or are minor modifications to the above plans or programmes, they should be assessed only where Member States determine that they are likely to have significant effects on the environment. …

(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme. Member States should communicate to the Commission any measures they take concerning the quality of environmental reports

> (15) In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion. …
>
> (17) The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.
>
> (18) Member States should ensure that, when a plan or programme is adopted, the relevant authorities and the public are informed and relevant information is made available to them. …"

30. The operative part of the SEA Directive includes the following provisions:

> "*Article 1*
>
> **Objectives**
>
> The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain and programmes which are likely to have significant effects on the environment.
>
> *Article 2*
>
> **Definitions**
>
> For the purposes of this Directive:
>
> (a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government and

- which are required by legislative, regulatory or administrative provisions;

(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

(c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;

(d) 'The public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

Article 3

Scope

…

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC. …

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set

out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive. …

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public. …

Article 4

General obligations

1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure. …

Article 5

Environmental report

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

Article 6

Consultations

1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. …

Article 9

Information on the decision

1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:

(a) the plan or programme as adopted;

(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and

(c) the measures decided concerning monitoring in accordance with Article 10.

2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States. …"

31. Annex I to the SEA Directive, which sets out the information to be included in the environmental report, provides as follows:

"The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

(a) an outline of the content, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental

importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;

(j) a non-technical summary of the information provided under the above headings."

32. As usual with EU legislation, a purposive approach is to be taken to the interpretation of the SEA Directive: *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 at [20]-[21] per Lord Reed JSC. The Directive is implemented in domestic law by the Environmental Assessment Regulations. The Regulations closely follow the drafting of the SEA Directive and are to be interpreted in conformity with it, in accordance with usual *Marleasing* principles (Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1992] 1 CMLR 305).

33. Guidance in relation to the precautionary principle, in light of which the SEA Directive is to be interpreted, is provided in a number of judgments: see e.g. Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee* [2005] 2 CMLR 31, para. 44.

34. Regulation 12 corresponds to Article 5 of the Directive. It provides in relevant part as follows:

> "**12.— Preparation of environmental report**
>
> (1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and
>
> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
>
> …
>
> (5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies. …"

35. Schedule 2 to the Environmental Assessment Regulations is in material respects in the same terms as Annex I to the Directive.

36. Regulation 13(1) corresponds to Article 6 of the Directive. It provides that every relevant draft plan prepared pursuant to regulation 12 "and its accompanying environmental report" shall be made available for the purposes of consultation.

37. Regulation 16 makes provision in relation to the procedures to be followed after a plan has been adopted. It corresponds to Article 9 of the Directive. It requires publication of the plan as adopted, its accompanying environmental report and various information.

Factual Background

38. In May 2009, the South East Plan was promulgated as the relevant regional strategy for the South East. It included statements of housing requirements for the South East for the period to 2030. The housing requirement for the area of WDC was set at 11,000 homes. The South East Plan included the following policy NRM5, "Conservation and Improvement of Biodiversity":

> "Local planning authorities and other bodies shall avoid a net loss of biodiversity, and actively pursue opportunities to achieve a net gain across the region.
>
> i. They must give the highest level of protection to sites of international nature conservation importance (European sites). Plans or projects implementing policies in this RSS are subject to the Habitats Directive. Where a likely significant effect of a plan or project on European sites cannot be excluded, an appropriate assessment in line with the Habitats Directive and associated regulations will be required.
>
> ii. If after completing an appropriate assessment of a plan or project local planning authorities and other bodies are unable to conclude that there will be no adverse effect on the integrity of any European sites, the plan or project will not be approved, irrespective of conformity with other policies in the RSS, unless otherwise in compliance with 6(4) of the Habitats Directive.
>
> iii. For example when deciding on the distribution of housing allocations, local planning authorities should consider a range of alternative distributions within their area and should distribute an allocation in such a way that it avoids adversely affecting the integrity of European sites. In the event that a local planning authority concludes that it cannot distribute an allocation accordingly, or otherwise avoid or adequately mitigate any adverse effect, it should make provision up to the level closest to its original allocation for which it can be concluded that it can be distributed without adversely affecting the integrity of any European sites.
>
> iv. They shall avoid damage to nationally important sites of special scientific interest and seek to ensure that damage to county wildlife sites and locally important wildlife and geological sites is avoided, including additional areas outside the boundaries…"

39. In July 2009 WDC issued a consultation document on spatial development options for the Core Strategy. It was premised on a housing requirement of 11,000 homes, as stated in the South East Plan. Various options for the distribution of this requirement in WDC's area were canvassed.

40. Alongside this, WDC issued a Sustainability Appraisal drawn up by its environmental consultants in relation to the spatial development options for the Core Strategy. A Sustainability Appraisal is a form of assessment required in the plan development process which also qualifies as the environmental report required by the SEA Directive and Regulations. Chapter 6 reviewed the likely predicted impacts of the housing distribution options under review.

41. At about the same time, WDC conducted some preliminary screening work for the purposes of the Habitats Directive and Regulations and noted that it appeared that an "appropriate assessment" would be required in relation to the impact of the Core Strategy on Ashdown Forest. The possible impacts were noted to be increased recreational pressure on the site from new housing development in the north of WDC's area, where the Forest is located, and nitrogen deposition associated with increased traffic movements close to the Forest arising from such development.

42. In early 2010, WDC's environmental consultants did some preliminary work on an appropriate assessment report under the Habitats Directive and Regulations. On 8 June 2010 there was a meeting between WDC and its consultants and representatives of Natural England, one of the statutory consultee bodies in relation to the development of the Core Strategy. Natural England said that it considered that new development in WDC's area up to 7 km from Ashdown Forest, in combination with new housing development elsewhere, had the potential to affect adversely the integrity of the protected site through disturbance of the bird species there, so that the precautionary principle required the implementation of mitigation measures comprising a development exclusion zone within 400m of the boundary of the Forest and a requirement that any net increase in dwelling numbers within 7 km of the Forest would require the provision of SANGs (it was noted that it might be acceptable to have one or two large SANGs to cover a number of developments, rather than requiring a separate SANG for each development in that area). Natural England also noted the issue of nitrogen deposition associated with a housing requirement of 11,000 dwellings, and said that mitigation measures would be required in relation to that as well.

43. In mid-2010, the Government announced that it intended to revoke the layer of regional strategy plans in the planning system, which would entail revocation of the South East Plan. However, the formal legal revocation of the South East Plan did not occur until March 2013, shortly after adoption of the Core Strategy. WDC therefore remained obliged to ensure that its Core Strategy, as adopted, was in general conformity with the South East Plan. The announcement of the revocation of the South East Plan served as a spur to WDC to do further work to update the evidence base in relation to the requirement for new homes in its area.

44. On 21 September 2010, Natural England published a report it had commissioned on data analysis of a visitor survey at Ashdown Forest. The analysis modelled visitor levels set against the distribution of the protected birds present on the site. The report did not seek to explore breeding success. It noted, "Additional development surrounding the site is likely to result in increases in visitor rates to the site", and gave predictions of the number of additional visits arising from development in different locations around the site. The report stated, "It is not possible to determine whether or not an increase in visitor rates may result in impacts on the [protected] bird species for which the site is designated." The analysis compared Ashdown Forest with studies of disturbance at other protected sites, in particular the Thames Basin Heaths and the Dorset Heaths. In relation to those sites, a 5 km protective zone had been operated. The analysis indicated that Ashdown Forest had lower densities of protected species (nightjar, woodlark and Dartford Warbler) than the Thames Basin Heaths and (save in relation to woodlarks) Dorset Heaths, while it had much lower densities of visitors than the Thames Basin Heaths but slightly higher on average than the Dorset Heaths. The report reviewed studies which showed links between human disturbance and negative effects on all three species.

45. Chapter 8 of the report discussed the implications of the evidence for site management, spatial planning and mitigation. The report stated that "whilst birds [in Ashdown Forest] are not being displaced from breeding habitat as a result of recreation, it cannot be conclusively determined that current levels of recreational pressure are not affecting the breeding success of birds exposed to recreational pressure" (para. 8.8) and "The level at which recreational pressure will be such that birds will begin to be displaced is not known. Given the evidence from other sites, there is the potential that, were access levels to increase, there may be avoidance of otherwise suitable habitat and there may be impacts on breeding success" (para. 8.9). It was noted that mitigation strategies, along with long term monitoring, were in place in relation to the Thames Basin and Dorset Heaths to counteract the effects of increasing levels of housing in their vicinity (also para. 8.9). The report referred to the principle of taking a precautionary approach (para. 8.12) and advised that a similar approach to protection of other heathland sites should be taken, but with adjustment for the specific features of Ashdown Forest (paras. 8.13-8.15).

