Appendices

Respondent Nos. 1184241 & 771740

WEALDEN LOCAL PLAN EXAMINATION

STATEMENT BY THE VINE FAMILY AND THE UNIVERSITY OF BRIGHTON
Appendix 1

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INTRODUCTION and SUMMARY OF ADVICE

1. We are asked by JMT Planning and JLL, on behalf of the Vine family and the University of Brighton respectively, to advise in relation to legal issues arising from the proposed new Wealden Local Plan (“the Proposed Plan”), which was submitted by Wealden District Council (“the Council”) for independent examination on 18 January 2019.

2. We have been provided with a list of issues set out by the Examining Inspector, Louise Nurser BA (Hons) Dip UP MRTP (“the Inspector”). It will be seen that our advice is relevant, in particular to issues 1, 5 and 8, being:

   (1) Has the Plan been prepared in accordance with the relevant Act and regulations?

   (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 met the requirements for Strategic Environmental Assessment been met?

   (8) Have all reasonable alternatives been considered in terms of strategy, policies and sites? Have these reasonable alternatives, including those set out within the Sustainability Appraisal Addendum 2019, been considered on a like for like basis? Is the evidence on which the scenarios are predicated consistent? Are there any policies, or strategies, where there were no reasonable alternative options to consider? If so, what is the justification?

3. Our view, in summary, is that the Proposed Plan prompts a negative answer to each of these three questions and, to that extent, is unlawful.

4. This is on the basis of deficiencies in (i) the Council’s justification for departing from the advice of Natural England in concluding that the effect of nitrogen deposition on Ashdown Forest justified a reduction in the overall housing figures; and (ii) the Council’s consideration of alternatives to this proposed approach.
5. In our view, were the Inspector to approve the Proposed Plan in its present form, a statutory challenge on the basis of s.113 of the Planning and Compulsory Purchase Act 2004 would have good prospects of success.

6. This Advice is structured as follows:

I Legal Framework
II The Ashdown Forest SAC
III The MM Site
IV Advice

I LEGAL FRAMEWORK

Plans: general

7. The statutory framework for local plans is found in Part 2 of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”). Per s.20(5) of the 2004 Act:

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; and
(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

8. Section 113 of the 2004 Act provides a mechanism for challenging in the Administrative Court development plan 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.

9. 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]).
10. In preparing a local development plan document the local planning authority must have regard to national policy: s.19(2)(a). Paragraph 182 of the National Planning Policy Framework\(^1\) provides as follows:

"Exaining 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]. …”

**Strategic Environmental Assessment**


12. Art.3(1) of the SEA Directive requires the production of an environmental assessment ("SEA") for plans and programmes which fall into certain specified categories and are likely to have significant environmental effects. The SEA must be carried out during the preparation of a plan and before its adoption: Art.4(1). Art.5(1) provides:

"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." [emphasis added]

13. Part of the information to be provided is at Annex I(h):

\(^1\) The 2012 version of the NPPF is the relevant version for the purposes of the Proposed Plan. See para.214 of the 2019 version of the NPPF, which provides that plans submitted n or before 24 January 2019, the 2012 NPPF will apply. The Proposed Plan was submitted for examination on 18 January 2019.
“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”


“5.12 .... 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 not are considered to be the best option.

5.13 ... 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.

15. Ouseley J gave the following guidance on the duty to consider alternatives under the SEA Directive in *Heard v Broadland District Council and others* [2012] EWHC 344 (Admin) [2012] Env. L.R. 23 at [69]-[71]:

“69 (…) an outline of reasons for the selection of alternatives for examination is required, and alternatives have to be assessed, whether or not to the same degree as the preferred option, all for the purpose of carrying out, with public participation, a reasoned evaluative process of the environmental impact of plans or proposals. A teleological interpretation of the directive, to my mind, requires an outline of the reasons for the selection of a preferred option, if any, even where a number of alternatives are also still being considered. (…)

70 Even more so, where a series of stages leads to a preferred option for which alone an SA is being done, the reasons for the selection of this sole option for assessment at the final SA stage are not sensibly distinguishable from reasons for not selecting any other alternative for further examination at that final stage. 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. This is what happened here. So this represents a breach of the directive on its express terms.

71 There is no express requirement in the directive either that alternatives be appraised to the same level as the preferred option. Mr Harwood again relies on the Commission guidance to evidence a legal obligation left unexpressed in the directive. Again, it seems to me that, although there is a case for the examination of a preferred option in greater detail, the aim of the directive, which may affect which alternatives it is reasonable to select, is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination along side whatever, even at the outset, may be the preferred option. It is part of the purpose of this process to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of what the authority regards as reasonable alternatives. I do not see that such an equal appraisal has been accorded to the alternatives referred to in the SA of September 2009. If that is because only one option had been selected, it rather highlights the need for and absence here of reasons for the selection of no alternatives as reasonable. (…)”

16. In *Ashdown Forest Economic Development LLP v Wealden District Council* [2015] EWCA Civ 681, the Court of Appeal considered a challenge to Policy WCS12 in the
2013 Core Strategy (which related to the protection of Ashdown Forest) on the basis of a failure to assess reasonable alternatives. Policy WCS12 had imposed a requirement that, for new development within 7km of Ashdown Forest, suitable alternative natural green space should be provided. Sales J, at first instance, had held that reasonable alternatives to the 7km zone had been considered by reference to the screening assessment under the Habitats Regulations. The Court of Appeal disagreed, per Richards LJ at [42] and [45]:

“42 (...) the identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including Wednesbury unreasonableness. In order to make a lawful assessment, however, the authority does at least have to apply its mind to the question. A fundamental difficulty faced by the Council in the present case, and not satisfactorily addressed in Mr Edwards's submissions, is that there is in my view no evidence that the Council gave any consideration to the question of reasonable alternatives to the 7 km zone. (...)”

(...)

45 ... it was not the function of the Habitats Regulations Assessment to consider alternatives. What mattered for the purposes of that assessment was that the Core Strategy should not lead to any adverse effects on the integrity of the Ashdown Forest SPA. The avoidance and/or mitigation measures recommended in it were put forward in accordance with the precautionary principle with the aim of eliminating the risk of adverse effects. They were considered to meet that aim. It does not follow that there were no alternative means of ensuring the necessary protection of the SPA.”

17. In preparing a local development plan document the local planning authority must carry out a sustainability appraisal (SA) of the proposals in each development plan document: s.19(5), 2004 Act. An SA incorporates the requirements of an SEA under the SEA Directive.²

**The Habitats Directive**

18. Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”) is currently transposed into UK domestic law by the Conservation of Habitats and Species Regulations 2017 (“the Habitat Regulations”), which recently replaced the 2010 regulations. The broad aim of the Habitats Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. Art. 2 provides:

“1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."

19. Sites designated by Member States where the conservation measures under the Habitats Directive are to be applied are termed special areas of conservation ("SACs"). One of the ways in which the Habitats Directive seeks to achieve its aims is by the imposition of duties with respect to both plan-making and the determination of applications for proposed development, where those plans/development might affect SACs. Art.6 of the Habitats Directive provides as follows:

"1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

20. Thus, Art. 6(3) of the Habitats Directive thus provides that, where a plan or project is not directly connected with or necessary to the management of a SAC, it shall be subject to appropriate assessment of its implications for the SAC in view of the SAC’s conservation objectives. Art.6(3) is transposed into UK domestic law by Reg 63 of the Habitat Regulations which provides:

3 Article 1(1), Habitats Directive.
“(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 of the plan or project for that site in view of that site's conservation objectives.

(...)

(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 specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, 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 competent 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 it proposes that the consent, permission or other authorisation should be given.

(...)

(9) In paragraph (1) the reference to the competent authority deciding to undertake a plan or project includes the competent authority deciding to vary any plan or project undertaken or to be undertaken.”

21. The relevant competent authority “is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not)”: Smyth v The Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at [85].

22. In the joined cases of Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg and Others C-293/17 and C-294/17 (“Dutch Nitrogen”), the CJEU considered the extent to which conservation or preventive measures within the meaning of Art.6(1) and (2) could be taken into account in an appropriate assessment in the context of a Dutch programme which included measures to reduce the emission of nitrogen at source. The CJEU concluded as follows at [130]-[132]:

“130 The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such ‘measures’ if those benefits are uncertain, inter alia because
the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.

131 It must be added that the ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive must include not only the anticipated positive effects of those ‘measures’ but also the certain or potential adverse effects which may result from them (see, to that effect, judgment of 25 July 2018, Grace and Sweetman, C-164/17, EU:C:2018:593, paragraph 53).

