Matter 1: Legal Compliance, including Duty to Co-operate.

Issue 1: Whether the plan has been prepared in line with the relevant legal requirements and procedural matters?

Question 1. Has the Plan been prepared in accordance with the relevant Act and regulations?

We not believe that the plan has been prepared in accordance with the relevant Act and regulations as we explain in this submitted statement.

Climate Change

Question 4. Whether the overarching strategy of the Local Plan is designed to secure the development and use of land which contributes to the mitigation of, and adaptation to, climate change consistent with S19 (1A) of the Planning and Compulsory Purchase Act 2004? If so, how has this been translated into policies within the Plan?

Aside for the GI policies there is little in the plan to mitigate climate change. Although Policy NE7 refers to ‘low carbon and renewable energy schemes’ this is not integral to the design of buildings and linked to Policy BED 1 which only refers to solar gain and orientation. There is no mention of energy efficiency and no requirement for BREEAM or design codes for commercial buildings. (Compare to Brighton and Hove City Plan Policy CP8 Sustainable Buildings - see Appendix)

Sustainability Appraisal

Question 5. Has the plan been subject to Sustainability Appraisal (SA), including a report on the published plan, which demonstrates, in a transparent manner, how the SA has influenced the evolution of the plan making process and have the requirements for Strategic Environmental Assessment been met?

Wealden District Council has produced a Sustainability Appraisal (SA). However, we have great difficulty in finding any evidence that the SA has influenced the plan making process. We believe the production of the SA lagged the policies in the Plan.
The 2015 Issues, Options and Recommendations consultation contained a SA of the Council’s preferred options. Weaknesses were identified within the SA and one of our concerns was that the SA was compiled after the Council had chosen their preferred options with the scoring being adjusted to achieve the sustainability scores. An attempt was made to engage the Council during the consultation period, however, the Council declined to become involved and merely responded that they were not legally obliged to provide a SA at that stage of plan making.

On 3 March 2017, the Council published the Draft Proposed Submission Wealden Local plan (DPSWLP) within the agenda papers for the 14 March Local Plan Sub-committee meeting. The recommendation was to request the Portfolio Holder to recommend the DPSWLP to Full Council for representations and submission to the Secretary of State for examination.

In FAQ’s published on 8 March 2017, the Council stated that the period for representations would be 8 May – 19 June 2017.

On 14 March 2017 the agenda papers for the 22 March 2017 Full Council meeting were published with a similar recommendation for representations and submission to the SoS.

Whereas the DPSWLP was available in March 2017, many other important documents were not, including the SA.

On 13 March 2017, the Local Plan Sub-committee and Joint Planning Committee agreed with the recommendation to Full Council that the DPSWLP be published for representations and submission to the Secretary of State for examination. This was despite the lack of a SA and many other evidence base documents.

At the Full Council meeting on 22 March 2017, the DPSWLP recommendation was withdrawn and changed to one delaying approval of the plan until the SA and other supporting documentation was available.

Clearly, the DPSWLP had been produced without a completed SA.

The SA was first published 17 months later on 13 August 2018, together with the Plan and the supporting evidence base for the eight week representation period starting that day. Although many of the individual volumes forming the SA are dated March 2017 they were not published until August 2018. This 2017 SA contains information that was not known in March 2017, thus further suggesting confirmation that the Plan provisions largely preceded the SA.

**Question 6. Is the non-technical summary suitably concise? Has the SA followed the correct processes in terms of content and consultation? In particular, is the scoring methodology within the SA consistent, coherent and accurate?**
We believe that the Plan was compiled largely before the SA and that the SA contains many areas where the scoring is questionable, potentially in order to make the policies sustainable. Many examples of attributes being scored as compatible with the objective on close inspection should have resulted in being scored as incompatible. Examples of the converse have not been found. Therefore, we do not consider the scoring methodology to be accurate and the SA sound.