46. The report recommended adoption of a 400m exclusion zone in which residential development is avoided, on the basis that at such short distances it is difficult to provide alternative sites for use and residents would be likely to use the Forest for their local recreational needs, such as the daily dog walk, and so as to minimise other urban effects, such as cat predation (paras. 8.16-8.17). It also analysed the extent of a "Wider Zone of Influence", by assessing "how far people travel to visit Ashdown and where new housing will result in a definite increase in visitor pressure to the [protected site] and where these visits are of a type that will have an impact on the site" (distinguishing, for example, daily recreational visits to walk the dog from visits once or twice a year to see the view) (para. 8.18). The report noted that 5 km zones had been established around the protected sites at the Thames Basin and Dorset Heaths in which it was recognised that new development had the potential to result in increased use of the heaths so that mitigation measures needed to be established (para.

8.19). The report then reviewed data from visitor surveys in relation to Ashdown Forest and the Thames Basin and Dorset Heaths; noted that visitors to the Forest appeared to travel further than in relation to the other sites; and modelled the visitor rates to be expected at the Forest from development of specific numbers of houses at specific locations, highlighting how the effect of additional housing near it would lead to a much higher increase in visitors than an equivalent sized development much further from it, thereby putting increased pressure on the protected species at the Forest.

47. The effect of the analysis in the report was to identify that people were willing to travel greater distances by car to get to Ashdown Forest than in relation to the Thames Basin and Dorset Heaths, with the result that one should expect to establish a wider protective zone in relation to the Forest in which mitigation measures would be required (the measure considered appropriate was use of SANGs) than in relation to the other sites reviewed, in order to offset its greater attractive force and the likely additional visitor numbers which would be generated by residential development in its vicinity. In due course, a 7 km zone was chosen to reflect these points. In my view, this zone was appropriately based on the available evidence and the advice of Natural England, the expert statutory consultees on environmental issues.

48. On 16 September 2010 WDC officers met with representatives of Natural England to discuss the issue of nitrogen deposition in relation to Ashdown Forest. Natural England explained its view that if the estimated annual average daily traffic ("AADT") flows would be increased by 1,000 cars or more on any road in or adjacent to the Forest, that would represent a material increased risk to the environmental integrity of the protected site and would trigger the need for a detailed "appropriate assessment" to be carried out pursuant to the Habitats Directive, Birds Directive and the Habitats Regulations. Conversely, if the estimated AADT flows for cars were less than 1,000, there would be no material increase in risk and a detailed appropriate assessment would not be required.

49. There is no challenge to the use of the 1,000 AADT flow figure as the relevant threshold to trigger the need for a detailed appropriate assessment of the impact of increased nitrogen deposition on Ashdown Forest. Mr Elvin QC, for the Claimant, however, emphasises that if the 1,000 AADT flow increase threshold were exceeded because of the extent of housing development in the vicinity of the Forest, it would not necessarily follow that such development could not be permitted because of the operation of the Habitats Directive, Birds Directive and the Habitats Regulations. If a detailed appropriate assessment were carried out, as required by that legislation, it might reveal that the possible environmental harm posed by more extensive development was in fact within acceptable limits and that such development could safely proceed.

50. In February 2011, WDC issued a Proposed Submission Core Strategy. This was a draft of the Core Strategy document which it would in due course have to submit to the Secretary of State for the purposes of independent examination, issued for the purposes of consultation before the final submission version of the Core Strategy was

drawn up. In the Proposed Submission Core Strategy, in accordance with advice which had by this stage been received from Natural England, WDC included a proposal for a 400m development exclusion zone around Ashdown Forest together with a 7 km zone within which any development would have to be accompanied by mitigation measures in the form of provision of SANGs (see, in particular, para. 3.32). Proposed policy WCS12 (Biodiversity) stated, among other things, that WDC would prevent a net loss of biodiversity, ensure a comprehensive network of habitats and work with partners to maximise opportunities to ensure that habitats etc. are maintained, restored and enhanced (but it did not include specific text relating to the 400m exclusion zone and 7 km protective zone around the Forest). WDC also included a proposed policy WCS1 (Provision of Homes and Jobs 2006-2030) which used the figure of 9,600 additional dwellings to be provided in the period, rather than the 11,000 figure included in the South East Plan.

51. In conjunction with the Proposed Submission Core Strategy, WDC also issued a Sustainability Appraisal of it, again for the purposes of consultation before final submission to the Secretary of State. This Sustainability Appraisal was proposed as the document which would cover the matters required to be examined in an environmental report for the purposes of the SEA Directive and the Environmental Assessment Regulations. It included a discussion of six strategic spatial housing options which had been reviewed at the outset of WDC's consideration of the Core Strategy and explained in chapters 1 and 6 the reasons why three of them had not been taken forward for more detailed consideration, while the other three (identified as Scenarios A, B and C) had been. Chapter 8 set out the sustainability appraisal of the selected three plan alternatives.

52. Scenario A reflected the overall number (11,000) and distribution (7,000 in the south of WDC's area and 4,000 in the north) of additional dwellings as allocated to WDC in the South East Plan. Scenario B also reflected the overall 11,000 figure in the South East Plan, but provided for 6,000 to be allocated to the south of WDC's area and 5,000 to the north (where Ashdown Forest is located), to accommodate infrastructure constraints in the south. It was noted that in terms of environmental impact on Ashdown Forest, Scenario A would be better than Scenario B, because it involved less new development close to the Forest.

53. Scenario C involved a departure from the overall 11,000 figure for new dwellings in the South East Plan in favour of a figure of 9,600. It was described as having emerged as a result of the sustainability appraisal of Scenarios A and B, which ran into infrastructure capacity constraints (both Scenario A and Scenario B, but in particular in relation to Scenario A) and environmental constraints (both Scenario A and Scenario B, but in particular Scenario B in relation to Ashdown Forest, by reason of its higher distribution of new homes in the north of WDC's area). WDC stated: "Scenario C seeks to maximise housing delivery within acknowledged capacity constraints …" (para. 8.13).

54. At para. 8.40 and in Table 8.8 WDC explained its reasons for not proceeding with Scenario A and Scenario B, and for selecting Scenario C for detailed sustainability

review, in order to comply with Article 5(1) of and paragraph (h) of Annex I to the SEA Directive. The main reasons given for rejecting Scenarios A and B related to infrastructure constraints which had nothing to do with the need to protect Ashdown Forest, but an additional reason given for rejecting Scenario B was that the distribution of new development under it did not reflect environmental constraints including in relation to the protected site at Ashdown Forest. In relation to Scenario C, WDC stated:

> "Scenario C distributes growth in line with acknowledged infrastructure capacity and is realistic in terms of the likelihood of the provision of new infrastructure to support growth. This distribution places less pressure on resources both environmental and social and enables a more realistic balance of housing growth with employment provision. Broadly in line with Parish responses to requirements for new growth [part of the further work done after the announcement that the South East Plan was to be revoked] it should meet the needs of local communities. The predicted environmental effects for this Scenario are less adverse than for Scenario A or B and the selection of this option is therefore more likely to achieve the vision for Wealden of protecting the essential rural character and high quality environment."

55. Alongside this Sustainability Appraisal, WDC issued a report by itself and East Sussex County Council (the relevant highways authority) for the purposes of the Habitats Regulations, which assessed, among other things, the impact on the increase in traffic resulting from WDC's Proposed Submission Core Strategy on the Ashdown Forest protected site. This report explained the methodology behind choosing an increase of 1,000 AADT flows on any road in or within 200m of the Forest as the relevant threshold for assessing whether a detailed appropriate assessment under the Habitats Regulations would be required or not, and contained an assessment of the traffic impacts flowing from WDC's proposed Core Strategy (Scenario C). The additional AADT flows on all relevant roads were assessed to be below the 1,000 level (albeit, in the case of one road, at a figure of 950, which did not leave much headroom). This meant that a detailed appropriate assessment was not required under the Habitats Regulations in relation to Scenario C.

56. After further consultation on these documents, in August 2011 WDC drew up and submitted to the Secretary of State for independent examination final submission versions of the draft Core Strategy, the related Sustainability Appraisal and the related assessment under the Habitats Regulations. This latter document was entitled simply, "Assessment of the Core Strategy under the Habitats Regulations" ("the Habitats Regulations Assessment"), and was in relevant parts in the form of a screening assessment to explain why no detailed "appropriate assessment" was required in relation to Ashdown Forest under the Habitats Regulations; but in some places in the submission version of the Core Strategy and the Sustainability Appraisal it was referred to as the "Appropriate Assessment". The Sustainability Appraisal

constituted the "environmental report" required by the SEA Directive and the Environmental Assessment Regulations.