132 In the light of the foregoing, the answer to the fifth to seventh questions in Case C-293/17 and the third to fifth questions in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that an ‘appropriate assessment’ within the meaning of that provision may not take into account the existence of ‘conservation measures’ within the meaning of paragraph 1 of that article, ‘preventive measures’ within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or ‘autonomous’ measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.”

23. The CJEU, in setting out its conclusion, notably chose not to adopt or approve the more stringent test set out in the Opinion of Advocate-General Kokott at [169]:

“...measures to reduce nitrogen deposition from other sources, restoration measures to improve nitrogen-sensitive habitat types in the sites concerned, and the autonomous decrease in nitrogen emissions can establish the compatibility of additional nitrogen deposition in protected sites with Article 6(3) of Directive 92/43 only if it is already definitively established at the date of the authorisation that the total load on the site from nitrogen deposition falls below the threshold for the integrity of the site being adversely affected. On the other hand, it is not sufficient, for the purposes of approval of additional nitrogen deposition, if deposition declines overall, but the land in question is still overloaded with nitrogen. Mere forecasts regarding the future effects of those measures and the expected decrease in nitrogen emissions may not be taken into account in the decision on the approval of additional nitrogen deposition.”

II    THE ASHDOWN FOREST SAC

24. The majority of Ashdown Forest is designated as a SAC due to the presence of, inter alia, extensive areas of lowland heath, in particular European dry heath and Northern Atlantic wet heath communities.

25. The issue that arises in relation to the Ashdown Forest is air quality and specifically nitrogen deposition. Nitrogen deposition is the process whereby nitrogen in the atmosphere gets deposited to land and water surfaces. While nitrogen deposition is a natural process, anthropogenic activities, such as the burning of fossil fuels, can increase the inputs of nitrogen to levels where it can have harmful effects on the environment. The Council’s attempts to response to the effect of nitrogen deposition on the Ashdown Forest SAC have been subject to a number of legal challenges.
26. Natural England’s recently published European Site Conservation Objectives: Supplementary advice on conserving and restoring site features, Ashdown Forest Special Area of Conservation (SAC) (10 February 2019) deals with air quality issues as follows:

“Modelling undertaken by Wealden District Council, Lewes District Council and other relevant Local Planning Authorities for Local Plan assessments has identified that increases in development coming forward within plans, would increase Nitrogen deposition, Nitrogen Oxides and ammonia adjacent to roads that run through Ashdown Forest from associated increased transport. However assessment of improvements in vehicular technology and in particular Euro6/VI standards that all vehicles are currently being manufactured to, will outweigh impacts from new development. The improvements will be marginally retarded by additional development but future nitrogen deposition and concentration will continue to decline with the existing trend.

The site exceeds the critical load/level however Natural England Commissioned Report 210 identifies that expected increase in Nitrogen levels from additional transport would fall below the level that would reduce species richness on the site even if the expected declining trend in Nitrogen failed to materialise.

The background levels of Nitrogen are expected to decline with EU and Government clean air strategies and continue the existing downward trend. Notwithstanding the above, large inputs from industrial processes that could disperse over greater distances or large increases in vehicular movements not included within Local Authority modelling would need to be assessed separately for potential impacts on the site.”

III THE MM SITE

27. Between them, the Vine family and the University of Brighton are owners of land at Mornings Mill Farm being 51.2ha located to the east of the Eastbourne Road (A2270) (“the MM Site”). The Council is the local planning authority for the area in which the Site is located.

28. Policy WCS1 of the Council’s Core Strategy Local Plan (February 2013) (“the 2013 Core Strategy”) makes provision for 4,525 dwellings and an additional 40,000 sq. metres net employment space over the plan period of 2006-2027. Policies WCS2 and WCS3 respectively distribute housing and employment floorspace to meet the provision in WCS1. Strategic Development Area 4 (SD4) relates to land at land at South Polegate and East Willingdon- where provision is to be made for around 700 dwellings and 8,600 square metres of employment floorspace, leisure, recreation and community facilities. The majority of the MM Site is within SD4.

29. WCS1 also provides, in accordance with the report of the examining inspector, that the 2013 Core Strategy be reviewed in 2015. The Wealden Local Plan Issues, Options and Recommendations (“the WLPIOR”) was published in October 2015 as part of that review. The WLPIOR retained the MM Site allocation for 700 dwellings: see §8.47 and Preferred Option for Housing at p.55.
30. The 3 March 2017 draft of the Proposed Plan (“the March Draft Plan”)\(^4\) in effect maintained the SD4 allocation from 2013 Core Strategy in Policy SWGA 43 as Allocation Polegate and Willingdon 1 (PW1). As the Sustainability Appraisal Report – March 2017 (“the March 2017 SA”), which deals with the period up to the March Draft Plan, indicates, the reduction to the housing figure of 14,102 dwellings set out in Policy WLP1 of the March Draft Plan was due primarily to the Council’s concerns regarding the scale of the proposed development on the Ashdown Forest: §1.64.

31. Subsequently, the Council further reduced its housing figure, to 11,456. Per the Report dated 22 March 2017 (“the 22 March 2017 Report”) for the Full Council meeting of the same date:

“10 (...) One of the key factors impacting on the Draft Proposed Submission is the additional evidence gathered in relation to the impact upon the Ashdown Forest. Significant work...has identified that the impact on the Ashdown Forest Special Area of Conservation (SAC) is significant in the immediate vicinity of the roads across the forest with high levels of nitrogen deposition recorded and consequent ecological damage....Taking into account existing levels of traffic and development commitments that are in place there is already an unacceptable level of impact from nitrogen deposition in the areas close to the forest roads.

(...) 

14. ...the Council has gathered evidence of levels of nitrogen deposition across the whole of the SAC which indicates high but acceptable levels. The Council is proposing to adopt an approach which is based on delivering development at a level which will be below that which would be deemed to be potentially damaging to the SAC overall.

(....)

17. In order to allow development to proceed the proposal is therefore to compensate for the damage which is already occurring and alongside this to set a level of development across the district which will ensure that the overall integrity of the SAC is not damaged due to traffic movements and the consequent nitrogen deposition.

18. The nitrogen deposition modelling work to assess the level of development which will allow this proposal to proceed shows that a level of 11,456 dwellings will be acceptable.

19. This represents a reduction from the 19,500 dwellings proposed as the preferred option for testing ... It also represents a reduction from the 24,000 dwellings which was also tested as a result of the land availability identified through the SHLEAA process.”

32. As part of this change, the housing allocation at the MM Site was removed.

33. In a section of the 22 March 2017 Report entitled “Changes from the Draft Proposed Submission Document of 3 March 2017” it is stated “Allocation Polegate and Willingdon 1 removed”. Policy SWGA 38 of The submission draft of the Proposed Plan allocates a

\(^4\) Document B58, Wealden Local Plan Submission Library
small portion of the western part of the MM Site for “community infrastructure purposes only including education, medical facilities, community hall, sports and leisure facilities”.

IV ADVICE

34. We would highlight two issues that arise in relation to the Proposed Plan and which bear, in particular, on the proposed de-allocation of Site:

(i) The Council’s basis for reduction of the overall housing figure;

(ii) The Council’s consideration of alternatives.

(i) The Council’s basis for reduction of the overall housing figure

35. The Council’s decision that the level of development set out in the Proposed Plan must represent a reduction on that initial proposed is based on its view that the effects of additional development in the form of increased use of roads close to the Ashdown Forest SAC will lead to a legally unacceptable increase in nitrogen deposition. That view is contrary to the advice of the statutory body with responsibility for nature conservation, Natural England. The Council is, of course, entitled to disagree with Natural England, provided it has a good reason to do so, and the Court will afford due weight to Natural England’s expertise in considering whether or not the Council would be justified in doing so.

36. In its Regulation 19 response of 5 October 2018, Natural England said as follows in relation under the heading ‘Air Quality – All Sites’:

“Natural England is satisfied that it can be ascertained that the plan or project will not adversely affect the integrity of Ashdown Forest Special Area of Conservation (SAC), Lewes Downs SAC and Pevensey Levels SAC and Ramsar from air quality impacts. Natural England’s advice regarding air quality is that this conclusion can be reached without mitigation measures being needed under the specific requirements of the Habitats Regulations. Our advice is based on the evidence provided, our expert knowledge of the particular characteristics, interest features and management of the designated sites in question and our professional judgement.

