Wealden Local Plan Examination
Hearing Statement prepared by Dr Paul Bond on behalf of Fairfax Acquisition Ltd: Matters relating to Habitat Regulations Assessment (HRA) and Air Quality

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1. **Introduction**

1.1 This statement has been prepared by Paul Bond PhD MSc BSc CEnv CSci MIEnvSc MCIEEM, Associate Sustainability Consultant at Hilson Moran, on behalf of Fairfax Acquisitions Ltd. It is an elaboration of matters relating to Habitat Regulations Assessment (HRA) presented in an earlier Regulation 19 Representation made by Tim Rodway, 04/10/19.

1.2 Since then, a number of events have ensued which have deemed the need for this elaboration necessary. In particular:

   a. The publication of Natural England’s (NE) written response to the Wealden Local Plan (LP) Proposed Submission Document (05/10/19) and subsequent response from Wealden District Council (DC) (January 2019);
   
   b. The Judgement of Advocate General Kokott under European Law, delivered 07/11/18, relating to Case C-461/17, Brian Holohan and Others v An Bord Pleanála;
   
   c. A meeting between representatives of Fairfax Acquisitions Ltd and Wealden DC Planning Team (19/11/19) to discuss HRA methodology.

2. **Inspector’s Issues and Questions**

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

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

   **Habitat Regulations Assessment (HRA)**

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

2.1.1 Under Section 110 of the Localism Act, the Planning Inspectorate (PINS) will need to see sufficient evidence to demonstrate that the 'duty to co-operate' has been undertaken appropriately, before considering whether a plan is sound.

2.1.2 If PINS consider that the legal requirement to co-operate has been met through joint working but there is disagreement about the policy outcome, then this will need to be resolved through the examination process.

2.1.3 Local Government Association and Planning Advisory Service Guidance advises that Councils and other public bodies covered by the duty should make every effort to ensure that strategic issues are properly addressed at the formative stages of the plan preparation process, and that any major disagreements are resolved well before the examination.

2.1.4 It is for the Inspector to decide whether sufficient co-operation between Wealden DC and NE has taken place to ensure that the basis of the LP is sound. Notwithstanding that assessment, it is clear that there are a great number of issues on which NE and Wealden DC still need to find agreement, particularly on HRA issues, many of them being fundamental to the provisions and deliverability of the LP.
2.1.5 With reference to NE’s written response to the Wealden LP Proposed Submission Document and subsequent response from Wealden DC, matters on which agreement have not yet been reached (and in many cases being diametrically opposed), include (but are not limited to) the following (please note that reference to Wealden DC below can be regarded as Wealden DC and/or their advisors):

a. NE is satisfied that the LP will not adversely affect the integrity of Ashdown Forest Special Area of Conservation (SAC) (together with Lewes Downs SAC and Pevensey Levels SAC) from air quality impacts, without mitigation measures being needed. Conversely, Wealden DC ascertain that air quality mitigation measures will be required in order to deliver the plan, as per Policies AF1 and AF2.

b. NE states that the air quality mitigation measures (if needed), do not provide the level of efficacy or certainty as to their delivery that would be required under the Habitats Regulations. Conversely, Wealden DC considers that the mitigation measures proposed are appropriate and will provide the requisite certainty.

c. NE asserts that although it is relevant to consider the whole (European Designated) site at screening stage, abundant specific information about qualifying features mean that further stages of assessment should only relate to these features and their location in relation to potential impacts. Where pollutant exceedances affect woodland, these should be disregarded in the Appropriate Assessment (AA) and only exceedances affecting the notified features of dry heath and wet heath should be assessed. Conversely, Wealden DC does not agree with this approach, stating that all of the lands and habitats within the SAC boundary must be considered.

d. Although Ashdown Forest SAC is currently in an exceedance state for oxides of nitrogen (NOx), ammonia (NH3) and N deposition, NE is of the opinion that this does not automatically mean that further plans or projects affecting it would have an adverse effect on site integrity. Conversely, Wealden DC ascertain that increased pollutant contributions to an exceedance state, no matter how small, will result in additional harm and move the site further away from its ability to ‘restore’ favourable condition.

e. It is NE’s opinion that air quality model “Scenario B”, with its precautionary element, is the most appropriate basis of assessment. It considers that “Scenario A” is wholly unreasonable and is not realistic, whilst “Scenario C” should be disregarded as it includes forecasted improvements from untested technology. Conversely, Wealden DC maintains that Scenario A is both ‘scientifically’ and ‘legally’ the correct scenario on which to base the LP.