57. The submission Core Strategy and Sustainability Appraisal were in relevant respects closely similar to the draft versions of February 2011, with the Sustainability Appraisal amplifying the reasoning set out in the draft version. It was again explained why Scenario C had been chosen as the Core Strategy. Policy WCS12 was included in the same terms, together with para. 3.32 in relation to the 400m exclusion zone and 7 km protective zone around Ashdown Forest. Policy WCS1, with a requirement for 9,600 additional dwellings, was repeated.

58. Chapter 8 of the Sustainability Appraisal again identified infrastructure constraints in relation to Scenario A (para. 8.6). In addition, it noted that Scenario A performed poorly in relation to general environmental objectives (not restricted to the issue of protection of Ashdown Forest), and although it was noted that it would have benefits in terms of impact on Ashdown Forest as compared with Scenario B, it was stated that the distribution figures for new homes in relation to both these scenarios "would result in mitigation requirements for impacts on the Ashdown Forest [protected site], as highlighted by the Habitat Regulations Assessment" (para. 8.7).

59. Infrastructure objections to Scenario B were identified (para. 8.9). In addition, it was noted that it performed poorly in relation to general environmental objectives, and these were assessed to be worse than for Scenario A since more development would be directed in proximity to Ashdown Forest and it would, "on a precautionary basis, require mitigation to prevent additional nitrogen deposition and prevent an adverse effect on the integrity of [the protected site]", which would require measures to restrict additional traffic journeys across the local strategic road network, which would have inherent difficulties in terms of implementation and reliability (para. 8.11).

60. Paragraph 8.13 of the Sustainability Appraisal again explained that Scenario C emerged from work which revealed infrastructure capacity and environmental constraints in relation to Scenarios A and B, and stated that Scenario C would be more beneficial overall in sustainability terms, "as it places less pressure on environmental resources, on infrastructure and on communities and is evidence-based at a local level using the most up to date evidence [sc. on housing requirements]".

61. Table 8.2 set out a comparison of Scenarios A, B and C against the Sustainability Appraisal framework. Against the objective of ensuring "that everyone has the opportunity to live in a good quality, sustainably constructed and affordable home", the greater new housing numbers in Scenarios A and B (11,000), as against only 9,600 in Scenario C, were noted. But for Scenario A it was noted that constraints under the Habitats Regulations would prevent delivery in the south of WDC's area, for Scenario B it was noted that constraints under the Habitats Regulations would prevent delivery in the north of the area (by reference to the Habitats Regulations Assessment for Ashdown Forest) and also to a lesser extent in the south of the area (by reference to the Habitats Regulations Assessment for the Pevensey Levels), while

for Scenario C it was noted that "This scenario allows delivery of the maximum amount of housing the District can accommodate focusing on the areas where affordable housing is needed the most."

62. Mr Elvin criticised this statement in relation to Scenario C as a false explanation, because WDC had not carried out a detailed appropriate assessment under the Habitats Regulations in relation to Ashdown Forest to examine whether the higher housing figures and distributions under Scenarios A or B might in fact be accommodated. If WDC had done that work - although clearly this was a matter of speculation - it might have been discovered that the development in Scenario A or Scenario B could have been accommodated without breach of the obligations under the Habitats Directive, Birds Directive and Habitats Regulations to protect Ashdown Forest.

63. I do not consider that this criticism is fair. Unlike for Scenario C, the need for an "appropriate assessment" of the environmental impact on Ashdown Forest under those Directives and Regulations had not been screened out in relation to Scenarios A and B by the assessment work in relation to nitrogen deposition. It is common ground, therefore, that WDC could not lawfully have adopted either Scenario A or Scenario B on the evidence then available. As discussed below, there were good reasons why WDC had not carried out a detailed "appropriate assessment" in relation to those scenarios. Thus, in the circumstances which applied in August 2011, WDC was entitled to state as its assessment that Scenario C allowed delivery of the maximum amount of housing the district could accommodate.

64. Again in stated compliance with Article 5(1) of and paragraph (h) of Annex I to the SEA Directive, para. 8.40 and Table 8.9 (renumbered from Table 8.8 in the draft submission version) of the Sustainability Appraisal explained the reasons for selecting or rejecting alternatives, why Scenario C had been selected for full sustainability appraisal and why Scenarios A and B had not been so selected in terms which were essentially the same as those in the draft submission version (see paras. [53] and [54] above).

65. At para. 9.15 of the Sustainability Appraisal, in relation to the topic of conservation and enhancement of the biodiversity in WDC's area, WDC noted:

> "The broad locations for development have been chosen with biodiversity implications in mind and on a strategic level 'least worst options' in terms of impact on biodiversity were progressed. There is still uncertainty over the specific impacts on biodiversity from the spatial policies and strategies and these will be explored and understood further at the Site Allocations Stage. The Core Strategy has two policies that will have significant beneficial effects for biodiversity, WCS12 and WCS13 aim to put biodiversity central to considerations when planning and designing development areas and this should help

> to mitigate overall impacts on biodiversity on a district wide level."

66. Para. 9.34 of the Sustainability Appraisal noted that the Habitats Regulations Assessment had identified the need for mitigation and avoidance measures in relation to impacts from air quality and recreational pressure, and referred to the 400m development exclusion zone and 7 km protective zone around Ashdown Forest, which it said was outlined in the Core Strategy "and will be developed in subsequent [development plan documents]".

67. The Habitats Regulations Assessment was by expert consultants, UE Associates Ltd, appointed by WDC. The Assessment reviewed a number of protected sites in WDC's area, including Ashdown Forest. It explained the issue of nitrogen deposition in relation to the Forest and again set out the methodology and screening assessment based on the additional 1,000 AADT flow figure, essentially repeating the previous information (see para. [55] above). It noted analysis which had been carried out which showed that "the nitrogen deposition load [at the centre of the Forest] is significantly exceeded beyond the ability of habitats to withstand deleterious effects, even without implementation of the Core Strategy" and that the "situation is likely to be more severe in closer proximity to busy road corridors" (p. 18 and Table 5.1).

68. The Habitats Regulations Assessment also reviewed the visitor analysis in relation to the Forest (para. [46] above), referred to the advice from Natural England on 19 February 2010 and 8 June 2010 (para. [42] above) and in light of this material and in accordance with the precautionary principle stated that avoidance and mitigation measures were required, including the 400m exclusion zone and 7 km protective zone within which SANGs would be required to balance any development. Adoption of these measures would mean that effects connected with increased recreational pressure on the Forest from new development could be "satisfactorily avoided and reduced." No further detailed "appropriate assessment" would be required under the Habitats Regulations.

69. The Inspector held examination in public hearings between 17 January and 2 February 2012 and on 6 September 2012 and issued his Report on 30 October 2012.

70. The Inspector concluded that, with certain limited modifications, the Core Strategy was "sound" (in compliance with section 20(5) of the 2004 Act) and was in general conformity with the South East Plan (in compliance with sections 24(1) and 20(5) of the 2004 Act).

71. The Inspector was not persuaded by WDC's case that new work on the level of housing requirement in its area meant that the assessment in the South East Plan of a requirement of 11,000 new homes could be treated as superseded. Therefore, justification for the lower figure of 9,600 in the Core Strategy had to rely on other factors in the South East Plan and the NPPF (para. 15 of the Inspector's Report). He found that although the difference between the 9,600 and the 11,000 figures was significant and would, if taken alone, have meant that the Core Strategy was not in

general conformity with the South East Plan (para. 16), nonetheless the Core Strategy could be found to be in general conformity with the South East Plan and to comply with the NPPF by reason of the infrastructure and environmental constraints highlighted by WDC, read against Policy NRM5 in the South East Plan, as follows:

