The Town and Country Planning Act 1990

Appeal Reference: APP/C1435/W/23/3321978

Planning Appeal by Gleeson Land and John Alison Land and Research Ltd

LAND AT DOWNLANDS FARM, UCKFIELD

Proof of Evidence

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on Behalf of the Downlands Action Group

Introduction

1. My name is Nick Daines, a Wealden resident and for several years have taken an interest in the protection from development afforded to Ashdown Forest. Since 2018, I have been the Wealden planning lead for CPRE (Sussex) and have been supporting the Downlands Action Group (DAG) for most of that time. Previously, CPRE (Sussex) supported DAG in their opposition to the 2006 application for this site.

2. Wealden District Council (the Council) has listed nine reasons for refusal in its Decision Notice dated 21 April 2023, with Reason 9 being concerned with the impact of the proposal on Ashdown Forest Special Protection Area (the SPA). This reason for refusal explains that the proposal site being within 7km of the SPA, is likely to have a significant adverse impact upon the conservation objectives as a result of increased recreational impact arising from the increase in population. The Council conclude that this proposal has not demonstrated through an appropriate assessment that the necessary mitigation measures can be achieved.

3. It is not explained in the decision notice the perceived shortcomings in the mitigation, but in the officer report, the Council states that it considers that the proposed SANG cannot be delivered as it is partly sited in ancient woodland, which would likely deteriorate due to the inevitable large increase in footfall on becoming a SANG. This would be in contrary to NPPF para 180.

4. Whilst fully supporting the Council's reason for refusal, I wish to add a further reason that would become relevant should the inspector find that the increased footfall would not harm the ancient woodland. This fallback reason is that the Appellant's shadow appropriate assessment has failed to demonstrate that the proposed SANG in conjunction with SAMM, will be effective to mitigate the increase in visitor pressure. Without confirmation that the mitigation will be effective, a positive conclusion cannot be concluded from the assessment and therefore permission cannot be granted.

Appellant shadow Habitats Regulations Assessment

5. The Appellant provided a shadow Habits Regulations Assessment (sHRA) at Appendix 7.2 of their Environmental Statement supporting their application to the Council. The intent behind this document is to provide the information necessary for the Council as competent authority to undertake their HRA of the implications of the proposed development on the European sites.

6. In section 2 of this sHRA, the Appellant sets out in considerable detail the requirements of an HRA and cites the legal framework, government guidance on the methodology and applicable case law. Briefly, an appropriate assessment must:

- Adopt the precautionary principle (sHRA para 2.2.10), and
- No reasonable scientific doubt remains about the absence of such [adverse] effects (para 2.3.2), and
- Must contain no lacunae - *"cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned"* (para 2.3.4), and
- the assessment must *"unequivocally demonstrate why the protected habitat types and species are not adversely affected"* (para 2.3.4).

7. Section 3 of the Appellant's report is titled "Information to Inform a Habitats Regulations Assessment" with the first section containing information for screening. This concludes on page 10 that the proposed development alone could result in a likely significant effect to the SPA and thus an appropriate assessment is required.

8. The shadow appropriate assessment is undertaken in section 3.2 of the report where it is stated that:

> *New development in the vicinity of the Ashdown Forest SPA is likely to result in an increase in overall visitor numbers and could therefore result in an increase in recreational pressure / disturbance on the protected bird species without mitigation in place*.

9. In proposing the type of mitigation, the Appellant cites the Council's 2013 Core Strategy policy (plus the similar policy in the Draft Local Plan HRA (2018) (now withdrawn)) for the provision of SANG and SAMM as suitable mitigation. Whereas the Council has provided two strategic SANGs, the Appellant is proposing to provide their own bespoke SANG which they state will be in accordance with Natural England guidelines.

10. On page 16 of the sHRA, the Appellant concludes:

> *Conclusion – with the implementation of mitigation, will the proposals in-combination with other plans or projects avoid an adverse effect on integrity of a European designation? Yes.*

11. I consider that for the impact on the SPA, the sHRA is quite robust save for one fatal shortcoming; there is no evidence that the SANG and SAMM will be effective in mitigating or avoiding any increase in visitor pressure arising from the proposed development. Without this evidence, the impact of the mitigation cannot be considered certain and it falls far short of the required threshold of being beyond reasonable scientific doubt.

