Neutral Citation Number: [2017] EWHC 351 (Admin)

Case No: CO/3943/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2017

Before:

MR JUSTICE JAY

- -

Between:

WEALDEN DISTRICT COUNCIL	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) LEWES DISTRICT COUNCIL** **(3) SOUTH DOWNS NATIONAL PARK AUTHORITY**	**Defendants**
- and –	
NATURAL ENGLAND	**Interested Party**

- -
- -

John Hobson QC and Scott Lyness (instructed by **Trowers & Hamlins LLP**) for the **Claimant**
Richard Moules (instructed by **Government Legal Department**) for the **First Defendant**
James Findlay QC and Clare Parry (instructed by **Sharpe Pritchard LLP**) for the **Second and Third Defendants**

Hearing date: 8th February 2017

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Judgment Approved

See Order at bottom of judgment.

MR JUSTICE JAY:

Introduction

1. This is a challenge by way of application for statutory review brought under section 113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to quash part of the Lewes District Local Plan Part 1, known as the Joint Core Strategy 2010-2030 ("JCS").

2. The JCS was jointly prepared by Lewes District Council ("LDC") and South Downs National Park Authority ("SDNPA") under Part 2 of the 2004 Act. LDC is the local planning authority for the district of Lewes, save for that part – I am told 56% - which falls within the South Downs National Park (in respect of which SDNPA is, and has been since 1st April 2011, the local planning authority). The JSC forms part of the statutory development plan for the district of Lewes, including the extent of the South Downs National Park which falls within it.

3. The Secretary of State for Communities and Local Government ("SSCLG") is involved in these proceedings as First Defendant because one of his inspectors examined the emerging JCS and gave his report to WDC and SDNPA on 22nd March 2016. Following his recommendation that the emerging JCS was sound, the JCS was adopted by LDC on 11th May 2016 and by SDNPA on 23rd June 2016.

4. The geographical and environmental focus of this application is Ashdown Forest Special Area of Conservation ("the SAC") which was designated as such in 2005 pursuant to Council Directive 92/43/EEC of 21st May 1992 on the Conservation of Natural Habitats and Wild Fauna and Flora ("the Habitats Directive"). The designation was given for a number of reasons, including the SAC's extensive areas of lowland heath, which is vulnerable to nitrogen dioxide pollution from motor vehicles. The SAC covers 2,729 hectares and lies wholly within the area of the Claimant, Wealden District Council ("WDC"). This is the local planning authority for Wealden District, save for that part of it (to the south) which falls within the South Downs National Park. Relevantly for present purposes, it should be noted that two major roads pass through or close to the SAC: the A22 runs more or less from north to south, and travels across the western side of the SAC; the A26, more to the east, runs alongside the south-eastern boundary of the SAC. It should also be noted that the north-eastern boundary of LDC is approximately 5-6 kms from the nearest point on the south-eastern boundary of the SAC. These geographical features are apparent on the colour plan which was helpfully provided to me in advance of the hearing.

5. The Interested Party, Natural England, has submitted a witness statement but has not otherwise pursued an active role in these proceedings. It provided expert advice to LDC and SDNPA during the preparation of the JCS relating in part to the issue of the potential effects of planned development on the SAC. The advice given was that the planned development would not likely have a significant impact on the SAC in consequence of increased traffic flows.

6. The principal point raised by this application, in the terms in which it was formulated by Mr John Hobson QC for WDC, is whether LDC and SDNPA acted unlawfully in concluding, on advice, that the JCS would not likely have a significant effect on the SAC *in combination with* the Wealden Core Strategy ("WCS"). I have emphasised the adjectival phrase "in combination with" because it lies at the heart of this application. WDC does not suggest that deleterious environmental effects are likely to have a significant effect on the SAC were they to be considered in isolation. WDC's point is that they must properly be considered in tandem with the WCS, which is another (and

earlier) Joint Core Strategy prepared with SDNPA and adopted in late 2012 and early 2013. The essential contention made is that if relevant data and findings are properly amalgamated, as they should be, the effects of increased traffic flows near the SAC would not have been ignored at the first screening or scoping stage of the process.

7. The subsidiary point advanced by WDC is that SSCLG's inspector failed to have regard to its representations that were relevant to the examination of the JCS, in particular the potential effect of planned development on the SAC.

8. Before these matters can be appropriately examined, I must set out the essential factual background to this application (drawing heavily from the pleadings, the agreed chronology and the skeleton arguments) and then address the statutory and regulatory framework.

Essential Factual Background

9. In 2010 LDC issued a series of topic papers to guide development of the JCS, and later in that year produced a draft screening report of the emerging JCS for the purpose of the Habitats Directive.