> "17. SEP [South East Plan] Policy NRM5 indicates that when deciding on the distribution of housing allocations local planning authorities should consider a range of alternative distributions within their area and should distribute an allocation in such a way that it avoids adversely affecting the integrity of European sites. In the event that the planning authority concludes that it cannot distribute an allocation accordingly, or otherwise avoid or adequately mitigate any adverse effect, it should make provision up to the level closest to its original allocation for which it can be concluded that it can be distributed without adversely affecting the integrity of any European site. The supporting text states that where provision is less than in the RS [regional strategy] the Council will need to demonstrate at independent examination that this is the only means of avoiding or mitigating any adverse impacts on European sites. This will involve clearly showing that they have attempted to avoid adverse effects through testing different distribution options and that the mitigation of impacts would be similarly ineffective.
>
> 18. Policy NRM5 therefore places the onus on the local planning authority to show that there are circumstances that mean that the RS provision cannot be met. As such, if the Council can demonstrate that the approach in the policy has been achieved, the CS [Core Strategy] would be in general conformity with the SEP in this respect. In this context, the Council has sought to justify the lower level of provision principally on the basis that in its view:
>
> - In south Wealden there is an infrastructure constraint relating to the capacity of the Hailsham North and Hailsham South waste water treatment works (WWTWs) which discharge into the Pevensey Levels – a Ramsar Site and candidate Special Area of Conservation (cSAC). These currently operate to the highest environmental standards and cannot be improved. Accordingly development above this existing limited headroom for these works cannot be accommodated until a new solution has been devised. While there are various options, the work to explore these has only just commenced. Such an approach is supported by other SEP policies, such as CC7 which indicates that the scale and pace of development will depend on

> sufficient capacity being available in existing infrastructure to meet the needs of new development.
>
> - In north Wealden levels of development beyond those proposed would have a significant effect on the Ashdown Forest SAC in terms of nitrogen deposition.
>
> 19. The presumption in favour of sustainable development in the Framework [the NPPF] does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined. The Framework cross refers to the guidance on the statutory obligations for biodiversity set out in Circular 06/2005 with the greatest protection being given to designations of international importance. In that context, the factors relevant to SEP Policy NRM5 are also those that in terms of the Framework may lead to housing provision being restricted against the assessed needs. …"

72. At paras. 20-25 of his Report, the Inspector reviewed the infrastructure constraints in relation to waste water treatment in the south of WDC's area before turning to the issue of nitrogen deposition in relation to Ashdown Forest, as follows:

> "*Nitrogen deposition*
>
> 26. Nitrogen emissions from traffic can increase acid deposition and eutrophication, potentially to the detriment of the Ashdown Forest and Lewes Downs SACs. The Design Manual for Roads and Bridges (DMRB) provides a methodology for a scoping assessment for air quality. This initially requires the identification of roads which are likely to be affected by development proposals. There are several criteria that are used to identify an affected road but the key one here is whether traffic flows will change by 1,000 AADT (annual average daily traffic flow) or more. As applied by the Council in its Habitats Regulations Assessment (HRA) the DMRB shows no roads in the Ashdown Forest SAC (or Lewes Downs SAC) that would be affected by the development proposed in the CS. This conclusion is supported by Natural England (NE).
>
> 27. I am satisfied that the DMRB methodology is the correct approach to a scoping assessment of air quality and that, as concluded in the HRA, the scale and distribution of development proposed in the CS is acceptable in this regard.

28. Based on the DMRB results, one section of the A26 would have an additional AADT of 950, indicating very little headroom for development beyond that proposed without further assessment to determine whether there would be a likely significant effect on the Ashdown Forest SAC. This work has not been done. However, the best available evidence on the existing nitrogen deposition load toward the centre of the SAC is that it significantly exceeds the ability of habitats to withstand deleterious effects. Deposition is likely to be more severe close to road corridors. Furthermore, I am mindful that the traffic modelling does not take account of possible traffic impacts of growth in neighbouring authorities. Although heathland management may have some part to play in mitigating the effects of nitrogen deposition, in the context of these other factors there is sufficient evidence at this point on a precautionary basis to restrict further development in north Wealden beyond that in the CS. On this basis there is not the scope to transfer SEP housing provision from the Sussex Coast Sub Region in the context of SEP Policy SCT5.

29. It has been concluded that in relation to the [waste water treatment] issue an early review of the plan is required. Air pollution relating to Ashdown Forest SAC could in the future restrict further planned development which might otherwise be acceptable. To ensure that the housing and other needs of the area are being addressed in the context of the Framework, for the review it would be important to establish more accurately the current extent and impact of nitrogen deposition at Ashdown Forest, the potential effects of additional development on the SAC and the possibility of mitigation if required, working collaboratively with other affected authorities. I therefore include an appropriate modification to this effect (MM63).

30. While the strategic development proposed in the CS would be achievable, concern has been expressed during the examination that windfall developments which might otherwise be acceptable in planning terms are being refused on the basis of the nitrogen deposition concern. The Framework requires that local planning authorities should look for solutions rather than problems and work proactively to secure developments that improve the economic, social and environmental conditions of the area. It supports economic growth in rural areas. In this context, the Council should not await commencement of the formal review before beginning the more detailed investigation of this matter. …"

73. In the context of the present case, paras. 28 and 29 of the Report deserve emphasis. The Inspector there explained why he accepted WDC's contention that there were important environmental constraints arising by reference to the Ashdown Forest protected site which, in conjunction with other constraints, meant that development at the level of 11,000 new homes in WDC's area would not be viable. The Core Strategy had been screened to show that there was not a need to carry out a detailed "appropriate assessment" under the Habitats Regulations in relation to its new homes figure and proposed distribution, but in light of the precautionary principle and the low headroom for screening clearance of the Core Strategy it could not be said that a higher housing figure (such as was included in Scenarios A and B) – and the likely increased traffic pressure on the road network in the vicinity of the Forest that would result - would not have significant detrimental effects on the Forest. Indeed, there was already evidence of deleterious effects on the Forest from nitrogen deposition, so that there was a real prospect that increased nitrogen deposition load from significantly increased traffic flows associated with new housing development at the higher figure would indeed be found to have a material detrimental effect if further and more detailed investigations of the issue were undertaken. Moreover, full examination of the issue would need to take account of possible traffic impacts of growth in neighbouring authorities and would require collaborative work with those other authorities – whereas the background to the examination of WDC's Core Strategy, as Mr David Phillips for WDC explained to the Inspector on 19 January 2012 at the session of the examination in public dealing with environmental issues, was that other neighbouring authorities were some way behind WDC in working up their relevant development plans so this sort of full examination of the issue would not be possible for some time. At the same session, Natural England stated that it agreed with WDC's approach, which struck an appropriate balance between pragmatism and the precautionary approach. In those circumstances, WDC had made out a sufficient case on the currently available evidence to warrant restricting the new homes number in its area to 9,600, and was not found to have failed to make out its case by reason of the absence of further and more detailed work. The appropriate course, in the circumstances, was to approve the Core Strategy (with all the co-ordination advantages and benefits for coherent planning which would be associated with having a Core Strategy plan in place) while at the same time requiring WDC to undertake further review work in the future to supplement the existing evidence base.

74. The Inspector then went on at paras. 31-33 of his Report to deal with issues relating to phasing and the supply of housing land and previously developed land, before continuing to set out his conclusions on Issue 1 (whether the Core Strategy is in general conformity with the South East Plan, and whether the scale and distribution of housing provision has been justified and is consistent with the NPPF) and Issue 2 (whether the Core Strategy is sound), as follows:

> "*Conclusions on the amount and distribution of housing development*
>
> 34. The CS has not established the full, objectively assessed housing needs of the District but it has demonstrated on the

currently available evidence that there are at present restrictions on the overall scale of housing development that can be accommodated. However, the CS should be positively prepared and every effort made to meet the housing needs of an area. The Framework aims to boost significantly the supply of housing. It is therefore important to ensure that new homes are brought forward as quickly as possible.

35. The CS should make provision up to the level closest to its original SEP allocation for which it can be concluded that it can be distributed without adversely affecting the integrity of any European site. The proposed phasing modifications and the level of housing need mean that development could come forward more quickly than anticipated in the CS, providing greater flexibility in the land supply. The Framework indicates that local plans should be drawn up over an appropriate timescale, preferably a 15-year time horizon, taking account of longer term requirements. In this case, having regard to the significant infrastructure and environmental uncertainties beyond the scale of growth proposed by the Council, I consider that the plan period should be limited to 15 years, bringing the end date forward from 2030 to 2027 and the rate of new housing development closer to that in the SEP. There is insufficient evidence on the rate at which the SDAs could be delivered to justify bringing the end date even further forward.

36. If the CS provision of 9,600 dwellings related to the period 2006 to 2027 this would amount to an annual average of about 460 – some 17% short of the RS requirement. The deletion of the SDA at Heathfield (see below) would reduce this provision by 160 to 9,440 or an annual average of about 450 new homes between 2006 and 2027. Based on the distribution provided by the Council at paragraph 12, the SEP housing provision for the 'Rest of Wealden' would be achieved but that for the 'Sussex Coast Sub Region' would still be some 29% short, giving an overall District shortfall of over 18% compared with the RS. A series of modifications are necessary to achieve these changes to the time period and amount of new housing (MM1, MM3, MM7 to MM13, MM15, MM16, MM18, MM19, MM22 to 24, MM27, MM54). Taken with the earlier modifications on phasing they would enable provision to the level closest to the SEP requirement having particular regard to the waste water infrastructure issues in the south of the District.