<u>Elizabeth Allinson's PhD Thesis</u>

12. During the examination of the submission Wealden Local Plan in May 2019, an ecology expert representing two LPAs advised that he thought there was a PhD paper on the effectiveness of SANGs, although he had not seen it. This PhD thesis is by Ms Elizabeth Allinson, dated February 2018 and titled "The Role of Suitable Alternative Natural Greenspace Strategy in Protecting High-Value Wildlife Sites" University of Southampton (Faculty of Natural and Environmental Sciences).[1]

[1] PhD_FINAL_thesis_2018_E_Allinson.pdf (soton.ac.uk)

13. Ms Allinson's research was funded by Natural England Thames Basin Heaths Partnership, the Glamorgan Further Education Trust and The Hampshire and Isle of Wight Wildlife Trust and examined the effectiveness of the SANGS strategy used by Natural England and the 15 LPA members of the Thames Basin Heaths Partnership. The research found that human behaviour in terms of visiting the SPAs or the SANGs was complex but concluded that "The strategy did not appear to be attracting dog walkers away from the SPA, which is a policy failure." However, the thesis also declared that:

> *"The breeding numbers of all three priority bird species have not decreased since the implementation of SANGS which suggests that it may be providing mitigation for the increased visitor disturbance, although not necessarily in a way that was predicted by the underlying assumptions."*

14. It is instructive to note that Ms Allinson considered that SANGS "may be providing mitigation" for Thames Basin Heaths (TBH) but clearly, this view falls considerably short of the requirement to be beyond reasonable scientific doubt. Furthermore, the numbers of successfully breeding birds is dependent on many factors other than disturbance during their breeding season e.g. winter weather, migratory hazards etc. and Ms Allinson recommended further research to identify if there is a causal relationship between environmental factors and the Annex 1 species breeding populations.

15. In addition, the TBH have considerably different characteristics to Ashdown Forest and the majority of the findings in the paper will be site specific and thus of doubtful use for the unique conditions of Ashdown Forest and the surrounding areas.

<u>The role of Natural England</u>

16. Natural England is a government agency sponsored by DEFRA. Their role is to advise government on the natural environment and to help protect and restore our natural world.

17. Under the Habitats Regulations, regulation 63(3) a competent authority making an appropriate assessment must consult with Natural England (the appropriate nature conservancy body) and have regard to any representations made by them.

18. It appears that planning authorities, including Wealden, do not receive adverse comments from Natural England when an appropriate assessment is submitted that includes SANG/SAMM in accordance with Natural England guidelines. That the effectiveness

of this mitigation is not demonstrated in the assessment does not appear to be a bar to Natural England accepting the appropriate assessment.

19. I find this position astonishing; it is clear that if mitigation is required to avoid an adverse effect, that it needs to be shown within the appropriate assessment that it is certain that the mitigation will be provided and certain that it will be effective. Certainty of provision is ensured by a s106 agreement effected before planning permission is granted, but no evidence of certainty of the effect of the mitigation in avoiding an increase in visitor pressure is provided to Natural England.

20. Natural England has been promoting the use of SANGs combined with SAMM for getting on for 20 years as mitigation to avoid an adverse effect to an SPA, but I am not aware that any LPA has demonstrated in their appropriate assessment that this mitigation will achieve the desired effect to the required level of detail. Whilst in the acceptance of an appropriate assessment short on evidence of the effectiveness of the mitigation, Natural England has never provided any additional evidence to make up this evidential shortfall in the assessment.

21. When this Council submitted their draft submission HRA[2] dated August 2018 for their emerging local plan to Natural England, as they are required to do under regulation 63(3) of the Habitats Regulations, for the SPA, Natural England responded in their letter dated 5 October 2018[3] thus:

> *<u>Recreational Pressure – Ashdown Forest</u>*
> *Natural England is satisfied that It **can** be ascertained that the plan or project **will not** adversely affect the integrity of Ashdown Forest SAC and Special Protection Area (SPA), from recreational pressure subject to appropriate mitigation measures as identified in Policy EA 2.*

22. Natural England's further comments on Policy EA2 were:

> *<u>Policy EA 2: Ashdown Forest Special Protection Area</u>*
> *We welcome this policy that ensures that mitigation is in place and secured to avoid impacts on Ashdown Forest SPA and SAC from recreational impacts. The policy reflects the strong commitment that Wealden has shown to working with adjacent authorities on this issue and mirrors the approach that is in place within the local plans of other relevant*

[2] B2.-Habitats-Regulations-Assessment-August-2018-1-1.pdf (wealden.gov.uk)
[3] Appendix 1

authorities. Natural England confirms that the strategy proposed is the most appropriate based on the evidence base. We recommend a minor word amendment to avoid confusion with wording elsewhere in the policy that relates to development within 400. The suggested correction is below:

> *"Proposals for a net increase in residential development or other accommodation within **between** 400m and 7 kilometres from the Ashdown Forest SPA…."*

23. It appears that Natural England are content that an adverse effect to an SPA will not occur whenever SANG/SAMM conforming to their guidelines is incorporated in the plan or project. However, this conclusion is reached without any evidence being presented within the appropriate assessment. Nor does Natural England provide any evidence supporting the effectiveness of the SANG/SAMM mitigation in their advice to the competent authority. Clearly, without the required evidence, the appropriate assessment is incomplete.

24. A FOI request was submitted to Natural England on 15 March 2020 requesting that they confirm the evidence from which they were able to state in their 5 October 2018 letter to the Council that no adverse effect would be experienced by the SPA . Natural England responded[4] (late) on 1 May 2020 stating that the evidence in question was contained on Wealden's website and provided this link: https://www.wealden.gov.uk/planning-and-building-control/planning-policy/planning-policy-evidence-base/habitat-regulations-assessment/

25. However, within the seven documents in this SPA section on Wealden's website (two of which post-date the FOI request), none contain any evidence that SANGs and SAMM would be effective in mitigating or avoiding an increase in visitor pressure to the SPA.