**Habitat Regulations Assessment (HRA)**

*Please reference the relevant European site when answering the following questions. To avoid repetition, any reference to the Plan should be read as either alone, or in combination, with other plans or projects.*

**Question 18. What role has Natural England played in the production of the HRA and how has the Council had due regard to its professional expertise and its guidance? Have other key stakeholders been consulted?**

Natural England (NE) has been involved in the HRA as the statutory nature conservancy body and by providing advice to the Council under their discretionary advice service (DAS). NE has also given advice to neighbouring LPA’s for their plan making with regard to the effect of planned growth to Ashdown Forest. NE has participated in the Ashdown Forest Working Group, formed by the South Downs National Park Authority (SDNPA), to address the cross border issues created by the need to protect Ashdown Forest.

For many years, NE had been advising LPA’s that for screening, they need not undertake in-combination assessments of the traffic effects of other local plans on protected sites if their plan indicates a traffic increase below the threshold. But recently, Wealden District Council did not consider this advice correct and in 2016 instigated a judicial review against the Joint Core Strategy (JCS) prepared by Lewes District Council (LDC) and SDNP, which had followed NE’s advice. In his judgement, Jay J ruled with regard to NE’s advice that the “advice was plainly erroneous” (89), that “Natural England’s advice cannot be supported on logical and empirical grounds” (101), “because key advice on which it was based was plainly wrong” (104), “Natural England’s plainly erroneous advice” (111) and “Natural England’s advice …… brought about a clear breach of Article 6(3) of the Habitats Directive” (112).

We consider that NE’s advice may have been accepted for so long as they were considered expert on these matters and thus subject to minimal, if any, challenge. At paragraph 109 of his judgement, Jay J stated “This must include an evaluation of expert evidence.”

Wealden District Council has built up considerable expertise with regard to the evidence required in undertaking an HRA. They have also engaged consultants to assist in the technical aspects of the HRA and two of these, AQA and NERC Centre for Ecology and Hydrology have provided recent detailed reports (HRA Appendices 12a & 12c respectively)
containing many points contradicting NE’s advice in their Regulation 19 representation to the Plan.

We find it somewhat ironic that NE has reminded the Council in their Regulation 19 representation that “...it will be necessary for the Council to demonstrate that the mitigation will be effective and there is sufficient certainty as to its delivery.” However, despite the Council not providing any evidence to support the effectiveness of the SANGS and SAMM mitigation strategy in the Plan, NE confirm that they are content that in delivery of this strategy, the Plan will not cause an adverse effect on the SPA.

We believe that the Council has sufficient convincing evidence from professional advisors to put aside NE’s advice concerning the effect of growth on the Ashdown Forest SAC not causing an adverse effect.

**Question 19. Has the Habitat Regulations Assessment been prepared in a manner consistent with the relevant legislation? If not, please set out clearly why not.**

We believe that the HRA has possibly fallen short in two areas.

The HRA only appears to have considered the effect of the Plan on the notified species in the SAC and SPA. It has not considered all species as detailed in CJEU ruling C-461/17 on 9 November 2018.

The HRA concludes that despite the Plan causing an adverse effect to the Ashdown Forest SAC and SPA, that the implementation of their proposed mitigation measures will sufficiently reduce or remove that adverse effect permitting the Plan to progress. But the Council has failed to provide any evidence of the effectiveness of the mitigation, and clearly nothing to show the degree of certainty required by the Habitats Regulations.

Thus, the Habitats Regulations Assessment has not been prepared in a manner consistent with the relevant legislation.

**Question 20. Is the Plan, as submitted, likely to have a significant effect on European sites either alone, or in combination with other plans or projects? Have these other plans or projects been appropriately identified?**

We believe that the Plan is likely to have a significant effect on the Ashdown Forest SAC and SPA, both alone and in combination with other plans or projects. We do not consider that the proposed mitigation measures will be effective in avoiding any significant effect.

However, we are concerned with regard to the paucity of available information about the Ashdown Forest Traffic Model (AFTM). Clearly, to be able to quantify the harmful emissions and their effect on the qualifying species, the number and type of vehicles has to be known. The Technical Note to the AFTM does provide some information, but this is more
background material than information concerning details of forecasts of future traffic from the various development options considered. We are very mindful that the 2018 Mid Sussex District Plan considered it would not have a harmful effect on Ashdown Forest. The principle reason for this finding was that their transport model predicted that despite their growth, there would be a reduction to Mid Sussex generated traffic on four out of the five main roads traversing the Forest. Unfortunately, this bizarre result was not challenged at the examination. Clearly, in any work involving traffic emissions, the correct identification of the volume of traffic must be fundamental. If this forecast is not robust, all the subsequent analysis becomes highly questionable. Currently, we are unable to take any view on the robustness of the AFTM due to the lack of available information.