Overall conclusion

37. In the light of the above considerations and modifications I conclude that the CS is in general conformity with the SEP and that the scale and distribution of housing provision has been justified and is consistent with the Framework. The CS is therefore both sound and legally compliant in this regard.

Issue 2 – Whether the overall special strategy is soundly based, presenting a clear spatial vision for the District in accordance with national and regional policies.

38. The CS contains a vision for the District and a series of spatial planning objectives. The spatial strategy derives from and broadly reflects the vision and objectives. In turn, subject to specific concerns and main modifications identified and discussed elsewhere in this report, the CS policies also broadly reflect the vision and objectives.

39. The methodology and process by which the CS has been produced is recorded in Background Paper 1: Development of the Core Strategy (BP1) and the consultation process in the Council's Regulation 30(1)(d) Statement – BP8. Initial consultation took place on issues and options in 2007 which embraced consideration of alternative locations for development. In 2009 there was further consultation on the vision and the strategic spatial housing and employment options. The Strategic Housing Land Availability Assessment (SHLAA) was used to identify potential housing sites which were assessed in accordance with sustainability objectives.

40. BP10: Sustainability Appraisal of the Core Strategy (SA) includes consideration of both the strategic options and the alternative broad locations for growth at the main settlements. In the light of the High Court judgement on *Save Historic Newmarket Ltd and Others v Forest Heath District Council and Others* (2011) [[2011] JPL 1233] the Council has indicated that it is satisfied that the sustainability appraisal undertaken adequately assesses alternatives and sets out the reasons why they were rejected. The alternative growth locations are considered in more detail below. However, overall, reasonable alternatives to the spatial strategy have been considered and the audit trail by which it has been arrived at, as set out in the evidence base, is sufficiently clear.

41. Having regard to my conclusions on the scale of development in the first main issue and the main modifications

> recommended elsewhere in this report, I conclude that the overall spatial strategy is soundly based, presenting a clear spatial vision for the District in accordance with national and regional policies."

75. In the event, for further reasons which are not called in question in these proceedings, the Inspector reduced the new homes figure of 9,600 to 9,440 and modified the relevant period in relation to this from 2006-2030 to 2006-2027. He required Policy WCS1 in the Core Strategy to be modified accordingly.

76. The Inspector also required modification of Policy WCS12 in the Core Strategy, to promote the explanatory text in para. 3.32 regarding the need for a 400m development exclusion zone and a further 7 km protective zone around Ashdown Forest into the body of the Policy itself. This reflected an amendment to the Core Strategy proposed by WDC. The Inspector considered the justification for these measures at paras. 53 to 55 of his report, as follows:

> "**Issue 5 – Whether the Core Strategy makes appropriate provision for the protection of the natural environment and other environmental assets and for sustainable construction.**
>
> *Ashdown Forest Special Protection Area*
>
> 53. The HRA has addressed the impacts of possible additional disturbance and urbanising effects from residential development on the Ashdown Forest Special Protection Area (SPA) where there are breeding populations of Dartford warbler and nightjar. It indicates that it cannot be concluded that the CS would not lead to adverse effects on the ecological integrity of the SPA. Avoidance and mitigation measures are required including a 400m zone around the SPA where residential development will not be permitted, a 7km zone where new residential development will be required to contribute to Suitable Alternative Natural Greenspaces (SANGs), an access strategy for the Forest and a programme of monitoring and research. The measures are regarded as critical infrastructure in the Infrastructure Delivery Plan (IDP). This approach is supported by Natural England (NE). I am satisfied that it is justified by the evidence base, including the 7km zone which is broader than those used elsewhere but supported by local factors, including the distance visitors to the Forest are willing to travel.
>
> 54. The main impact of these measures would be on the towns of Crowborough and Uckfield and villages and rural areas within the buffer zones. I have seen evidence that there is a

> reasonable expectation that suitable SANGs could be provided relating to the SDAs at the towns. There is a large supply of open spaces within the District, many under the ownership or management of town or parish councils. NE is confident that SANGs can be delivered. However, for windfall planning applications and smaller sites where SANGs cannot be provided on site there is the possibility that otherwise acceptable development might be delayed while suitable SANGs are identified and brought forward.
>
> 55. The CS does not refer to these measures in a policy but includes text suggested in the HRA in supporting justification. The Council has proposed a modification (MM62) to the plan that would include a policy reference to them being taken forward in subsequent DPDs. The Strategic Sites DPD is not expected to be adopted until Summer 2014 and the Delivery and Site Allocations DPD in Autumn 2015. To avoid otherwise acceptable development being delayed it is important that, with appropriate partners, the Council proactively identifies suitable SANGs and develops an on-site management strategy for the Forest as soon as possible in accordance with the conclusions of the HRA. While accepting the general thrust of the Council's approach, for the CS to be effective I am including a further modification to the policy to reflect this (MM63)."

77. The addition which the Inspector required to be made to WCS12 was as follows:

> "In order to avoid the adverse effect on the integrity of the Ashdown Forest Special Protection Area and Special Area of Conservation it is the Council's intention to reduce the recreational impact of visitors resulting from new housing development within 7 kilometres of Ashdown Forest by creating an exclusion zone of 400 metres for net increases in dwellings in the Delivery and Site Allocations Development Plan Document and requiring provision of Suitable Alternative Natural Green Space and contributions to on-site visitor management measures as part of policies required as a result of development at SD1, SD8, SD9 and SD10 in the Strategic Sites Development Plan Document. Mitigation measures within 7 kilometres of Ashdown Forest for windfall development, including provision of Suitable Alternative Natural Green Space and on-site visitor management measures will be contained within the Delivery and Site Allocations Development Plan Document and will be associated with the implementation of the integrated green network strategy. In the meantime the Council will work with appropriate partners to identify Suitable Alternative Natural Green Space and on-site

> management measures at Ashdown Forest so that otherwise acceptable development is not prevented from coming forward by the absence of acceptable mitigation.
>
> The Council will also undertake further investigation of the impacts of nitrogen deposition on the Ashdown Forest Special Area of Conservation so that its effects on development can be more fully understood and mitigated if appropriate."

78. WDC and SDNPA accepted these and other modifications set out by the Inspector in his Report and adopted the Core Strategy, as so modified, on 19 February 2013.

Legal Analysis

Ground One: the Inspector reached an irrational conclusion that the Core Strategy could be approved as sound and capable of adoption based on the housing requirement figure of 9,440

79. The assessment by the Inspector in relation to soundness of the Core Strategy (section 20(5)(b) read with the guidance in the NPPF) and its general conformity with the South East Plan (section 24(1) of the 2004 Act) is one involving evaluative judgments in relation to the planning merits and other matters which are primarily for the Inspector. The test on judicial review in relation to this Ground is a *Wednesbury* rationality test (see generally *Persimmon Homes (Thames Valley) Ltd v Stevenage BC* [2005] EWCA Civ 1365; [2006] 1 WLR 334).

80. In my view, the Inspector's reasoning on this part of the case is rational and compelling. He was entitled to conclude that WDC had produced sufficient evidence in relation to the risk of environmental harm to Ashdown Forest to justify the use of the smaller 9,600 housing figure in the Core Strategy, that the possibility that further work on the issue of nitrogen deposition would show that a higher housing figure could be accommodated was so speculative and likely to be so delayed as not to warrant holding up the approval of the Core Strategy, and that this possibility would be more appropriately accommodated by requiring further investigatory work to be carried out after the adoption of the Core Strategy and when other neighbouring authorities were more advanced in producing their own development plans.

81. Similarly, I consider that WDC acted in a rational and lawful way in making the examination of the nitrogen deposition issue which it did and in not seeking to undertake any further or more detailed investigation before deciding to submit and then to adopt the Core Strategy. WDC had taken reasonable steps to inform itself about relevant matters in respect of that issue and it was not irrational for it to choose not to pursue further investigations before proceeding to decide that it was appropriate to select Scenario C for assessment under the SEA Directive and to adopt a Core Strategy based on a figure for new homes derived from Scenario C: cf *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065B; *Cotswold DC v Secretary of State for Communities and Local Government*

[2013] EWHC 3719 (Admin), [57]-[61]; and *R (Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] QB 37, [34]-[35]. WDC's assessment was that any housing development above that in the Core Strategy would exceed the 1,000 AADT flows threshold and require a detailed "appropriate assessment" (which, given the low headroom below that figure even for the number of new homes in the Core Strategy, was plainly a rational view); and it was informed by environmental consultants and Natural England that a full detailed "appropriate assessment" of the impact of proposals for development above the 1,000 AADT flows threshold would require traffic modelling on a co-ordinated approach between planning authorities (see, in particular, paragraphs 32, 92 and 124 of Marina Brigginshaw's first witness statement for WDC). The Inspector did not err in concluding that WDC had properly made out its case for deciding to proceed with Scenario C without further examination at the plan making stage of the nitrogen deposition issue.