Natural England is satisfied that it can be ascertained that the plan or project will not adversely affect the integrity of Ashdown Forest Special Area of Conservation (SAC), Lewes Downs SAC and Pevensey Levels SAC and Ramsar from air quality impacts. Natural England’s advice regarding air quality is that this conclusion can be reached without mitigation measures being needed under the specific requirements of the Habitats Regulations. This is based on the evidence provided, our expert knowledge of the particular characteristics, interest features and management of the designated sites in question, and our professional judgement.”

5 Policy SWGA 38, Map 13.
37. In its response to Natural England’s Regulation 19 Representation at Appendix 12 to the Habitats Regulation Assessment (“the HRA”), the Council’s summarised the scope of the dispute between itself and Natural England as being focused on three issues:

- Which air quality modelling scenario to use (A, B or C);
- Legal interpretation of Habitats legislation; and
- Interpretation and application of recent case law.”

38. The HRA set out three emissions scenarios which formed the basis for its assessment: Scenarios A, B and C. The key difference between these scenarios turns on the extent to which they do or do not take into account Government forecasts as to reductions in nitrogen emissions due to changes in car technology; as summarised in report prepared by Air Quality Consultants, Ashdown Forest SAC Air Quality Monitoring and Modelling, (“AQC”, “the AQC Report”) as follows:

“Emissions model ‘A’ represents the existing situation with respect to both emissions per vehicle and emissions released outside of the study area (such that, when applied to the future, emissions model A assumes that there will be no improvements over time). Emissions models ‘B’ and ‘C’ represent the effects of partial and full reductions of vehicle (and other sector) emissions as predicted by Defra.”

39. As is clear from the HRA, the difference between scenario A on the one hand and scenarios B and C on the other was decisive to the Council’s conclusion that the envisaged figure for housing over the plan period would put the Council in breach of the Habitats Directive and thus require it to reduce its overall housing figure: see, for example, Table 19 of the HRA, where the number of hectares of the SAC above the critical level is either 0 or close to zero under scenarios B and C but not for scenario A.

40. The Council provides a more detailed response in the same document as follows:

“AQC provide the following in their Natural England response. This response is agreed by WDC: Natural England’s position is considered to be ill informed and also does not appear to take account of UK High Court Case No: CO/3943/2016 nor the Advocate General Kokott Opinion or subsequent Judgement on ECJ Joined Cases C-293/17 and C-294/17. As a result of these failings, adherence to Natural England’s published guidance would mean providing an air quality assessment which is not the most appropriate or robust scientific assessment as required by the Habitats Regulations and therefore not fit for purpose for the protection of the environment.

In addition to the above, WDC has taken note and agrees with the specific advice provided by Professor Mark Sutton of CEH3. The advice provides, in part, an analysis of Natural England’s approach as set out in their Guidance document NEA001 to assessing road traffic emissions under the Habitats Regulations. Detail is provided in paragraphs 22-62 of the CEH ‘Regulation 19 analysis report. It is advised to read the advice document in full to gain a full appreciation of the advice provided. However, the following main issues are considered:

- Emission trading and reliance on future predicted background nitrogen pollution levels for this purpose;
- The level of certainty that is required to rely on future predicted background nitrogen pollution trends;
• Future development and whether the implementation of this will delay the attainment of critical loads / levels to be achieved and therefore a delay to achieving favourable conservation status.

• The 200m distance criterion for screening and the issue that this provides a focus on near road increases only and does not provide a mechanism to understand background increases.

• An understanding of background increases is important in relation to an ‘in combination’ assessment, if full account of the possible impacts of development are to be assessed.

• The suggestion that only ‘live’ plans and projects should be considered in any assessment.

• The 1% screening threshold of the critical level / loads and its relevance to road and other emission sources; and

• Natural England’s approach to the SAC area to be considered with regards to adverse impacts and the duration of potential adverse impacts.”

41. The Council refers to two reports to support its departure from Natural England’s advice. The first is the report prepared by the Centre for Ecology & Hydrology entitled Risks from air pollution to the integrity of Ashdown Forest Special Area of Conservation: analysis of the Regulation 19 consultation responses from [inter alia] Natural England, 11 January (“the CEH Report”). While the Council’s response provides a longer list of topics covered by the CEH Report, the salient analysis in the CEH Report is at §§22-30.

The second is the AQC Report.

42. On the salient issues, we consider that, on a judicial challenge, the Council is likely to face considerable difficulty relying on either of these reports to support its position on any of the key points of difference it identifies.

43. We note that both the Council’s analysis and those of the reports it relies on seek to apply the Dutch Nitrogen case to the issue of forecasting a reduction in future emissions. In doing so, the Council and the reports it relies on assume that an analogy can be drawn between the Dutch programme considered in the Dutch Nitrogen case, and the taking into account of reductions in nitrogen deposition arising from improvements in car technology which have arisen in response to the imposition of EU-wide legal standards. As Natural England’s supplementary advice notes, the forecast reductions are based on standards that all vehicles will be required to comply with at the manufacturing stage. In our view, this assumed analogy is very much a moot point but, for present purposes, we proceed on this premise. Thus, the question, applying the test set out by the CJEU in the Dutch Nitrogen case, is whether the benefits arising are certain.

44. The CEH Report simply states that it does not consider that forecast reductions in nitrogen emissions to satisfy the relevant standard of certainty, but there is no analysis to support this assertion. This would not allow the Council to justify a departure from Natural England’s advice.
45. The AQC Report does provide an analysis of the forecast. It begins by recording the inaccuracy of previous forecasts at §7.7 as follows:

“Historically, large reductions in NOx emissions have been projected, which has led to significant reductions in NO2 concentrations from one year to the next being predicted. Over time, it was found that trends in measured concentrations did not reflect the rapid reductions that Defra and DfT had predicted (Carslaw, Beever, Westmoreland, & Williams, 2011). This was evident across the UK, although the effect appeared to be greatest in inner London; there was also considerable inter-site variation. Emission projections over the 6 to 8 years prior to 2009 suggested that both annual mean nitrogen oxides and nitrogen dioxide concentrations should have fallen by around 15-25%, whereas monitoring data showed that concentrations remained relatively stable, or even showed a slight increase. An analysis for 23 roadside sites in London covering the period 2003 to 2012 showed a weak downward trend of around 5% over the ten years (Carslaw & Rhys-Tyler, 2013), but this still falls short of the improvements that had been predicted at the start of this period. Analysis of more recent data (AQC, 2018) showed an average downward trend for NO2 and NOx of around 1.5% per year with marked regional variations.”

46. The AQC Report, however, proceeds to note the way in which both the regulatory and forecasting processes have responded to past forecasting issues at §§7.9-7.11:

“7.9 Recognition of these discrepancies has led to changes to the type approval process. Vehicles are now tested using a more complex laboratory drive cycle and also through ‘Real Driving Emissions’ (RDE) testing, which involves driving on real roads while measuring exhaust emissions. For Heavy Duty Vehicles (HDVs), the new testing regime has worked very well and on-road NOx emissions from the latest vehicles (Euro VI27) are now very low when compared with those from older models (ICCT, 2017).

7.10 For Light Duty Vehicles (LDVs), while the latest (Euro 6) emission standard has been in place since 2015, the new type-approval testing regime only came into force in 2017. Despite this delay, work by AQC (2016) showed that Euro 6 diesel cars manufactured prior to 2017 tended to emit significantly less NOx than previous (Euro 5 and earlier) models. Given the changes to the testing regime, it is reasonable to expect that diesel cars and vans registered for type approval since 2017 will, on average, generate even lower NOx emissions.

7.11 As well as reviewing information on the emissions from modern diesel vehicles in the real world (AQC, 2016), AQC has also reviewed the assumptions contained within EFT V8.0.1 (AQC, 2018). One point of note is that the EFT makes a range of assumptions, which appear to be very conservative, regarding the continued use of diesel cars into the future and the relatively slow uptake of non-conventional (e.g. electric) vehicles (AQC, 2018). Thus, despite previous versions of Defra’s EFT being over-optimistic regarding future-year predictions, it is not unreasonable to consider that EFT v8.0.1 might under-state the scale of reductions over coming years (i.e. overpredict future-year traffic emissions).”