We find that NE’s stance in their statutory Regulation 19 representation of no adverse effect to Ashdown Forest surprising and outwith their stated general purpose. Their approach, that as the background nitrogen level is falling faster than the nitrogen increase from traffic generated from new development, there will be no adverse effect, is however in conflict with recent CJEU judgements.

The 25 July 2018 opinion by AG Kokott (which was not criticised in the subsequent CJEU judgment for C-293/17 and C-294/17) confirm that NE’s approach is not correct. The AG clearly opined that that an increase in nitrogen from a plan or project cannot be offset against falling background levels at a time when that the total level is above the critical level. For Ashdown Forest, nitrogen is likely to be above the critical level for many years.

Put another way, it is clear that the nitrogen load from the increased traffic generated by the Plan will be greater with the Plan than without it. As the nitrogen load is already above the critical load and will be at the end of the Plan period, the effect of the Plan is to increase the load, which clearly will cause an adverse effect.

Thus, NE’s advice of no adverse effect to the SAC is wrong and the Council is right to ignore this advice.

The Council, however, considers that suitable mitigation will reduce the impact from additional traffic emissions so that no adverse effect can be achieved. This mitigation is a combination of (currently unknown) measures that will be funded by Section 106 contributions or conditioned on applications (Policy AF 2 measures a) - g) and h) - k) respectively). However, whereas the HRA includes in Appendix 9 a report titled Air Quality Mitigation Strategy June 2018 and at Appendix 11, an Air Quality Technical Note titled Evaluation of Impact of Wealden Mitigation Strategy January 2019, neither of these two papers include any evidence for the effectiveness of the proposed measures.

A Freedom of Information request was submitted to the Council in February requesting evidence for the effectiveness of the mitigation for the protected sites. This request was denied on 15 February 2019 on the basis that the information was exempt being already in the public domain. The Council, however, helpfully provided links to the HRA and its associated evidence base and confirmed that Appendix 11 in the HRA considers the effectiveness of the measures proposed. But an inspection of Appendix 11 shows that there is no data or even discussion on the effectiveness of the mitigation.
Clearly, the Council is either not prepared or not able to present any evidence of the effectiveness of the proposed mitigation, certainly nothing that would meet the requirement to be beyond reasonable scientific doubt. Thus, the appropriate assessment is incomplete with the Council being unable to demonstrate that there will not be an adverse effect on the Ashdown Forest SAC from the Plan and therefore, the Plan should not progress.

Both the Council and NE consider that increased visitor pressure will arise from the Plan which will cause an adverse effect on the Ashdown Forest SPA. Both bodies agree that this harm can be mitigated by the use of SANGS and SAMM measures. However, evidence for the effectiveness of the mitigation is absent in the HRA.

A FOI request was sent to the Council on 13 February 2019, requesting evidence that the growth in the Plan will not cause an adverse effect to the SPA. A response was received on 6 March 2019, in which the Council declined the request on the basis that the requested information was in the public domain. The Council helpfully provided links to the HRA and the HRA Evidence Base documents. However, none of these documents contain any evidence regarding the effectiveness of the SANGS or SAMM.

We wrote to NE in March of this year to request evidence to support their contention that the Council’s mitigation will effectively protect the Ashdown Forest SPA. NE’s response did not include any up to date evidence.

Therefore, due to the lack of evidence concerning the effectiveness of the proposed SANGS and SAMM mitigation, this mitigation cannot be considered as likely to prevent harm to the Ashdown Forest SPA. Thus, the appropriate assessment is incomplete, and the Council is unable to demonstrate that the Plan will not cause an adverse effect to the Ashdown Forest SPA.