82. There is nothing in the guidance in the NPPF which indicates that the Inspector proceeded in an illogical or irrational way, or in a way which conflicted with that guidance. In particular, he was entitled to conclude, in conformity with paragraph 158 of the NPPF, that WDC had produced sufficient objective evidence to justify its adoption of the figure of 9,600 (later reduced to 9,440), rather than 11,000, for new homes.

83. I therefore dismiss the challenge under Ground One.

Ground Two: The investigatory steps taken by WDC in relation to deciding to adopt the figure of 9,440 for new homes in the Core Strategy were inadequate and in breach of WDC's obligations under the SEA Directive and the Environmental Assessment Regulations

84. The Inspector found that reasonable alternatives to the spatial strategy in the Core Strategy (i.e. Scenario C) had been considered and that the audit trail by which it had been arrived at, as set out in the evidence base, was sufficiently clear: para. 40 of the Inspector's Report, set out above. I agree with him.

85. As I understood Mr Elvin's submissions, he criticised WDC under this Ground on two fronts. First, he contended that WDC had not done sufficient work as required under the SEA Directive and the Environmental Assessment Regulations to identify reasonable alternatives for consideration, because of WDC's omission to investigate in greater detail - including by commissioning what would have been the necessary "appropriate assessment" under the Habitats Directive and the Habitats Regulations - whether 11,000 new homes might in fact be accommodated in WDC's area without causing environmental harm to the Ashdown Forest protected site. Secondly, he criticised the adequacy of the reasons given in the Sustainability Appraisal (the environmental report for the purposes of the SEA Directive) for choosing Scenario C and maintained that they were insufficient to meet WDC's obligations under Article 5 of the Directive (regulation 12 of the Environmental Assessment Regulations). In addition, at paragraph 22 of his written submissions in reply, sent after the end of the oral hearing, Mr Elvin submitted for the first time that since the environmental report published under Article 5 must be subjected to consultation under Article 6, it is the

February 2011 environmental report (i.e. Sustainability Appraisal) which had to include the contents required by Article 5; the August 2011 documents were not relevant because they were published after the consultation had concluded.

86. I do not accept either of the criticisms of WDC advanced by Mr Elvin. Nor do I accept his new submission in reply. I deal with this latter point first.

87. The thrust of Mr Elvin's argument in opening was that the court should apply the legal analysis set out by Collins J in *Save Historic Newmarket Ltd v Forest Heath District Council* [2011] EWHC 606 (Admin); [2011] JPL 1233, in which at [40] Collins J accepted the submission by counsel for the claimant (Mr Elvin again) "that the final report [i.e. the sustainability appraisal] accompanying the proposed Core Strategy to be put to the inspector was flawed", in that it failed to comply with the council's obligations under the SEA Directive and the Environmental Assessment Regulations. Thus the analysis drawn from *Save Historic Newmarket Case Ltd* involved a focus on the August 2011 documents – the draft Core Strategy submitted for independent examination, the final version of the Sustainability Appraisal and the Habitats Regulations Assessment. The Claimant's pleaded case (see paragraph 41 of the Particulars of Claim) relied upon this analysis based on *Save Historic Newmarket Ltd* and focused on "the environmental report accompanying the final draft of the plan [i.e. the August 2011 Sustainability Appraisal accompanying the submission draft of the Core Strategy]", as did Mr Elvin's skeleton argument (paragraph 40). There was no reference to an alternative argument such as he sought to introduce in his written submissions in reply. Mr Pereira (as was clear from his written and oral submissions) and I understood that the Claimant's case, as presented by Mr Elvin, was focused on the compliance of the August 2011 documents with the SEA Directive and the Environmental Assessment Regulations. Mr Elvin did not seek to correct Mr Pereira on that score while Mr Pereira was presenting his submissions.

88. In my judgment, the Claimant required permission to introduce this new argument in reply, to the effect that the August 2011 documents are irrelevant to the analysis in relation to the SEA Directive. Mr Elvin did not seek permission from the court to introduce it and, had he done so, I would have refused it, since it would have required the case to be re-argued. It would have required far greater elaboration by Mr Elvin than a single short paragraph in his reply submissions to develop and make good the point, and then full submissions from Mr Pereira.

89. I would add that I am far from being persuaded that there is anything in this new argument in any event. Collins J in *Save Historic Newmarket Ltd* and Ouseley J in *Heard v Broadland BC* [2012] EWHC 344 (Admin); [2012] Env. LR 23 at [13] (where he set out para. [40] of Collins J's judgment as providing a useful summary of the law) both had no difficulty in accepting that the focus for analysis under the SEA Directive is properly upon the final form documents submitted to the Secretary of State for independent examination. The Inspector in the present case investigated the same documents for compliance with the SEA Directive, specifically by reference to *Save Historic Newmarket Ltd*. I was not shown any document or evidence to suggest that the Claimant or anyone else in the course of the examination in public suggested

that this focus on the August 2011 documents was wrong as a matter of law. The SEA Directive does not itself make provision for an independent examination in public by an Inspector. That is a procedure adopted in the United Kingdom as part of its planning regime into which the requirements of the SEA Directive have been introduced and with which they have been aligned. As Ouseley J explains in *Heard v Broadland DC* at [11], the SEA Directive permits a national authority to integrate compliance with the Directive into national procedures. The procedures involved in independent examination of a plan by an inspector, including by examination in public, appear to me to be a consultation process which is capable of fulfilling the consultation requirement under Article 6 of the Directive. If that is so, then Mr Elvin's new submission in reply falls away. I emphasise again, however, that I have not heard argument on this issue so this view must be regarded as provisional.

90. I turn, then, to Mr Elvin's two criticisms of what was done by WDC. As to the substance of the work to be done by a local planning authority under Article 5 in identifying reasonable alternatives for environmental assessment, the necessary choices to be made are deeply enmeshed with issues of planning judgment, use of limited resources and the maintenance of a balance between the objective of putting a plan in place with reasonable speed (particularly a plan such as the Core Strategy, which has an important function to fulfil in helping to ensure that planning to meet social needs is balanced in a coherent strategic way against competing environmental interests) and the objective of gathering relevant evidence and giving careful and informed consideration to the issues to be determined. The effect of this is that the planning authority has a substantial area of discretion as to the extent of the inquiries which need to be carried out to identify the reasonable alternatives which should then be examined in greater detail.

91. These points are similarly relevant to interpretation of the SEA Directive and the standard of investigation it imposes as under ordinary domestic administrative law: see, e.g., the review of the authorities by Beatson J (as he then was) in *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), [71]-[78]. The Directive is of a procedural nature (recital (9)) and the procedures which it requires involve consultation with authorities with relevant environmental responsibilities and the public, with a view to them being able to contribute to the assessment of alternatives (recitals (15) and (17); Articles 5 and 6). The relevant aspect of the obligation in Article 5 is to identify and then evaluate "reasonable alternatives" to the plan in question. Under the scheme of the Directive and Environmental Assessment Regulations it is the plan-making authority which is the primary decision-maker in relation to identifying what is to be regarded as a reasonable alternative (and see *Heard v Broadland BC* at [71] per Ouseley J: part of the purpose of the process under the Directive is to test whether a preferred option should end up as preferred "after a fair and public analysis of what the authority regards as reasonable alternatives"). In respect of that decision, the authority has a wide power of evaluative assessment, with the court exercising a limited review function.

92. This interpretation is reinforced by the scope for involvement of the public and the environmental authorities in commenting on the proposed plan and to make counter-

proposals to inform the final decision by the plan-making authority. The Directive contemplates that the plan-making authority's choices may be open to debate in the course of public consultation and capable of improvement or modification in the light of information and representations presented during that consultation, and accordingly recognises that the choices made by the plan-making authority in choosing a plan and in selecting alternatives for evaluation at the Article 5 stage involve evaluative and discretionary judgments by that authority which may be further informed by public debate at a later stage.