47. Thus, the conclusion of the only reasoned analysis on which the Council relies is in fact unhelpful to the Council’s conclusion on modelling. The AQC Report goes as far as suggesting that future forecasts may under-state the scale of reductions in coming years. In fact, as the Council notes, AQC (the Council’s consultants) are in agreement with Natural England that Scenario B, which takes into account the Euro 6/VI standard that has been mandatory since 2015, is “the most likely future scenario”.6

48. The CEH Report at certain points in §§22-28 appears to engage in a more wide-ranging analysis based on the Dutch Nitrogen case. However, this analysis is based, solely it

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6 Appendix 12 to the HRA, p.749, §21 and response.
seems, on the Advocate-General’s comments that a decrease in nitrogen emissions could only be taken into account “if it is already definitively established at the date of the authorisation that the total load on the site from nitrogen deposition falls below the threshold for the integrity of the site being adversely affected”, a formulation that the CJEU notably did not adopt in its judgment. The Advocate-General’s Opinion also appears to be the Council’s justification for not proceeding on the basis of Scenario B: Appendix 12 to the HRA, p.750. As to the CEH Report, references, such as at §30, to parts of the CJEU decision dealing with a different issue, further indicate that the CEH Report fails to properly understand the legal effect of the Dutch Nitrogen case.

49. We note that the Council also refers to the case of Wealden DC v Secretary of State for Communities and Local Government [2017] EWHC 351 (Admin) (this is the reference to “CO/3943/2016”). This was a case in which the Council successfully quashed a joint core strategy that had been approved by the Secretary of State on the basis of erroneous advice from Natural England that had failed to address the cumulative increased traffic flows from the joint core strategy and the (Wealden) Core Strategy 2013. We do not follow the relevance of this case to the present dispute between the Council and Natural England. It cannot, of course, be said that the making of one error by Natural England licenses the Council to thereafter disregard its advice without reason, and we would consider such an argument to itself be irrational.

50. In conclusion, therefore, we consider that the basis for the reduction in the overall housing figure, which of course is the driver for the de-allocation of the Site, is vulnerable to challenge on the basis that the Council’s departure from Natural England’s advice is irrational.

(ii) The Council’s conclusion that the Site in particular should be de-allocated

51. The Council is under a legal obligation to consider alternatives by virtue of the SEA Directive. The question is what alternative means there are for ensuring the necessary environmental objective: Ashdown Forest Economic Development LLP v Wealden District Council. There is a need to ensure public consultation on the SEA and draft plan capable of exerting the appropriate influence on the contents of the draft plan: see Re Seaport Investments Ltd’s Application for Judicial Review [2008] Env. L.R. 23. It is, therefore, important that the consideration of alternatives is clear enough to inform the plan examination process. Furthermore, the common law will impose duties on the Council in relation to the decision to de-allocate the MM Site, in that the Council will

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7 The distinct question of whether the Dutch programme’s provision for granting authorisation based on a certain ceiling amount of nitrogen deposition within which an individual project falls was lawful

8 The Lewes District Local Plan Part 1, jointly prepared by Lewes District Council and the South Downs National Park Authority.
be required to act rationally in choosing to de-allocate the MM Site as against the other sites that it could have de-allocated.

52. In our view, two aspects of the Council’s consideration of alternatives appear problematic.

53. The first is in relation to the Council’s decision to use the reduction of its housing figure over the plan period as a means to address the effect of nitrogen deposition on the Ashdown Forest SAC (putting aside, for a moment, the issues raised above as to the Council’s basis for this position). Pra.15 of the 22 March 2017 Report:

“The Council has explored a range of alternatives to the level of development proposed in order to protect the SAC including lower levels of development, alternative distributions for development and development conditions. In addition it has considered mitigation measures including traffic speed restrictions, introducing tolls, restricting categories of vehicles and options for tunnels. These investigations are continuing, however, for a variety of reasons the Council believes that these measures would not produce any significant improvements, either because they are already in place or because they are not practical or economically viable.”

54. Thus far, it appears that this represents the extent of the Council’s consideration of responses to the potential impact of nitrogen deposition on the Ashdown Forest SAC other than reducing the scale of residential development over the plan period. In relation to alternatives to restricting residential development, we note that it is not and has not been explained: (i) what stage the investigations referred to had reached, and what remained to be done; (ii) what the fruit of such investigations has been subsequently, and how the fact of such investigations is informing the Proposed Plan and intention to reduce development; (iii) why such measures being in place means that they could not (for example through modification) produce improvements; (iv) why such measures are not practical or economically viable and the basis for such a conclusion; (v) what the Council understands “significant improvements” to mean; and (vi) how the Council could come to the conclusions it came to in light of the investigations then being ongoing.9

55. In our view, these questions call into serious doubt the robustness of the Council’s approach to consideration of alternatives to the approach proposed by the Proposed Plan of reducing residential development over the plan period.

56. The second difficulty in the Council’s consideration of alternatives arises in relation to the Council’s consideration of the de-allocation of the MM Site in particular. The way

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9 While there is consideration of alternative housing growth options in the Wealden Local Plan Sustainability Appraisal Report (six housing growth scenarios are set out at §§4.2.1-4.2.6), this does not answer the foregoing issue.
in which the Proposed Plan considers the issue of the de-allocation of the Site is described at §2.6:

“...consideration was given to alternative approach to Scenario I and K which relocated 700 dwellings from North Hailsham development area to an area in Polegate and Willingdon, in line with the Strategic Sites Local Plan (now withdrawn). Two scenarios identified as Scenario J and L relate to this spatial distribution (although housing number totals remained the same to I and K). Although the overall housing number and distribution was retained in Scenario J, the amount of development was reduced (for the purposes of transport and air quality modelling) by removing brownfield commitments, which were considered by the description to have a redundant use. Scenario L retained all commitments for the purposes of transport and air quality modelling.”

57. Thus, the Proposed Plan formulates four scenarios, two of which exclude the Site (I and K), and two of which include the MM Site (J and L). The Proposed Plan justifies the allocation of 700 dwellings in Hailsham rather than Polegate with reference to: concerns relating to highway congestion; less facilities at Polegate relative to Hailsham; and the furtherance of the goal of regenerating Hailsham town centre.

58. The principal difficulties with the Council’s consideration of alternatives in relation to the MM Site in particular are as follows:
   (i) there is a significant lack of analysis or detail setting out the basis for the Council’s conclusions;
   (ii) there is no evidence that the Council has considered the evidence pertaining to the MM Site’s relative sustainability, as evidenced by the fact that the MM Site was, until the March Draft Plan, allocated as a major residential site and had been for numerous years.

59. In our view, there is an unlawful failure to consider alternatives in both respects.

CONCLUSION

60. We have set out above our view on the lawfulness of the Proposed Plan with respect to two key issues of the basis for reducing the overall housing figure in the Proposed Plan, and the consideration of alternatives. As presently instructed, we have nothing further to add, but those instructing us should not hesitate to contact us in Chambers should any questions arise from the contents of this Advice.

7 May 2019
Appendix 2

Respondent Nos. 1184241 & 771740

WEALDEN LOCAL PLAN EXAMINATION

STATEMENT BY THE VINE FAMILY AND THE UNIVERSITY OF BRIGHTON
WEALDEN LOCAL PLAN EXAMINATION

ECOLOGY REPRESENTATIONS TO EIP FROM THE VINE FAMILY AND THE UNIVERSITY OF BRIGHTON

A Report to: Vine Family and University of Brighton

Report No: RT-MME-130629-01

Date: May 2019
REPORT VERIFICATION AND DECLARATION OF COMPLIANCE

This study has been undertaken in accordance with British Standard 42020:2013 “Biodiversity, Code of practice for planning and development”.

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<td>Issue 1</td>
<td>06-05-2019</td>
<td>Dr Katy Read CEcol MCIIEEM CEnv MCIWEM C.WEM DipSM (Executive Director)</td>
<td>Tom Docker MCIIEEM (Associate Director - Ecological Impact Assessment)</td>
<td>Dr Philip Fermor MCIIEEM CEnv (Managing Director)</td>
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The information which we have prepared is true, and has been prepared and provided in accordance with the Chartered Institute of Ecology and Environmental Management’s Code of Professional Conduct. We confirm that the opinions expressed are our true and professional bona fide opinions.

DISCLAIMER

The contents of this report are the responsibility of Middlemarch Environmental Ltd. It should be noted that, whilst every effort is made to meet the client’s brief, no site investigation can ensure complete assessment or prediction of the natural environment.

Middlemarch Environmental Ltd accepts no responsibility or liability for any use that is made of this document other than by the client for the purposes for which it was originally commissioned and prepared.