f. 1% of Critical Load (CL)/Critical Level (CLE) is considered by NE’s air quality specialists (and by industry, regulators and other statutory nature conservation bodies) to be suitably precautionary, as any emissions below this level are widely considered to be imperceptible. Conversely, Wealden DC are of the opinion that the 1% approach is not appropriate.

g. NE are of the view that for Ashdown Forest, which is at/above the CL for N deposition, larger contributions of N would be required to result in a further reduction in floral diversity, when compared to a site with much less nutrient loading. Conversely, although Wealden DC accepts that there is some evidence of a non-linear response in species numbers relating to N deposition, they do not find such observations useful.
h. NE is of the opinion that even with the contributions from the LP, the overall environmental loading will return to below CL/CLE within an appropriate timeframe. Conversely, Wealden DC do not accept this.

i. NE identifies that much of the ecological monitoring and analysis at Ashdown Forest is unable to attribute road contributions as a statistically significant contributor to botanical diversity. Conversely, Wealden DC are convinced that there is a substantial body of evidence pointing to the effects of near-road and background atmospheric N deposition on this site.

j. NE are of the opinion that the decline in condition of large areas of Ashdown Forest SAC has been due wholly to management constraints (e.g. lack of grazing) and that there are measures in place to ameliorate the decline. Conversely, Wealden DC argues that the wording ‘wholly’ excludes the role of atmospheric deposition and that there is clear evidence of species effects that are consistent with CL/CLE exceedance.

k. NE objects to the allocation for major development within the High Weald AONB, at Ghyll Road, Heathfield and recommends that it is deleted to avoid the plan being considered unsound.

2.1.6 Consequently, there are numerous substantive issues over which Wealden DC and NE fundamentally disagree, which currently call the soundness of the LP and it’s deliverability into question.

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

2.1.7 With reference to point 2.1.5 (c) above, in their response to NE relating to the consideration of qualifying features, Wealden DC state that:

“The Habitats legislation itself does not distinguish between stages in HRA, i.e. between screening and an appropriate assessment. Therefore, WDC does not agree with Natural England’s representation regarding considering the whole site at the screening stage and then specific interest features only during further stages of assessment.”

2.1.8 Although the legislation may not explicitly distinguish such stages, EC Guidance supporting the Habitats Directive (Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, November 2001), clearly defines the stages as:

I. Stage One: Screening;

II. Stage Two: Appropriate assessment;

III. Stage Three: Assessment of alternative solutions; and

IV. Stage Four: Assessment where no alternative solutions exist and where adverse impacts remain.

2.1.9 This guidance should be of no surprise to Wealden DC as it is directly cited and transcribed in para. 3.2 of their HRA and the first 2 Stages of this methodology is adopted throughout the HRA.

2.1.10 With regard to Wealden DC’s assertion that “In an appropriate assessment, the implications for the site as a whole must be considered in the light of its conservation objectives.” I agree wholly with
this statement, but it only serves to support the qualifying feature approach advocated by NE, rather than to rebut it. The key phrase here is “in the light of its conservation objectives.”

2.1.11 The conservation objectives for Ashdown Forest SPA/SAC, together with associated citations, are published online by NE at http://publications.naturalengland.org.uk/publication/6399918323269632 and http://publications.naturalengland.org.uk/publication/6183967367626752.

2.1.12 The Conservation Objectives for the SAC and SPA seek to “Ensure that the integrity of the site is maintained or restored as appropriate...”, for the SAC this relates to ensuring that “the site contributes to achieving the Favourable Conservation Status of its Qualifying Features...”, whilst for the SPA it is to “ensure that the site contributes to achieving the aims of the Wild Birds Directive.”

2.1.13 For the SAC qualifying features, the Conservation Objectives seek to “Maintain the total extent of a mosaic of H4020 Northern Atlantic wet heath and H4030 European Dry heath communities...” and “Maintain the distribution and configuration of the feature, including where applicable its component vegetation types, across the site.” As such, there is no Conservation Objective designed to convert non-qualifying features such as woodland to heathland and thereby increase the area of qualifying feature – rather the focus is on maintaining the extent and increasing the quality of the qualifying features present.