93. The interpretation is also supported by the limited nature of the information which the plan making authority is obliged to provide to explain the selection of the "reasonable alternatives" which are selected for examination. It is only "an outline of the reasons" for selecting those alternatives which has to be provided (paragraph (h) of Annex I; language which is similar to that used in paragraph (a), "an outline of the contents, main objectives of the plan or programme [etc]"), directed to equipping the public to participate in debate about the plan proposed, not a fully reasoned decision of a kind which might be appropriate for a more intrusive review approach or exercise of an appellate function on the part of the court.

94. As Mr Pereira submitted, paragraph (h) of Annex I (replicated in Schedule 2 to the Environmental Assessment Regulations) is to be contrasted with the language in the text of the equivalent paragraph of the draft of the SEA Directive which was originally proposed for adoption. The corresponding paragraph in the draft Directive (paragraph (f)) referred to "any alternative ways of achieving the objectives of the plan or programme which have been considered during its preparation (such as alternative types of development or alternative locations for development) and the reasons for not adopting these alternatives". This was a more demanding standard in relation to the level of reasons which would be required to be given at the Article 5 stage which the legislator chose to reject in favour of an obligation to provide only "an outline of the reasons" for selecting the alternatives to be subjected to full comparative appraisal.

95. The European Commission has issued guidance in relation to the SEA Directive: *Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*. Paragraph 5.6 emphasises the importance of review of alternatives under Article 5: "The studying of alternatives is an important element of the assessment and the Directive calls for a more comprehensive review of them than does the EIA Directive." Paragraphs 5.11 to 5.14 and 5.28 deal with the assessment of alternatives, as follows:

> "**Alternatives**
>
> 5.11 The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

5.12 In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the draft plan or programme and for the alternatives [footnote: Compare Article 5(3) and Annex IV of the EIA Directive which require the developer to provide an outline of the main alternatives studied and an indication of the main reasons for his choice taking into account the environmental effects]. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen. This includes for example the information for Annex I (b) on the likely evolution of the current state of the environment without the implementation of the alternative. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects.

5.13 The text of the Directive does not say what is meant by a reasonable alternative to a plan or programme. The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (e.g. different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes covering long time frames, especially those covering the very distant future, alternative scenario development is a way of exploring alternatives and their effects. As an example, the Regional Development Plans for the county of Stockholm have for a long time been elaborated on such a scenario model.

> 5.14 The alternatives chosen should be realistic. Part of the reason for studying alternatives is to find ways of reducing or avoiding the significant adverse environmental effects of the proposed plan or programme. Ideally, though the Directive does not require that, the final draft plan or programme would be the one which best contributes to the objectives set out in Article 1. A deliberate selection of alternatives for assessment, which had much more adverse effects, in order to promote the draft plan or programme would not be appropriate for the fulfilment of the purpose of this paragraph. To be genuine, alternatives must also fall within the legal and geographical competence of the authority concerned. An outline of the reasons for selecting the alternatives dealt with is required by Annex I (h). …"
>
> "*(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.*
>
> 5.28 Information on the selection of alternatives is essential to understand why certain alternatives were assessed and their relation to the draft plan or programme. A description of the methods used in the assessment is helpful when judging the quality of information, the findings and the degree to which they can be relied upon. An account of the difficulties met will also clarify this aspect. When appropriate, it would be helpful to include how those difficulties were overcome."

96. It is open to the plan-making authority, in the course of an iterative process of examination of possible alternatives, "to reject alternatives at an early stage of the process and, provided there is no change of circumstances, to decide that it is unnecessary to revisit them"; "But this is subject to the important proviso that reasons have been given for the rejection of the alternatives, that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary, by repeating them, to know from the assessment accompanying the draft plan what those reasons are": *Save Historic Newmarket Ltd v Forest Heath District Council*, [16]-[17]. It may be that a series of stages of examination leads to a preferred option for which alone a full strategic assessment is done, and in that case outline reasons for the selection of the alternatives dealt with at the various stages and for not pursuing particular alternatives to the preferred option are required to be given: *Heard v Broadland DC*, [66]-[71]. As Ouseley J put it in *Heard*, in this sort of case "The failure to give reasons for the selection of the preferred option is in reality a

failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage" ([70]).

97. A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: see *Heard v Broadland DC* at [71]). The court will be alert to scrutinise its choices regarding reasonable alternatives to ensure that it is not seeking to avoid that obligation by saying that there are no reasonable alternatives or by improperly limiting the range of such alternatives which is identified. However, the Directive does not require the authority to embark on an artificial exercise of selecting as putative "reasonable alternatives," for full strategic assessment alongside its preferred option, alternatives which can clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan and for good planning reasons, as not in reality being viable candidates for adoption.

98. In my judgment, that is the position in the present case, by contrast with the position in *Heard v Broadland DC*. In *Heard*, the plan-making authority failed to explain in outline its reasons for the selection of the alternatives dealt with at the various stages, and failed to explain why ultimately only the preferred option was chosen to go forward for full assessment (see [66] and [70]-[71]). In this case, however, WDC has made rational and lawful choices in narrowing down a field of six options, initially to three (Scenarios A, B and C), and then in choosing only to take Scenario C forward for full detailed strategic assessment. It has explained its reasons for doing so at each stage in some detail in, respectively, chapter 6 and chapter 8 of the Sustainability Appraisal.

99. I have already explained above that WDC made a rational and lawful choice in deciding that a detailed "appropriate assessment" should not be carried out under the Habitats Regulations in relation to Scenarios A and B. It was speculative whether an "appropriate assessment" would ever really show that more extensive housing development could actually take place in the vicinity of Ashdown Forest without nitrogen deposition effects from increased traffic flows having a detrimental effect on the Forest, which was already significantly affected by such deposition, as the Habitats Regulations Assessment made clear. As explained in the Sustainability Appraisal (paras. [58]-[61] above), there were other and more prominent reasons why WDC had decided that it would not be appropriate to take Scenarios A and B forward for more detailed examination, none of which were subject to challenge. Accordingly, it was unlikely that a detailed "appropriate assessment" would make a significant difference to the selection of the reasonable alternatives required by Article 5 - in this regard, it should be noted that the Inspector's discussion at paragraphs 28 and 29 of his Report was directed to the question whether the Core Strategy was in general conformity with the South East Plan, not to the question whether selection of Scenario C but not Scenarios A and B for detailed examination had been reasonable for the purposes of the SEA Directive. Moreover, a full examination of the environmental effects from new residential development beyond that in Scenario C would require information about the development plans proposed by neighbouring

authorities who were well behind WDC in getting to a position where they could make a useful contribution to such an examination. In these circumstances a decision to proceed to examine Scenario C and not to do further work in relation to Scenarios A and B was well within the discretionary area of judgment allowed to WDC under the SEA Directive and the Environmental Assessment Regulations.

100. As to the Claimant's challenge to the adequacy of the reasons given by WDC in the Sustainability Appraisal for selecting Scenario C, but not Scenarios A or B, for full strategic assessment, I consider that it fails. WDC was only obliged to give an "outline of the reasons for selecting the alternatives dealt with", which in my view it undoubtedly did in chapters 6 and 8 of the Sustainability Assessment. In giving "outline reasons" it was entitled to focus, as it did, on the main reasons why particular alternatives (in particular, Scenarios A and B) were not considered to be viable or attractive having regard to the full planning context– and hence were not "reasonable alternatives" - without descending into great detail to set out each and every aspect of the case or of impediments to adoption of such alternatives.

101. Mr Pereira submitted that since paragraph (h) requires only an outline of the reasons for selecting the alternatives dealt with, it was open to WDC to amplify the reasons set out in the Sustainability Appraisal for selecting the alternatives dealt with, if it was necessary to do so to meet a rationality or other challenge directed against the merits of the choices it had made. I agree with this. It is implicit in the idea of a statement of "outline reasons" that fuller reasons may underlie the outline reasons which are set out, and where necessary to do so to meet a challenge to the merits of the decisions it has made it is open to a plan-making authority to amplify the outline reasons it has given, provided that it does not seek to rely ex post facto on entirely different or wholly new reasons for the choices made: compare *R (Wall) v Brighton and Hove City Council* [2004] EWHC 2582 (Admin); [2005] 1 P & CR 33, [59] per Sullivan J (as he then was).

102. In my view, the outline reasons given by WDC in the Sustainability Appraisal for selection of Scenario C and rejection of Scenarios A and B without further full assessment either under the Habitats Directive and Regulations or under the SEA Directive and the Environmental Assessment Regulations are compatible with and cover the detailed reasons explained by the Inspector and by WDC in these proceedings why those further assessments of Scenarios A and B were not taken forward. The objectives of the SEA Directive to contribute to more transparent decision-making and to allow contributions to the development of a strategic plan by the public have been fulfilled in the circumstances of this case. The Sustainability Appraisal and the accompanying Habitats Regulations Assessment were made available to the public, from which they could see why a detailed "appropriate assessment" under the Habitats Regulations was not thought to be necessary in relation to Scenario C and could see that no detailed "appropriate assessment" had been thought to be required in relation to Scenarios A and B. Members of the public were in a position to challenge each of those assessments during the examination of the proposed Core Strategy, should they wish to do so.