**Question 23. In doing so, are the appropriate assessments capable of ascertaining that the Plan as submitted will not adversely affect the integrity of the European sites and its qualifying features, either alone, or in combination?**

The Plan confirms that its development will cause an adverse effect and proposes mitigation to negate this effect. However, there is no evidence provided to show what effect, if any, this mitigation will achieve. The appropriate assessment is therefore unable to ascertain that the Plan will not adversely affect the integrity of Ashdown Forest SAC and SPA. Thus, the appropriate assessment is incomplete, meaning that the Plan cannot progress.

The evidence indicates the Plan will cause an adverse effect alone. This adverse effect is likely to be made worse when other plans are considered in-combination.

Further details regarding our search for mitigation evidence is included in in our response to Question 20 above.

**Question 24. Specifically, is the evidence, methodology, and the underlying assumptions on which the HRA has been formulated,**
realistic, robust, accurate, transparent, appropriate, and sufficiently replicable to allow sensitivity testing, so as to justify its conclusions? Has a qualitative, proportionate approach been taken to the potential impacts on the integrity of the sites? If not, should this be the case?

We are concerned that due to lack of information regarding traffic modelling, this being the basic data from which the subsequent air quality impacts are derived, the HRA is not transparent and may well not be realistic, robust accurate or appropriate making any sensitivity testing questionable. Therefore, the HRA’s conclusion cannot be relied upon.

Question 25. Should reference to ‘not adversely affect the integrity of the site’ be taken to mean that, as a result of the Plan, the qualifying elements of the site should not be in a worse state than the recorded baseline condition, ie no significant net deterioration? Or, does it mean, in the context of an improving situation, for example, improvements in air quality, that the potential for a theoretical quantum of improvement should not be compromised by the policies of the Plan?

We believe that the first alternative above is not correct and does not comply with the Habitats Regulations.

The Regulations require that any measures affecting a protected site shall be designed to maintain or restore the qualifying features to favourable conservation status.

Clearly, if any plan or project causes an increase in any conditions that are already causing harm, then this increase will directly delay the return to favourable conservation status. NE’s view that an increase from a plan or project is acceptable provided that other autonomous effects result in an overall reduction in harm, has been judged as unacceptable by CJEU. Obviously, if the level of harm is reducing, any increase in harm directly from a plan or project will reduce the overall rate of improvement, which is contrary to the conservation objectives of the site.

We consider that the Habitats Regulation require the second strand of the question above to be achieved i.e. in an improving situation of reducing harmful emissions, the Plan should not compromise the rate of improvement or delay the return to favourable conservation status.

Question 26. Is the approach to the use of evidence underpinning the HRA consistent with the ‘precautionary approach’ as described in the ‘Communication from the Commission on the precautionary principle’?
Wealden District Council’s approach to potential harm is precautionary. However, the council’s justification for their mitigation is certainly not precautionary.

**Question 27. What is the relevance of the recent CJEU Ruling on C-293/17 and C-294-17, as well as C-461/17, to the Council’s approach set out in the HRA?**

The ruling at paragraph 6 for C-293/17 and C-294/17 states that autonomous measures cannot be taken into account if the expected benefits of those measures are not certain at the time of that assessment. Wealden District Council, for the analysis of the harm in their appropriate assessment, appears to have followed this ruling, but in their Regulation 19 representation, NE clearly has not.

NE has based their position of no harm on improving background levels of nitrogen deposition, being greater than the additional inputs due to the Plan. But the evidence for future background nitrogen reduction is ambiguous and certainly falls well short of the certainty needed by the Habitats Regulations. Thus, NE’s representation is not in accordance with the Habitats Regulations’ precautionary principle in concluding no adverse effect from the Plan and should be discounted. Even if the rate of improvement of background nitrogen deposition was certain, any measures e.g. implementation of the Plan, that would delay or reduce that rate of improvement would be contrary to the ruling on C-293/17 and C-294/17.

For C-461/17, it is not clear what weight the Council has placed on potential harm to species other than those cited in the listing of Ashdown Forest SAC or SPA. But in their Regulation 19 representation, NE has advised (paragraph 42 of Annex 1) that only exceedances affecting the notifying features should be assessed. Clearly, this advice is contrary to this CJEU ruling and therefore incorrect.