2.1.14 In Britain, nightjar is one of the key ground nesting species associated with lowland heathlands, whilst Dartford warbler breeds almost exclusively on open heathland with a mix of heather and gorse.

2.1.15 The Conservation Objectives for the SPA in relation to the “Extent and distribution of supporting breeding habitat” seek to “Maintain the extent, distribution and availability of suitable breeding habitat which supports the feature for all necessary stages of its breeding cycle.” With regard to nightjar: “Habitat management should retain the open, mosaic structure of lowland wet and dry heath, ensuring all life cycles of heather are present. It may, in certain areas, be appropriate to maintain scrubby vegetation and occasional taller trees should be available for the nightjar to “churr” from.” For Dartford warbler there is an objective to: “Maintain the amount of open and unobstructed terrain within and around at least 0.5 km of the site, and restore dwarf shrub cover.” Similarly, there is no intention to increase the area of heathland e.g. by reducing woodland cover, to maintain populations of nightjar and Dartford warbler.

2.1.16 In addition to qualifying heathlands, the SAC boundary encompasses a mosaic of other habitats including woodlands, grasslands, ponds, streams and a number of man-made or altered features and habitats such as highways, access roads and tracks, car parks, picnic areas and the extensive Royal Ashdown Forest Golf Course (RAFGC), which neither meet the criteria of qualifying features, nor have little prospect of them ever being converted to such.

2.1.17 The Conservators are empowered by the 1974 Ashdown Forest Act to manage the Forest. They do not manage the full extent of the c. 3,205 ha SPA, being responsible for 2,472 ha or c. four-fifths of it; the remaining areas largely comprising (a) Old Lodge (c. 74 ha), a Local Nature Reserve, (b) Pippingford Park (c. 340 ha), a MoD training area, (c) Hindleap Warren (c. .120 ha) and (d) Broadstone Warren (c. 150 ha).

2.1.18 With reference to the Conservator’s document “Favourable Condition: A management Plan in support of Countryside Stewardship 2016-2020” only 1,395 ha of their 2,472 ha responsibility (just under three-fifths) comprise heathland, with 995 ha (c. two fifths) comprising woodland and the remaining 112 ha comprising “other (e.g. car parks, picnic areas, golf courses)”.

http://publications.naturalengland.org.uk/publication/6183967367626752

http://publications.naturalengland.org.uk/publication/6399918323269632

205 ha SPA, being responsible for 395 ha of their 2,472 ha responsibility.
confirms that the Conservators aim to improve the overall condition of both the lowland heathland and woodland, rather than increase the spatial extent of qualifying features. None of the c. 110 ha RAFGC (with the exception perhaps of a small area at the southern end of the “Old Course”) lies within a “Heathland Management Zone”, whilst the impoverished nature of habitats and increased levels of disturbance on the RAFGC, restrict breeding nightjar and Dartford warbler to the southern fringes of the Old Course. Consequently, there is a general lack of qualifying features and species within the boundaries of the RAFGC.

2.1.19 As such, development resulting in additional pollutant deposition and disturbance in areas not deemed to host a qualifying feature or species may well be judged to not adversely affect the integrity of the SAC or SPA at the AA Stage.

2.1.20 Wealden DC asserts that NE’s approach described in point 2.1.5 (c) above could only be adopted if it “could be evidenced definitively and with certainty that an area of the site could never be restored to contain such features, and could never have any relevant supporting role to play within the integrity of the site” and cites the judgment of the European Court of Justice (ECJ), on case C-461/17 as underpinning their stance.

2.1.21 In response to this assertion, and taking paras. 2.1.11 to 2.1.19 above into consideration:

a. With regard to providing certainty that an area of the site could never be restored to contain qualifying features, the Ashdown Forest Conservation Objectives clearly demonstrate that:

(i) There is no intention to restore or transform non-qualifying features, such as woodlands, into qualifying heathland habitat; rather the maintenance of a mosaic of non-qualifying and qualifying features is essential to the preservation of the populations of qualifying bird species (e.g. for foraging, comming and courtship purposes); and

(ii) Even if there was that intention, there are certain habitats and features for which there would be no realistic prospect of ever restoring or transforming to qualifying heathland, such as highways and the majority of the RAFGC, with its intensely managed greens and fairways, which has served as golf course since 1888 and is anticipated to remain as such in perpetuity.