VALIDITY OF DATA

The findings of this study are valid for the purpose for which they were intended, to set out representations to the Examination in Progress of the Wealden Local Plan Submission in relation to proposed development at Mornings Mill Farm. The information presented in this report should not be used for any purpose other than that set out in Chapter 1.
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1. **INTRODUCTION**

1.1 **PROJECT BACKGROUND**

1.1 In April 2019 the Vine Family and University of Brighton commissioned Middlemarch Environmental Ltd to provide a Technical Note in relation to ecological considerations associated with the Examination in Progress (EIP) of the Submission Wealden Local Plan (WLP), which are to commence in May 2019. These representations are to be put forward to Stage 1 of the EIP, at which the Inspector will consider whether the plan is likely to be capable of being found sound and legally compliant in relation to the matters covered (having regard to the potential to recommend main modifications).

1.2 The Inspector has provided information in relation to the Matters, Issues and Questions (MIQ) for discussion at the Examination hearings, and this report responds to those MIQ in relation to ecological considerations. These representations have stemmed from involvement with a proposed development project at Mornings Mill Farm, a site currently allocated in the extant Wealden District (Incorporating Part of the South Downs National Park) Core Strategy Local Plan, adopted in February 2013, but not proposed for inclusion as an allocated site in the Submission WLP. It is noted that matters in relation to specific sites and proposals will be dealt with at Stage 2, however, as the matters raised are fundamental to all development under the Submission WLP, representations are made at this stage.

1.3 The following Chapters provide representations from an ecological aspect, to respond to specific questions raised in the following document ‘Wealden Local Plan Examination – Inspector’s Matters, Issues and Questions for Discussion at the Examination Hearings’.

1.2.1 **AUTHOR**

1.4 This Statement has been produced by Dr Katy Read, Executive Director, Middlemarch Environmental Ltd. I have a Bachelor of Science in Environmental Science and a Doctorate of Philosophy in hydro-ecology, specialising in habitat creation. I have been a Chartered Environmentalist and Chartered Water and Environmental Manager since 2005, a member of the Chartered Institute of Ecology and Environmental Managers (CIEEM) since 2004 and a member of the Chartered Institute of Water and Environmental Managers (CIWEM) since 2005. I became a Chartered Ecologist (CEcol) in 2017. I also hold an NVQ Level 4 in Management and a Diploma in Safety Management.

1.5 I have successfully completed ecological impact assessments as part of wider Environmental Statements to support planning applications for large and small-scale residential and commercial development projects, energy-generation schemes, ground stabilisation projects and infrastructure projects throughout the UK. I am experienced in carrying out Habitat Regulations Assessments, particularly those requiring assessment of air pollution impacts on European sites. I have recently attended CIEEM-IAQM Working Group meetings in relation to air quality and ecology.

1.6 As an experienced habitat creation scientist, I also work extensively on habitat creation projects having carried out habitat creation feasibility assessments, detailed design works, hydrological and ecological monitoring and developed habitat and water level management plans.
2. **MATTER 1: LEGAL COMPLIANCE INCLUDING DUTY TO CO-OPERATE**

2.1 The Inspector has set out a number of questions in relation to the Habitat Regulations Assessment (HRA) that supports the Submission Wealden Local Plan (WLP). This chapter sets out the questions (in bold and italics) and outlines the team’s response where relevant. Document references from the WLP Submission Library are included in brackets.

**Habitat Regulations Assessment (HRA)**

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?*

2.2 It is noted that Wealden District Council (WDC) produced the following document in June 2018, ‘Wealden Local Plan Habitat Regulations Assessment. Draft Proposed Submission Document’. Natural England then provided comments on this document in October 2018. In response to this consultation, further works were completed by technical specialists for WDC, a revised Habitat Regulations Assessment (Document Ref: A35) was produced, and further background information (A35 Appendices) and proposed strategies were published in January 2019 (Document Ref: A36).

2.3 The feedback from Natural England (NE) in October 2018 concluded that they were satisfied that the Submission WLP would not adversely affect the integrity of any of the relevant European sites due to air quality impacts. However, NE reached their conclusion of no adverse effect without the mitigation measures proposed in the Submission WLP being needed. Natural England confirmed to WDC that if they deemed that the proposed mitigation measures would be required, these would need to be demonstrably effective and have sufficient certainty of delivery in order to mitigate for the specific impact identified.

2.4 Natural England agreed with WDC in relation to their assessment of impacts on Ashdown Forest SPA/SAC from recreational pressure and to Pevensey Levels SAC / Ramsar site from hydrological impacts and the team have no representations in relation to these matters.

2.5 It is evident from the additional work subsequently completed by WDC’s consultants and the information provided in WDC Response to NE’s Regulation 19 representation (A35, Appendix 12) that WDC have attempted to respond to NE’s comments through the provision of additional evidence and production of their January 2019 Habitat Regulations Assessment (A35) report.

2.6 Whilst it is therefore apparent that NE have been consulted in relation to the HRA, that NE’s comments have been considered and further works completed following their comments, it is also noted that WDC have maintained their difference of opinion in relation to the potential air quality impacts of the WLP (Document Ref: A1) when considered both alone and in combination with other plans on Ashdown Forest SAC/SPA, and that WDC continue to promote the requirement for mitigation measures to be provided to respond to perceived impacts.

2.7 In addition to their difference of opinion with Natural England, it is clear from the representations from other adjacent Local Planning Authorities, including Mid Sussex District Council, Rother District Council, Tandridge District Council and Tunbridge Wells Borough Council, that these other key stakeholders object to the proposals set out in the WLP in relation to the air quality mitigation in policies AF1 and AF2.
2.8 WDC have chosen not to sign up to The Ashdown Forest Working Group (2018) ‘Ashdown Forest Statement of Common Ground’, which has the following purpose:

“to address the strategic cross boundary issue of air quality impacts on the Ashdown Forest Special Area of Conservation (SAC) arising from traffic associated with new development. It provides evidence on how the authorities have approached the Duty to Co-operate, clearly setting out the matters of agreement and disagreement between members of the AFWG.”

2.9 AFWG (2018) SCG Chapter 2 sets out the approach to a series of key matters in relation to air quality and the development of Local Plans, and identifies which of the AFWG members agree, disagree, have no position, or reserve judgement in relation to the position statements under the following headings:

- Proportionality;
- Local Plan Housing Numbers;
- Traffic Modelling;
- Air Quality Calculations;
- Ecological Interpretations; and,
- The Need for Mitigation or Compensation Measures.

2.10 WDC have not signed up to any of the position statements set out in the AFWG SCG, again illustrating the extent of the difference between the other members of the AFWG (see list of members below) and the opinion and assessments of WDC in relation to the Ashdown Forest SAC and air quality impacts (predominately nitrogen deposition).

2.11 AFWG members who have signed up to the SCG include: South Downs National Park Authority (SDNPA), Lewes District Council, Eastbourne Borough Council, Tunbridge Wells Borough Council, Mid Sussex District Council, Tandridge District Council, Crawley Borough Council, Sevenoaks District Council, Rother District Council, East Sussex County Council (as the relevant Minerals and Waste Planning Authority), West Sussex County Council and Natural England.

2.12 Many of the matters set out in the AFWG (2018) SCG are reflected in the MIQ raised by the Inspector in relation to the WLP (A1) and its accompanying HRA (A35) and it is therefore clear that WDC, in their plan-making, have reached conclusions which differ significantly from those of Natural England and other key stakeholders. The SCG states that:

“The members of the AFWG will continue to work together constructively, actively and on an ongoing basis toward a consensus on the matter of air quality impacts on Ashdown Forest SAC associated with growth identified in Local Plans. The AFWG will continue to share evidence and information, and will work cooperatively together to discuss potential mitigation measures just in case need for these should arise, and will consider other measures to reduce the impact of nitrogen deposition around the Forest as matter of general good stewardship.”

2.13 Whilst it is clear therefore that Natural England and other key stakeholders are working together to respond to the considerations of air quality impacts of Local Plans on the Ashdown Forest SAC/SPA, WDC have chosen not to work with the Government's nature conservation advisor, or other key stakeholders in their approach.
19. Has the Habitat Regulations Assessment been prepared in a manner consistent with the relevant legislation? If not, please set out clearly why not.

2.14 Best practice guidance from the Habitat Regulations Handbook (DTA Publications, 2013 and subsequent updates), which expands upon previous guidance published by the Impacts Assessment Unit at Oxford Brookes University (2001) and the Department for Communities and Local Government (2006) identifies that the Habitat Regulations Assessment process is broadly divisible into four stages, with the need to complete each stage determined by the results of the previous stage. In summary, these stages are:

Stage 1: Evidence Gathering and Screening
This stage is associated with collecting evidence regarding those parts of the Natura 2000 network that have the potential to be impacted by a strategic land-use plan, either alone or in combination with other projects or plans. Where no significant effects are perceived, sites may be screened out of the need for further assessment during Stage 2.