**Question 29. Assuming that the mitigation measures set out in the HRA are required, what evidence is there that these will work?**

There is no evidence in the HRA (nor in the background papers) to support how the mitigation measures will perform.

Information has been requested both from the Council and NE (see response to Q. 20 above) to supply the evidence that enables them to conclude that the Plan will not cause an adverse effect on the Ashdown Forest SAC and SPA. However, despite both parties responding to the requests, neither response contained any evidence that would demonstrate the effectiveness of the mitigation.

Thus, we can only conclude that there is no evidence of the effectiveness of the mitigation meaning that the HRA has lacunae and is in conflict with the Habitats Regulations.
Appendix

**CP8 Sustainable Buildings**

The council will seek that all new development incorporate sustainable design features to avoid expansion of the city’s ecological footprint, help deliver the principles of the One Planet approach, radical reductions in greenhouse gas emissions, particularly CO₂ emissions, and mitigate against and adapt to climate change.

Unless it can be demonstrated that doing so is not technically feasible and/or would make the scheme unviable:

1. All development will be required to achieve the minimum standards as set out below unless superseded by national policy or legislation;

<table>
<thead>
<tr>
<th>Residential (New Build)</th>
<th>Development Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy Performance</td>
<td>Non-major</td>
</tr>
<tr>
<td>19% carbon reduction improvement against Part L 2013</td>
<td>Very Good</td>
</tr>
<tr>
<td>Water performance</td>
<td></td>
</tr>
<tr>
<td>Water efficiency 'optional' standard</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-residential Development Size</th>
<th>Development Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-major</td>
<td>Major and Greenfield</td>
</tr>
<tr>
<td>BREEAM</td>
<td>Very Good</td>
</tr>
</tbody>
</table>

2. All development proposals including conversions, extensions and changes of use will be expected to demonstrate how the development:

   a. addresses climate change mitigation and adaptation;
   b. contributes to a reduction in the city’s current level of greenhouse gas emissions by delivering significant reductions in fuel use and greenhouse gas emissions via: passive design and orientation; fabric performance; energy efficiency measures; and low carbon solutions;
   c. facilitates on-site low or zero carbon technologies, in particular renewable energy technologies.

---

188 This standard is equivalent to Code for Sustainable Homes level 4 in energy use. See paragraph 4.85-4.87 for guidance on demonstrating this standard.


190 Zero carbon technologies are those that harness renewable non fossil fuel energy to create heat or generate electricity. They are called zero carbon because they produce no carbon dioxide (CO₂) emissions when producing heat or power. These technologies are sometimes referred to as micro generation, producing heat or energy locally on a small scale. Low carbon technologies are those that use fossil fuels in a highly efficient way.
d. connects, makes contributions to low and zero carbon energy schemes and/or incorporates provision to enable future connection to existing or potential decentralised energy schemes;

e. aspires towards water neutrality by meeting high water efficiency standards and incorporating facilities to recycle, harvest and conserve water resources;

f. improves the sustainability of existing buildings, makes the most effective use of land and re-uses existing buildings;

g. protects occupant health and the wider environment by making the best use of site orientation, building form, layout, landscaping and materials to maximise natural light and heat, whilst avoiding internal overheating by providing passive cooling and ventilation;

h. reduces ‘heat island effect’ and surface water run-off;

i. uses materials that are sustainable and have low embodied carbon;

j. enhances biodiversity;

k. minimises waste and facilitates recycling, composting and re-use;

l. reduces air, land and water pollution and safeguards water supplies if development is within groundwater Source Protection Zones;

m. maximises operational efficiency through ongoing evaluation, monitoring and improvement of building performance especially in relation to energy and water use;

n. introduces means to encourage users, tenants and householders to reduce their ecological footprint;

o. is adaptable to respond to changing needs; and

p. encourages food growing.

Technical guidance and clarification will be produced to help planning applicants address this policy.

The Sustainability Checklist and the Authority Monitoring Report (AMR) will be used to assess planning applications, and monitor the effectiveness of the policy.