

Position statement and advice to Town and Parish Council's undertaking a Neighbourhood Plan

3rd August 2018

European Court of Justice People over wind Judgement

On April 13th the Court of Justice of the European Union published its ruling in the Case C323/17 with regards to the Habitats Directive. The case was called; Judgement of the European Court of Justice ('CJEU') 12 April 2018 -People Over Wind v Teoranta (C-323/17) ('POW').

On 24th May 2018 the Council received draft / informal advice from Natural England. This stated as follows:

Competent authorities undertaking HRAs should be aware of a recent ruling made by the Court of Justice of the European Union (the CJEU) on the interpretation of the Habitats Directive in the case of People Over Wind and Sweetman vs Coillte Teoranta (ref: C 323/17). The case relates to the treatment of mitigation measures at the screening stage of a HRA when deciding whether an appropriate assessment of a plan/project is required. The Court's Ruling goes against established practice in the UK that mitigation measures can, to a certain degree, be taken into account at the screening stage.

As a result, NE advises that any "embedded" mitigation relating to protected sites under the Habitat Regulations 2017 Regulation 63 (1) should no longer be considered at the screening stage, but taken forward and considered at the appropriate assessment stage to inform a decision as whether no adverse effect on site integrity can be ascertained. In light of the recent case law, any reliance on measures intended to avoid or reduce harmful effects at the likely significant stage is vulnerable to legal challenge.

The judgement is not retrospective as far as I am aware so reliance on existing HRAs through adopted Local Plans should be sound however the implications of the judgement will need to be considered within Local Plan reviews and emerging Local Plans. Mitigation (such as the Strategic Solution for Ashdown Forest) can, of course, be taken into account within a full Appropriate Assessment.

The implications of the People over Wind Judgement in relation to neighbourhood plans means that we can no longer use mitigation or avoidance at the screening stage to conclude 'no likely significant effect'. Instead, in order to meet the Habitats legislation and taking into account the judgement ruling, an Appropriate Assessment must be undertaken where it has been identified at the screening stage that the Neighbourhood Plan may result in a 'likely significant effect' on a European or Internationally designated site. It is only at the appropriate assessment stage therefore where avoidance and mitigation may be proposed.

An appropriate assessment is generally more detailed. The purpose of the Appropriate Assessment stage is to understand and assess the implications of a Plan in view of the site's conservation objectives, in order to inform the decision as to whether the plan will adversely affect the integrity of the site.

Implications for the Neighbourhood Plan process

Owing to the case of People over Wind, we are now in a situation where we need to rescreen Neighbourhood Development Plans that are not yet adopted. Neighbourhood Plans will need to be rescreened in relation to the Habitats Regulations to determine whether an appropriate assessment will be required. Plans will also need to be rescreened under Regulation 9 of the Environmental Assessment of Plans and Programmes Regulations 2004 to determine whether a Strategic Environmental Assessment is required. This is because where a plan is likely to have significant environmental effect a Strategic Environmental Assessment will normally also be required. Given there are a number of internationally designated sites of importance for biodiversity (such as Special Areas of Conservation (SAC), Special Protection Areas (SPA) and Ramsar Sites) within the district, there is a possibility that Neighbourhood Plan proposals could have likely significant environmental effects.

In accordance with The Conservation of Habitats and Species Regulations 2017, where an appropriate assessment is required then this will be undertaken by Wealden District Council as the competent authority.

Where a Strategic Environmental Assessment (SEA) / Sustainability Assessment is required then this will need to be undertaken by the Town or Parish Council as an iterative part of neighbourhood plan production.

Appropriate Assessment and the Wealden Local Plan

On the 13th August 2018 Wealden District Council will be publishing its Proposed Submission Wealden Local Plan for receipt of representations between Monday 13th August 2018 and 5pm on Monday 8th October 2018. The Wealden Local Plan Habitats Regulations Assessment will be published alongside the Plan.

As part of the appropriate assessment process it is necessary to consult Natural England. It is understood that the appropriate assessment for the Wealden Local Plan will not be complete until Natural England have provided comments and the competent authority (Wealden District Council) has considered those comments. As above comments are anticipated to be received by 8th October 2018.

Appropriate Assessment and Neighbourhood Plans

Owing to the relationship between Neighbourhood Plans and the Local Plan it is necessary for the Wealden Local Plan appropriate assessment to support any required Neighbourhood Plan Appropriate Assessments. On the basis that the Wealden Local Plan Appropriate Assessment is not currently complete it is not possible for any Neighbourhood Plans Appropriate Assessment to rely on the Wealden Local Plan Appropriate Assessment.

This situation has been discussed both internally within the Council as well as with Natural England. To avoid a Neighbourhood Plan being examined ahead of comments being received from Natural England, it has been agreed that it would be beneficial to synchronise any appropriate assessments required for Neighbourhood Plans. This would mean that we would not consult Natural England on any Neighbourhood Plan Appropriate Assessments until the Council has received and considered any representation made by Natural England. As above, the consultation period will end on 8th October 2018. A period of time will be required to consider Natural England's comments.

Town and Parish Councils are at different stages in their plan making. Meetings have taken place with Herstmonceux Parish Council and Hailsham Town Council already to explain the

Judgement and what this means for plan making. Meetings are arranged in August with Hellingly Parish Council and September with East Hoathly Parish Council. Should any other Town or Parish Council's wish to discuss this matter or if any further information is required at this stage then please do not hesitate to contact the Planning Policy team at Wealden District Council.

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3rd August 2018