Stage 2: Appropriate Assessment of Significant Impacts
Where it is considered a Natura 2000 site may experience significant effects from a project or strategic land-use plan, either alone or in combination, a detailed assessment of likelihood and severity of the perceived impact on the integrity of the Natura 2000 network should be undertaken. The assessment should be based on a detailed review of the project or plan in conjunction with the structure, function and conservation objectives of the Natura 2000 site. This stage may also include a preliminary assessment regarding the potential for the identified impacts to be mitigated.

Stage 3: Assessment of Alternative Solutions
Where impacts on the integrity of the Natura 2000 network are perceived, this stage examines alternative ways of achieving the objectives of the project or strategic land-use plan in order to avoid these impacts.

Stage 4: Imperative Reasons of Overriding Public Interest and Compensation Measures
At this stage, the potential for adverse impacts remains, and where it is deemed that a project or land-use plan should proceed for Imperative Reasons of Overriding Public Interest (IROPI), an investigation of appropriate compensatory measures is undertaken.

2.15 The Submission WLP HRA (June 2018) Chapter 4 confirms that the document considers Stage 1: Screening and Stage 2: Appropriate Assessment of the above process. It is unclear from the evidence presented in the HRA (A35) and the ‘Air Quality Mitigation – Interim Mitigation Strategy Tariff Guidance for Residential and Business Development’ (A36) documents whether the ‘mitigation’ proposed is actually mitigation, or in fact compensation. Whilst the HRA and WLP (A1) no longer uses the word ‘compensation’ when discussing policies AF1 and AF2, earlier-issued versions of the policies refer in fact to ‘compensation’ and it has not clearly demonstrated that the ‘mitigation’ measures proposed are directly controlling, or reducing to an acceptable level, the perceived impacts.

2.16 If the ‘mitigation’ measures proposed are in fact ‘compensation’ measures, then Stages 3 and 4 of the HRA process should be actioned prior to adoption of the WLP (A1).

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?
2.17 A significant weight of evidence has been provided by WDC and their consultants in relation to the impacts from air pollution on the Ashdown Forest SAC/SPA generated from the WLP (A1) in combination with other projects and plans. Whether the in combination effects have been appropriately considered appears to be a point of contention between the different technical specialists and advisors who have commented on the HRA (A35).

2.18 WDC’s own technical advisor, Professor Mark A. Sutton at CEH, who has critically reviewed the HRA and the background data and assessments on which it relies, concludes in the following report ‘Risks from air pollution to the integration of Ashdown Forest Special Area of Conversation: Overview of Issues and Conclusion’ (I28, p.25), that in order to provide an accurate in combination scenario for air pollution impacts, there should be two elements of the assessment:

- A Local Part which defines the near-road increase, and includes traffic emissions associated with the WLP and anticipated future development at the UK scale and the likely consequences of both the WLP and national development on non-traffic emissions including domestic heating and other emissions.
- A National Part which defines background increase based on national mapping scenarios of future traffic emissions for all national plans across the UK, and including all sources of development.

2.19 The HRA does not specifically respond to this advice, and the HRA remains based on an assessment of in combination effects purely from traffic-generated from the WLP in combination with other local Plans which will result in additional traffic generation along the key roads within the Ashdown Forest SAC/SPA. It is therefore argued that the conclusion of the HRA on Ashdown Forest SAC/SPA, when considered in combination with other projects and plans, potentially underestimates the impact and therefore the significance of the effect.

2.20 In direct opposition to the opinion of CEH, Natural England, and other members of the AFWG, appear to conclude that the data presented in the HRA does not represent a level of potential impact considered to be significant enough to warrant the scale of 'mitigation' measures which are proposed in planning policies AF1 and AF2 and Document A36.

2.21 The team have no representations to make in relation to the plans and protects that have been considered in combination with the Submission WLP.

22. Have the appropriate assessments of the implications for those sites been undertaken in a manner consistent with the sites’ conservation objectives?

2.22 In relation to the Ashdown Forest SAC, Natural England have recently (10th February 2019) released the following document: ‘European Site Conservation Objectives: Supplementary advice on conserving and restoring site features. Ashdown Forest Special Area of Conservation (SAC). Site Code: UK0030080’.

2.23 As this document has been made publically available since production of the Submission WLP HRA (June 2018), we ask this Inspector to ensure that WDC are confident that their HRA has fully considered...
the detailed conservation objectives for the Ashdown Forest SAC that are now set out in this document. The Inspector is specifically referred to the section on ‘Air Quality’ (page 12) which states that:

“Modelling undertaken by Wealden District Council, Lewes District Council and other relevant Local Planning Authorities for Local Plan assessments has identified that increases in development coming forward within plans, would increase Nitrogen deposition, Nitrogen Oxides and ammonia adjacent to roads that run through Ashdown Forest from associated increased transport. However assessment of improvements in vehicular technology and in particular Euro6/VI standards that all vehicles are currently being manufactured to, will outweigh impacts from new development. The improvements will be marginally retarded by additional development but future nitrogen deposition and concentration will continue to decline with the existing trend.

The site exceeds the critical load/level however Natural England Commissioned Report 210 identifies that expected increase in Nitrogen levels from additional transport would fall below the level that would reduce species richness on the site even if the expected declining trend in Nitrogen failed to materialise.

The background levels of Nitrogen are expected to decline with EU and Government clean air strategies and continue the existing downward trend. Notwithstanding the above, large inputs from industrial processes that could disperse over greater distances or large increases in vehicular movements not included within Local Authority modelling would need to be assessed separately for potential impacts on the site.

Source attribution data on APIS identifies that agriculture is contributing to ammonia (and thus Nitrogen) concentrations and deposition.”

2.24 It is therefore clear that the conclusions in the Submission WDC HRA does not align with this Supplementary Advice associated with the Ashdown Forest SAC’s Conservation Objectives and it is therefore questioned whether the HRA (A35) has been undertaken in a manner consistent with the site’s conservation objectives.

2.25 It is also clear from the Supplementary Advice that agriculture is a significant contributor to nitrogen deposition within the environment. The HRA identifies (A35, Table 1, p.28) that ammonia is one of the key pollutants that contribute to nitrogen deposition and that it can result in pollutant effects at a highly localised level, as well as contributing to effects from long-range pollutant transport. The HRA states that:

“The dominant source of Ammonia emissions is from the agricultural industry, contributing 81% of total emissions of Ammonia the UK in 2015”

2.26 Whilst it is recognised in the HRA that “The Wealden Local Plan does not promote energy production facilities or promote changes relating to agriculture or industrial practices” it is clear that this potentially significant contribution pathway has not been considered, likely due to the difficulties of assessing this impact accurately, and identifying mitigation measures which would control it. Significant weight has been given in the WLP (A1, A36) to requiring new developments within the Wealden District to ‘mitigate’ for the perceived impacts from air pollution as a result of new individual developments (both residential and employment), without necessarily recognising the background contributions from the
wider existing land use operations and activities within the zone of influence of the Ashdown Forest SAC/SPA. It is questioned whether this approach is proportionate, or whether it is a simply a tax on development within the District.

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?**

2.27 CEH report ‘Risks from air pollution to the integrity of Ashdown Forest Special Area of Conservation: Overview of Issues and Conclusions’ (I28), provides some clarification regarding this issue. It is recognised (I28, p.13) that air pollution concentrations, deposition and exceedances are associated with two features: firstly ‘near-road’ increases within 100m of the roads attributed to exhaust fume deposition, and ‘background increases’ across the whole European site resulting from traffic and other sources of air pollution in Wealden, South England and from long-range transport of air pollution. CEH identify that both situations should be considered as part of the HRA and conclude that whilst the HRA provides detailed information regarding the near road increases, the modelling on which the HRA is based likely underestimates the effect of development in the WLP in combination with other developments in adjacent districts and other districts across South England.

2.28 CEH conclude that in order to provide an accurate in combination scenario there should be two elements of the assessment:

A Local Part which defines the near-road increase, and includes traffic emissions associated with the Submission WLP and anticipated future development at the UK scale and the likely consequences of both the Submission WLP and national development on non-traffic emissions including domestic heating and other emissions.

A National Part which defines background increase based on national mapping scenarios of future traffic emissions for all national plans across the UK, and including all sources of development.