103. In fact, it does not appear that any significant criticism or sustained argument was directed to those matters in the course of the procedures leading up to adoption of the Core Strategy. That in turn reinforces my view that WDC could not be criticised for irrationality in choosing not to pursue a detailed "appropriate assessment" in relation to Scenarios A or B.

104. For the reasons given above, I dismiss the challenge under Ground Two.

Ground Three: Failure to carry out a detailed "appropriate assessment" in respect of the Core Strategy in relation to nitrogen deposition, in breach of regulation 61(1)(a) of the Habitats Regulations

105. In my judgment, this Ground of challenge must be dismissed as misconceived. I accept the primary submission made by Mr Pereira, namely that WDC had carried out an appropriate screening assessment in relation to the Core Strategy (which adopted Scenario C), as set out in the Habitats Regulations Assessment, and had determined in that screening assessment that adoption of the Core Strategy was not likely to have a significant effect on the Ashdown Forest protected site. Therefore, by this work, WDC had properly established that there was no obligation on it under regulation 61(1)(a) of the Habitats Regulations to proceed to make a detailed "appropriate assessment" of the implications of adoption of the Core Strategy for Ashdown Forest.

Ground Four: Breach of the SEA Directive and the Environmental Assessment Regulations by failing to consider alternatives to the protective 7 km SANG zone

106. I also dismiss this Ground of challenge. As the Commission guidance at para. 4.7 and the court in *Save Historic Newmarket Ltd* at [15] and in *Heard v Broadland DC* at [12] explain is permissible, the Habitats Regulations Assessment was issued with and incorporated by reference into the Sustainability Appraisal and hence into the environmental report required under the SEA Directive and the Environmental Assessment Regulations; and in the Sustainability Appraisal itself, WDC made clear that it adopted the protection recommendations set out in the Habitats Regulations Assessment. Chapter 6 of the Habitats Regulations Assessment contained a detailed discussion of the issue of disturbance of wildlife at Ashdown Forest through increased recreational pressure associated with new residential development in its vicinity. The protective 7 km SANG zone was stated by WDC's expert environmental consultants to be required to avoid harm to the Ashdown Forest protected site from increased residential development, and this was also the advice of Natural England.

107. The basis for this requirement was set out in the Habitats Regulations Assessment. It noted that increased recreational visitors associated with new housing in the vicinity of the Forest might have a negative effect on protected bird species, and that the closer a residential development to the Forest the more likely its inhabitants are to visit on a regular basis. It specifically referred to the protective 5 km SANG zone around the Thames Basin Heaths protected site as a relevant precedent, based on an identified study, which "sought to draw a reasonably precautionary conclusion from the variety of potential methods proposed for determining SANG provision" and

explained that "The 5km threshold aims to 'capture' around three quarters of all visitors to the heaths, including 70% of drivers and all pedestrians" (section 6.4, p. 31). The Assessment referred to the comparative visitor survey and analysis which had been conducted in relation to Ashdown Forest and concluded that the protective SANG zone around the Forest should be set at 7 km, since "This is considered to be sufficient to capture a similar proportion of visitors to Ashdown Forest, as compared to the avoidance measures adopted in relation to the Thames Basis Heaths SPA" (section 6.4, p. 32). The Assessment included a map showing what a 7 km protective zone would look like, and which main centres of population would be within it, and what a 15 km protective zone would look like, and an analysis of what additional visits might be associated with new development in that wider zone (section 6.4 and table 6.1, pp. 31-33).

108. Accordingly, in my view, the principled reasoning and evidence base which justified the selection of a protective zone set at 7 km were clearly set out in the relevant environmental report. Indeed, on a fair reading of the Habitats Regulations Assessment/environmental report I think one could say that three alternatives had been canvassed (a 5 km zone in accordance with the precedent at the Thames Basin Heaths; a 15 km zone; and a 7 km zone), and that clear reasons had been given for selecting the 7 km solution chosen to be included in the Core Strategy, namely that the Thames Basin Heaths protective zone was considered to provide a good model for controlling increased visitor numbers to the precautionary level considered appropriate by experts and that an extension of the protective zone around Ashdown Forest to 7 km was assessed to be necessary to provide the same level of protection. Read in this way, I think that the Habitats Regulations Assessment did in fact include a comparative assessment to the same level of detail of the preferred option (a 7 km zone) and two reasonable alternatives, a 5 km zone and a 15 km zone.

109. But even if one does not read the Habitats Regulations Assessment in that way, but rather just as a principled set of reasons for choosing a 7 km protective zone, in line with Mr Pereira's submissions, the reasons given explain clearly why that solution was chosen and, by clear implication, why other solutions were not chosen. Adjusting para. [70] of Ouseley J's judgment in *Heard v Broadland DC* for the circumstances of this case, the reasons given for selecting the 7 km protective zone as the relevant mitigation measure were in substance the reasons why no other alternatives were selected for assessment or comparable assessment. No other alternative would achieve the objectives which the 7 km zone would achieve. Again, the objectives of the SEA Directive to contribute to more transparent decision-making and to allow contributions to the development of a strategic plan by the public have been fulfilled in the circumstances of this case. WDC had explained the reasons for choosing a 7 km zone and members of the public were in a position to challenge those reasons and WDC's assessment during the examination of the proposed Core Strategy, should they wish to do so.

110. Mr Elvin sought to suggest that WDC should have commissioned further work to assess other possible options which might have resulted in equivalent visitor densities in relation to bird population density as between Ashdown Forest and the Thames

Basin or Dorset Heaths. I do not accept this suggestion. As the Habitats Regulations Assessment made clear, it was largely unknown exactly how and to what extend increased recreational visits might affect the protected bird populations, and any attempt to marry up visitor densities and bird densities in such a precise way would have been a spurious and potentially misleading exercise, which would not have met the points made by WDC's expert environmental advisers and Natural England. Neither of them suggested that there was any alternative which might be suitable and which should be examined further. A decision-maker is entitled, indeed obliged, to give the views of statutory consultees such as Natural England great weight: see *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), at [72]. No-one else raised any sustained or developed argument in the course of the iterative process of development of the Core Strategy in favour of a different solution. WDC was entitled to proceed to adopt the solution proposed by both Natural England and its own expert advisers without seeking to cast around for other potential alternatives to examine. To have done so would have been a completely artificial exercise in the circumstances.

111. In examining the Claimant's complaint under this Ground, it is also telling, I think, to compare the position in relation to the 400m development exclusion zone, which was part of the package of measures recommended by UE Associates Ltd and Natural England adopted by WDC in the Core Strategy. The Claimant makes no challenge to the lawfulness of adoption of this zone. Yet the position in relation to consideration and adoption of this part of the Core Strategy is closely similar to that in relation to the protective 7 km SANG zone. A reasoned explanation for choosing the 400m development exclusion zone was set out, and there was no distinct examination of alternatives (say, a 300m zone or a 500m zone). In my view the Claimant was right not to challenge the lawfulness of the selection of this zone. The reasons why it was chosen were fully explained and open to comment or criticism by the public, and in view of the reasons given in relation to it, it would have been completely artificial to have conducted separate assessments of notional different sized exclusion zones.

112. In these proceedings, the Claimant has adduced evidence from Karen Colebourn, an ecological consultant, giving her opinion about possible mitigation measures "which may be suitable at Ashdown Forest", including decreasing car park capacity or increasing the cost of parking, creation of special dog exercise areas, provision of information and education for dog owners and improvement of strategic walking routes. This is opinion evidence put forward not in the context of the iterative process resulting in adoption of the Core Strategy, but well after the event. No concrete, worked through proposals are set out and there is no evidence to suggest that such measures would actually work by themselves. I accept Mr Pereira's submission that it cannot sensibly be contended on the basis of Ms Colebourn's evidence that no reasonable planning authority would have failed to identify these as "reasonable alternatives" so as to be obliged to assess such ideas or their efficacy in the Sustainability Appraisal. I am fortified in this view by the fact that the Inspector did not consider that further assessment work was required in relation to this part of the Core Strategy.

Conclusion

113. For the reasons given above, this challenge is dismissed on all Grounds. It follows that it is not necessary or appropriate to consider issues regarding the exercise of the court's discretion in relation to remedy, which would only have arisen if any of the Grounds of challenge had been made out.