26. It is very surprising and concerning that Natural England do not consider that evidence confirming the effectiveness of SANG/SAMM is necessary in order to arrive at a conclusion of no adverse effect. They are fully aware of this requirement having advised the Council in their 5 October 2018 response to the Regulation 19 consultation of the submission Wealden Local Plan, where they stated on page 2:

[4] Appendix 2

It is our considered opinion that the mitigation measures, as proposed by WDC [for the SAC]*, do not provide the level of certainty that would be required under the Habitats Regulations*.

27. No such response appears to be provided to LPAs submitting appropriate assessments proposing SANG/SAMM that accord with Natural England guidelines, but provide no evidence of their effectiveness.

Ashdown Forest SPA Monitoring

28. The main method of monitoring visitors to the SPA is by visitor survey and three of these have been undertaken, in 2009, 2016 and 2021. Whilst providing useful data, the surveys do not provide evidence that the Council's two strategic SANGs are effective in avoiding any increase in visitor pressure arising from development. However, at paragraph 7.6 of the 2021 SPA survey, it is stated:

The results from this survey and the SANGs surveys (see separate report) provide a clear indication that SANGs are working to deflect use away from Ashdown Forest.

29. It is accepted that the surveys show that some visitors to the SANGs would have otherwise visited the SPA had not the SANG existed, but the survey results do not quantify this overall impact. Thus, this statement is provided without any justification. It is noted that neither this statement, nor any other claiming that SANGs are effective in avoiding any increase in visitor pressure arising from development, appear in the Summary at the start of the report. It is accepted that the SANGs survey indicates that these green spaces are popular, but taking the 2021 SPA and SANGs surveys together, and evidence that visitor numbers to the SPA may be up to 20% greater in 2021 compared to 2016, there is no evidence to indicate that the SANGs are successful in ensuring no increase in visitor numbers to the SPA from new developments.

30. I anticipate that compiling the necessary evidence to show beyond reasonable scientific doubt that the SANG/SAMM strategy is effective would be complex, time consuming and expensive and subject to the risk that the findings would fail to support the desired conclusion. With most LPAs being very short of funding, it is not surprising that they apparently do not appear to have tried to secure this evidence given that Natural England has not required it. However, permission continues to be granted for developments within the impact zone of an SPA (by both LPAs and PINS) because Natural England do not insist on the provision of suitable evidence

but declare they accept the findings of the appropriate assessment when there is provision of, or funding towards, a new or existing SANG that complies with their Guidelines.

31. Clearly, without the necessary evidence of effectiveness being contained in the appropriate assessment, competent authorities and Natural England are failing to comply with the Habitats Regulations.

HRA for Downlands Farm application

32. The Council undertook an HRA when considering this application and this is contained at pages 39 – 40 of the Officer Report (OR)[5]. Supporting information was provided by the applicant in their sHRA. The OR discusses the need for mitigation and that the applicant is proposing use of their own SANG and is to make contributions towards the Council's SAMM strategy. However, there is no information confirming that the mitigation will be effective.

33. Natural England was consulted by the Council and provided a response on 27 September 2022[6]. Most of the response sets out Natural England's concerns regarding the land on which the SANG is proposed to be provided, much of this being ancient woodland. However, nowhere does Natural England advise the sHRA is deficient as it fails to demonstrate. that the mitigation will be effective. Nor does Natural England cover this deficit by providing any evidence to support the effectiveness of the mitigation.

Conclusion

34. For this appealed proposal, the Inspector becomes the competent authority and will be obliged to undertake a HRA if minded to allow the appeal. However, the sHRA provided by the Appellant to assist the competent authority in their appropriate assessment is devoid of evidence supporting the effectiveness of the proposed SANG/SAMM mitigation. As an appropriate assessment "*cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned"* the lack of this information in the sHRA means that any appropriate assessment based upon this document would be defective.

35. Bizarrely, Natural England has not questioned this lack of evidence. From examining many responses by Natural England to planning applications, it appears that they do not take issue with

[5] Appendix 3
[6] Appendix 4

those appropriate assessments for proposals that include SANG/SAMM as mitigation in accordance with their guidelines. However, this approach does not comply with the Habitats Regulations which Natural England should abide by. Their status as a government agency does not provide any relief from compliance with these Regulations.

36. With no evidence supporting the effectiveness of the proposed mitigation contained in the Appellants sHRA, in the Council's HRA or Natural England's advice for this proposal, the Inspector is unable to ascertain whether the mitigation will avoid an adverse effect on the conservation objectives of the SPA. Therefore, a positive appropriate assessment cannot be concluded and thus permission for this appealed proposal should not be granted and the appeal thereby dismissed.

N J Daines
26 September 2023