2.29 Whilst it is understood that this would be a significant and complex piece of work, these comments from a national expert raise the question of whether the HRA and the mitigation proposed is based on suitable scientific evidence and that the direct causal relationships between the potential impact of development under the WLP, when considered in combination with all other aspects of development and background air pollution considerations which could affect the Ashdown Forest SAC/SPA, are in-fact clear and directly evidential? Whilst is it recognised that background nitrogen deposition at the Ashdown Forest is above the critical load for the key habitats within the SAC, and evidence has been presented that supports a conclusion that vegetation within proximity to the road system through Ashdown Forest appears to be in a poorer condition, than vegetation more removed from the road (see I28 report), it is identified that the effects on the vegetation could be as a result of air pollution impacts, in addition to recreational pressure and nutrient enrichment from pet excrement.

2.30 It is therefore clear, that whilst background nitrogen deposition is clearly considered, by all of the technical specialists who have provided input to and comments on the HRA, to be potentially having an adverse effect on the Ashdown Forest SAC, it is not entirely transparent that the direct causal links
between the conservation status of the European site and the potential impact of the WLP in combination with other plans, have been accurately established.

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?

2.31 This is a point for WDC to respond to. However, the Submission WLP HRA states the following (paragraph 12.29) which may provide some clarification (underline added for emphasis):

“…Taking into account all elements investigated as part of the appropriate assessment the Wealden Local Plan both alone and in combination will result in an adverse impact on the integrity of the site and will create conditions that would inhibit restoration of the annex 1 habitats at Ashdown Forest SAC should this growth take place unchecked”.

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?

2.32 A CJEU ruling on joined cases, C-293/17 and C294-17 was handed down on 7th November 2018. These cases relate to the use of nitrogen fertilisers in the Netherlands. Chapman (2018) states that:

“the Netherlands Government have adopted a strategic approach to nitrogen referred to as the Programma Aanpak Stikstof (PAS). The PAS has been in operation since 2015 and has a twofold objective. Firstly to achieve Favourable Conservation Status of natural habitats within the European sites network and, secondly, to enable economic developments to come forwards which might contribute nitrogen deposition to those sites.

The PAS aimed to achieve those objectives by a combination of source directed measures (to reduce emissions from agricultural sources) and site specific restoration measures (to deliver measures within European sites aimed at increasing their resilience to the effects of nitrogen deposition). The PAS approach regulates how much nitrogen deposition may occur during a six year period and introduces a concept known as “room for deposition” whereby the decreases are partially offset against new development.”

2.33 However, Chapman (2018) also states that:

“The Court has recognised that where the conservation status of a habitat type is already “unfavourable” the possibility of authorising activities which add further nitrogen loading (hence affecting the “ecological situation” as defined with reference back to paragraph 102 and the concept of “favourable” conservation status) seems necessarily limited.”

2.34 If this ruling is followed to its conclusion, this could mean that for the Ashdown Forest SAC, which is already exceeding the critical load in relation to nitrogen deposition at the qualifying habitats, it will not be possible to authorise activities (such as the development set out in the WLP), which would result in
further nitrogen loading at the SAC. If the background data presented in the HRA is agreed with, the WLP when considered in combination with other projects and plans, will result in additional nitrogen loading at the site. It is therefore unclear how this case law has been fully taken into consideration in the HRA.

28. On what basis has the threshold for development and its distribution been considered to be acceptable? Are the adverse impacts considered to be ‘real’, not ‘fanciful’?

2.35 The HRA (A35, p.218-220) attempts to justify the potential effect of the proposed mitigation measures by considering information from other schemes that have implemented ‘soft’ mitigation measures such as those proposed in AF1. The HRA concludes that the evidence supports an assumption that there will need to be a reduction of between 6-10% of vehicle km driven to allow the development proposed in the WLP to be ‘mitigated’. There is no clear evidence to show how these assumptions, when taking into account the ‘precautionary principle’, have been used to inform the quantum of development and development locations proposed in the WLP.

2.36 The reductions in vehicle driven km cited in the HRA (A35, p.219) from other schemes range from 2-11% and 5-7%, however an improvement of between 6-10% is stated as being required to allow the quantum of development set out in the WLP. Adopting the precautionary principle therefore it can be argued that the low values of reductions from other schemes should be used, and then that the higher value of improvements should be required in order to ensure scientific certainty that the mitigation measures proposed would be significant enough to mitigation, beyond reasonable scientific doubt, any perceived impacts. It is unclear from the evidence presented in the HRA how this has been used to inform the quantum of development within the WLP.

2.37 A key part of the mitigation hierarchy, which should be applied to all ecological impacts, including those assessed as part of a Habitat Regulations Assessment, is the requirement to avoid any impacts were possible, then to provide mitigation for any impacts which cannot be avoided, and only after all avoidance measures have been adopted, to provide compensation for any residual ecological impacts. No evidence is presented in the HRA or the WLP to local plan to illustrate that the process for avoidance has been fully considered in the distribution of development throughout the Wealden District. Given the location of the Ashdown Forest within the WDC area, and the concerns regarding nitrogen deposition on the Ashdown Forest SAC as a result of development within the WLP, traffic modelling should have been used to identify areas within Wealden District which would have greater impacts, and the distribution of development should have been designed accordingly. This process should have been evident and transparent, in order to evidence that WLP to have followed the appropriate mitigation hierarchy set out in the NPPF.

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

2.38 The HRA (A35) sets out a series of ‘mitigation’ measures associated with perceived in combination air pollution impacts, which WDC consider will ensure that there will be no adverse effect on the Ashdown Forest SPA/SAC and Pevensey Levels SAC. These include implementation of policies AF1 and AF2, to be funded through Developer Contributions from new residential and commercial development’s on allocated sites in the WLP. What is unclear however, is the evidence-base confirming that the proposed
mitigation measures will successfully mitigate, ie remove or reduce to an acceptable level, adverse effects from air pollution due to WLP development to a level at which the effect of development is no longer considered to have an adverse effect. The measures proposed are to be funded through Developer Contributions and delivered strategically by WDC. However, it is clear that this mechanism will not ensure that these ‘mitigation measures’ are in place prior to any impacts from new development being experienced, due to the mechanism for collecting such funds through S.106 or CIL agreements.

2.39 As the mitigation measures will not be funded until development is bought forward, it is not evident how the mitigation measures proposed will ensure that there is suitable ‘environmental capacity’ created, and what ‘triggers’ will be used to assess which developments can be delivered at what stage during the WLP period. As the critical levels of nitrogen deposition at the Ashdown Forest SAC are already exceeded by background levels, prior to any development under the WLP, how will the proposed mitigation measures be effectively monitored and measured to ensure that they are directly responding to the perceived impacts generated by the WLP.

2.40 In the absence of clear ‘trigger levels’ for the created ‘environmental capacity’ resulting from AP 1, there does not appear to be a scientific justification for the limiting of development based on the mitigation measures proposed.

31. Is the Plan’s strategy and distribution of development consistent with the recommendations of the HRA?

2.41 The HRA (A35) concludes that there is likely to be an adverse effect on the Ashdown Forest SAC/SPA and Pevensey Levels SAC, either directly, or in such a way that it will affect the site’s ability to be restored to favourable conservation status, as a result of air pollution impacts generated from the WLP in combination with other local Plans.

2.42 As discussed above, no evidence has been presented to show how different options for development within the Wealden District could have had a lesser, or greater impact on the two European sites from air pollution impacts, and as such, the WLP has not clearly demonstrated that the proposals have been developed in line with the mitigation hierarchy set out in the NPPF.
3. MATTER 2: VISION AND OBJECTIVES AND LOCAL PLAN GROWTH

3.1 The Inspector has set out a number of questions in relation to air quality considerations of the Wealden Local Plan (WLP, Document A1). This chapter sets out the questions (in italics) and outlines the team’s response where relevant.

**Issue 2: Does the significance attributed to air quality considerations present a positive framework which is consistent with national policy, justified and effective, and will contribute to the achievement of sustainable development within the District?**

35. Is a simple reading of policy AF1, that all development, irrespective of whether it is included within the list of categories set out in footnote 14 of the LP, or where it is located within the Plan area, is reliant on the action of the LPA? Does this raise any risk to the delivery of development within the Plan? Would development be dependent on the delivery mechanism being created or implemented?