b. Whether a certain development, in isolation or in combination, would adversely affect the integrity of Ashdown Forest SPA/SAC; the significance of the impact additional pressure such as pollutant deposition or visitor disturbance may have on non-qualifying features and qualifying features, will differ. For example, non-qualifying features such as woodlands or amenity areas such as golf courses, which do not provide suitable habitat for ground nesting nightjar and Dartford warbler, will not be particularly sensitive to impacts from visitor disturbance/dog walking, trampling and cat predation.

c. Wealden DC cites the judgment of the ECJ, on case C-461/17, in support of their refusal to accept NE’s approach. However, although the ruling states that an AA must catalogue the entirety of habitat types and species for which a site is protected, it should identify and examine the implications of the proposed project on the species present on that site, and for which that site has not been listed, as long as those implications are liable to affect the conservation objectives of the site. Consequently, in the case of Ashdown Forest, impacts on non-qualifying features would not have an effect on the conservation objectives of the site (refer to paras. 2.1.11 to 2.1.19 above).
2.1.22 The reason for the 400 m buffer prescribed Policy EA2 is that there is a presumption that the impact from a net increase in residential units within this zone is likely to be such that any mitigation would not be able to prevent a significant effect. This is due primarily to:

a. the potential for pet cats to reach the SPA and predate ground nesting birds, with a roaming distance typically limited to 400 m from their home; and

b. inability to prevent increased recreational pressure and associated impacts on ground nesting birds such as disturbance, trampling and intentional damage of birds and nests by people and dogs - 400 m is the optimum walking distance for people to visit the SPA.

2.1.23 Consequently, adopting NE’s approach, it can be envisaged that should a proposed development come forward within 400 m of the SPA boundary, but not within 400 m of a qualifying feature or species (and there is no intention or prospect of the non-qualifying features being restored or transformed to qualifying features), the development would be permitted, as long as it can be demonstrated that it will not adversely affect the integrity of the SPA.

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

2.1.24 Either the degree of uncertainty in the ‘Ashdown Forest Traffic Model’ or what constitutes an actual increase in traffic movements should be made clear in the LP. Please refer to paras. 7.6 to 7.11 of Tim Rodway’s Regulation 19 Representation, 04/10/18 for further details.

2.2 Matter 2: Vision and Objectives and Local Plan Growth

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?

Question 39: What would be the impact on development viability of the proposed financial obligations set out in the Air Quality Mitigation – Interim Mitigation Strategy Tariff Guidance for Residential Dwellings and Business Development?

2.2.1 The combined Recreational and Air Quality tariffs totalling £8,100 (£5,000 SANGS/SAMMS plus £3,100 air quality) per proposed new dwelling, irrespective of its size, value or distance from Ashdown Forest (within the 7 km buffer), is questioned. In particular, I would anticipate that such a levy would present a financial disincentive to developers to provide low cost affordable housing, with higher value properties preferred in order to offset the £8,100 levy. Please refer to paras. 7.1 to 7.5 of Tim Rodway’s Regulation 19 Representation, 04/10/18 for further details.

Question 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?

2.2.2 The LP does not make it clear whether the same financial contribution and mitigation measures should be applied to developments permitted, in addition to those identified in the LP. This should
be clarified. Please refer to para. 7.12 of Tim Rodway’s Regulation 19 Representation, 04/10/18 for further details.

**Issue 3: Are policies EA1- EA3 positively prepared, consistent with national policy and justified?**

**Question 44: What is the justification for setting out the 400 m and 7 km thresholds? Is it clear what is meant by ‘large residential developments’?**

2.2.3 It is unclear in the LP whether windfall development allocated under Policy WLP7, within the significant parts of the Forest Row Development Boundary that lie within 400 m of the SPA, are to be permitted. Although, Footnote 23 of the LP states: “...windfall allowance and distribution identified in the table constitutes ‘identified development’ for the purposes of Policy AF1 Air Quality and Wealden Local Plan Growth.”, it also lies within the 400 m “exclusion zone” identified in Policy EA2, in which “Proposals for a net increase in residential development or other accommodation will not be permitted... unless there are exceptional circumstances where it is demonstrated, through an appropriate assessment, that mitigation will be effective...”. The same goes for those parts of the Crowborough Development Boundary that lie within 400 m of the SPA. If they are to be permitted, there should be clarification as to what constitutes exceptional circumstances in these cases, whether mitigation is necessary, and if so how this will be effective.

07/05/19

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