3.2 The ‘Air Quality Mitigation – Interim Mitigation Strategy Tariff Guidance for Residential and Business Development’ (A36) states at paragraph 6.1 that “Developer contributions will be collected to devise and deliver the Interim Air Quality Mitigation Strategy”. It must therefore be surmised that the mitigation strategy would have to be delivered by the LPA, as individual development projects (either residential or commercial) will not be able to deliver the identified ‘mitigation’ as part of their own schemes, given the strategic nature of the measures proposed.

3.3 This therefore means that all development will in fact be reliant upon WDC successfully establishing, delivering, monitoring and concluding that the mitigation measures proposed will create suitable ‘environmental capacity’ in relation to air pollution impacts at Ashdown Forest SAC. If the delivery of mitigation measures is required to be funded by Developer Contributions, it is considered likely that there will be a ‘lag’ in the delivery of the mitigation measures whilst suitable funds are generated, and the mitigation measures are delivered by the LPA, and then another ‘lag’ before suitable measurements can be taken to prove that the mitigation has been successful. In the meantime, development would have been allowed to proceed, without the ‘certainty’ of delivery of the mitigation measures and the evidence to show that mitigation measures have been successful in reducing air pollution impacts. If the mitigation measures are not successful, it is not clear how WDC will respond to this and whether it would be possible to provide revised mitigation measures, if Developer Contributions have already been spent and the perceived air pollution impacts from development would have already been experienced at Ashdown Forest SAC/SPA and Lewes Downs SAC.

36. Is Policy AF1 consistent with the presumption in favour of sustainable development and national policy? Is the policy justified by appropriate evidence to suggest that harm to Ashdown Forest Special Area of Conservation and Lewes Downs Special Area of Conservation will take place, in the absence of mitigation, as a result of the envisaged level of Local Plan Growth, and in combination with other plans and projects?

3.4 As set out in Chapter 2, there are concerns regarding the conclusions that have been reached in the HRA (A35) due to the narrow focus of the assessment if impacts from the WLP, in combination with other plans, as traffic-generation has been main ‘contributor’ considered in the HRA. Again, it is recognised that quantifying and assessing impacts from all background pollution sources (including the major contributions from agriculture) which could have an adverse effect on the Ashdown Forest...
SAC/SPA is a significant task, and one which should be ‘proportional’ to the likely scale of impact associated with the WLP. As WDC have not signed up to the Ashdown Forest Work Group Statement of Common Ground (AFWG SCG), which sets out a section in relation to ‘proportionality’ of assessments of local plans in relation to air pollution impacts and the Ashdown Forest SAC, it is not known how WDC have considered this is in their decision-making process.

3.5 Natural England, and the ASFW SCG have both identified that national policies and trends, particularly in vehicle use and design, should be taken into account as part of the assessment of future air pollution impacts. However, the HRA dismisses these future trends and policies, and instead bases its assessment of future impacts on specialist advice from consultants (ECUS, CEH). This disconnect between opinions should be agreed at a national scale, as the potential decisions taken for all HRAs of all plans and projects in the UK could affect the way that assessments are taken forwards. It is questioned whether this is therefore a decision for the Planning Inspector, or for the CJEU.

37. How will the delivery mechanism work? Who is responsible for it? How does it mitigate any adverse impacts, and is there a clear direct link between development and mitigation on a pro rata basis? Should there be one? Is there a difference between the mitigation required for development already identified within the Plan and development which is in addition to that which has already been considered within the Plan’s HRA?

3.6 It is unclear from the HRA (A35) or WLP (A1) when the mitigation measures set out in AF2 will be delivered and when suitable ‘environmental capacity’ will thus be available to allow development to proceed. Policy AF1 suggests that for development which is in addition to that identified in the WLP, mitigation measures must be in place prior to completion / occupation of the development proposed. It is therefore assumed that this will also be required for development which is identified in the WLP. This could therefore have a significant effect on the certainty of delivery of the housing and employment requirements under the WLP, ultimately undermining the whole Plan.

3.7 The WLP Interim Air Quality Mitigation Strategy (A36, Appendix B) provides an expenditure and cash flow projection, which shows that in Years 1-5 the costs required to deliver the strategy will exceed the income from the Developer Contributions. These costs include for significant contribution to a wider SNAP (or a ‘contingency’), however, the HRA itself (A35, p.213) concludes that “It is not…possible to consider a SNAP as either a preventative measure or mitigation at this current time due to the benefits being uncertain”. It is therefore unclear how this can form part of the mitigation package, to be funded through Developer Contributions, if it is not deemed to be a suitable mitigation measure. The proposed A36 strategy is therefore unsound.

3.8 Unless it can be shown ‘beyond reasonable scientific doubt’ that the proposed mitigation measures will result in the creation of suitable ‘environmental capacity’ in relation to air pollution within the Ashdown Forest SAC/SPA and Lewes Downs SAC, the conclusion of ‘no adverse effect’ resulting from the WLP cannot be reached and ‘Stage 3: Assessment of Alternative Solutions’ and ‘Stage 4: Imperative Reasons of Overriding Public Interest and Compensation Measures’ of the HRA process should be completed prior to adoption of the WLP.
38. Is criterion a) of Policy AF1, clear what development will fall within its remit and how developers should satisfy its requirements? Is the policy internally consistent in how the Lewes Downs SAC and the Ashdown Forest SAC are treated? What evidence is there that the harm would ensue without mitigation, and that the mitigation measures set out within Policy AF2 would be effective and directly relate to the proposed development?

3.9 For development which is ‘outside’ of those areas which have been proposed as allocations in the WLP, Policy AF1 states that these schemes will have to carry out their own Habitat Regulations Assessments, in combination with other projects and plans, and provide their own mitigation measures, which will need to be implemented prior to completion or occupation of the development. This decision appears to preclude any development within Wealden which is on sites which are unallocated, even if they be more sustainable sites, or more able to be delivered, due to the likely need for mitigation measures over and above those proposed by WDC in AF1 and AF2.

3.10 The proposed air pollution mitigation set out in A36, includes predominantly ‘strategic’ solutions which will need to be coordinated, delivered and monitored by the LPA. Through their HRA process, WDC have been unable to identify any mitigation solutions which are deliverable by individual developers, and would allow a conclusion of no significant adverse effect. As such, it is difficult to envisage an opportunity where an individual developer, promoting an unallocated site, would be able to identify and implement any solution which would be acceptable to WDC. Thus, it follows that this mechanism effectively sets insurmountable controls precluding the granting of any planning permissions within Wealden which would result in any net increase in traffic flows along the roads within Ashford Forest SAC/SPA and Lewes Downs SAC, on sites which are not allocated.

3.11 As Ashdown Forest SAC/SPA already experiences air pollution from nitrogen which is above the environmental targets, it is not apparent how WDC will be able to monitor the effectiveness of the mitigation proposed in AF1 an AF2 and Document A36. Without a replicable way to monitor whether the mitigation is in fact working to control the deposition from traffic generated by WLP development, when considered in combination with other Local Plans, it is not clear how this confirmation of delivery of effective mitigation will be concluded. Document A36 relies on the monitoring of effectiveness to ensure that suitable mitigation measures are provided, however, without direct and clearly established ‘links’ showing that the mitigation has reduced the impact of the WLP, and as such protected the favourable conservation status of the Ashdown Forest SAC/SPA habitats, it is questionable whether the mitigation strategy can be considered sound. Without clear evidence of effective mitigation, it is not clear how WDC will be able to conclude that there would be no adverse effect from air pollution impacts on Ashdown Forest SAC/SPA and Lewes Downs SAC, from development on sites which are allocated, or even from development on sites which are not.

41. Specifically, how would such measures set out in Policy AF2 be differentiated from other strategies, good practice, and the wider principles of sustainable development consistent with core planning principles of the Framework?

3.12 The strategic measures which are proposed in AF2 and Document A36 to respond to air pollution impacts on the Ashdown Forest SAC/SPA and Lewes Downs SAC are in fact sustainable travel measures which Local Planning Authorities should already be considering in their plan-making, as part of a sustainable development agenda. As the proposals include electric vehicle charging infrastructure to be located at key public locations, as well as within new development areas, it is argued that if these
features are necessary to respond to the already elevated air pollution experienced at the European sites, why should the provision of these features be tied to ‘new’ development, rather than already delivered for the benefit of the European sites? If the mitigation strategy is proposed as a funding mechanism for the delivery of strategic mitigation to respond to an existing air pollution problem, then it is clear that the proposals do not respond to provide additional ‘environmental capacity’, they are in fact trying to respond to an existing problem, and are not therefore mitigation measures.
REFERENCES