10. Natural England gave advice on the draft screening report as follows:

> *"During the meeting with NE, it was explained that it was important to assess the impact of the Core Strategy on traffic flows on routes (including routes both within and outside the District) that lie within 200m of a protected site. NE explained that if the Core Strategy resulted in any of the following consequences on such routes then its affect [sic] on the protected sites would not be of significance:*
>
> - *If the expected increase in traffic ("AADT flows") is less than 1,000 cars per day or 200 HGVs per day.*
> - *If there is less than a 1% increase in traffic generated compared to that predicted at the end of the period that the Core Strategy plans for.*
> - *…"*

11. LDC's screening opinion concluded that it could not screen out the impacts on the SAC because, amongst other reasons, at this time LDC did not have a traffic model which would allow it to conclude whether the traffic generated by the proposed development would be significant enough to impact on the integrity of Ashdown Forest.

12. On 16th September 2010 WDC met with representatives of Natural England to discuss the issue of nitrogen deposition in relation to the SAC. Natural England advised that, having regard to guidance in what is now Highways England's Design Manual for Roads and Bridges ("DMRB"), if estimated AADT flows arising from the WCS

would be increased by 1,000 cars or more on any road in or adjacent to Ashdown Forest, that would trigger the need for an appropriate assessment under the Habitats Directive and domestic regulations.

13. In February 2011 WDC issued a report (by itself, and the relevant highways authority) which assessed the impact of the increase in traffic resulting from what was proposed in the WCS on the SAC. The WCS is not part of this application for statutory review, but it seems clear that WDC adopted the DMRB methodology and Natural England's advice. It assessed how roads within 200m of the SAC would be affected by development anticipated by the proposed WCS including committed developments. Additional AADT flows were all below the 1,000 car threshold such that a detailed assessment was not required, albeit in the case of a section of the A26 within 200m of the SAC, there was a figure of 950 cars. This is the A26 Duddleswell Road to Crowborough link which passes along the south-eastern boundary of the SAC.

14. In August 2011 WDC published its final submission WCS and associated Habitats Regulations Assessment ("HRA"). The HRA identified the A26 as the "main road corridor of interest", and stated that towards the centre of the SAC [I interpolate, more than 200m away from the A26] the nitrogen deposition load "is significantly exceeded beyond the ability of habitats to withstand deleterious effects". However, purportedly applying DMRB guidance:

> *"… maximum increases in traffic would arise on the A26 connecting Uckfield and Crowborough … with an increase of 950 vehicles per day … [below] the traffic criterion under the DMRB guidance … the impact of the [WCS] is therefore considered neutral and no further assessment is required.*
>
> *…*
>
> *Since the [WCS] has been found to be neutral in relation to air quality on roads local to European sites, as defined by the DMRB guidance, there can be no residual impact. Further consideration of in combination effects is not required."*

15. Meanwhile, in September 2011 an emerging JCS was published jointly by LDC and SDNPA and consulted on between then and November. At that time LDC was proposing to provide 4,150 additional homes in the plan period. It should be noted that the vast majority of these were to be focussed in the urban areas of LDC (lying to the centre and south) rather than in the north-east (i.e. the area closest to the SAC). The village of Newick, which lies on the A272 at the north-eastern section of LDC, was being proposed to accommodate 120-174 dwellings. It should be observed at this stage that any increase in traffic flows on the A26 would not just result from development in Newick.

16. Between 17th January and 2nd February 2012 examination hearings took place into the WCS. At these hearings WDC stated that it was unable to model what was coming out of other Core Strategies or similar local plans as other authorities were not at the level of detail or stage as WDC's.

17. On 30th May 2012 a meeting took place between LDC and Natural England. It was confirmed that the levels of traffic generated by the JCS were not significant. On 6th June LDC emailed WDC to similar effect.

18. On 30th October 2012 the examining Inspector reported on the WCS and found that it was sound. The Inspector accepted that the DMRB methodology was correct as regards "a scoping assessment of air quality", and then at paragraph 28 said:

> *"Based on the DMRB results, one section of the A26 would have an additional AADT of 950, indicating very little headroom for development beyond that proposed without further assessment to determine whether there would be a likely significant effect on the Ashdown Forest SAC. This work has not been done. However, the best available evidence on the existing nitrogen deposition load towards the centre of the SAC is that it significantly exceeds the ability of habitats to withstand deleterious effects. Deposition is likely to be more severe close to road corridors. Furthermore, I am mindful that the traffic modelling does not take account of possible traffic impacts of growth in neighbouring authorities. Although heathland management may have some part to play in mitigating the effects of nitrogen deposition, in the context of these other factors there is sufficient evidence at this point on a precautionary basis to restrict further development in north Wealden beyond that in the [WCS] …"*

19. The examining Inspector proposed a modification to the WCS requiring WDC to undertake further investigation, in collaboration with other affected authorities, of the impacts of nitrogen deposition on the SAC. His reference to "very little headroom" can only be sensibly interpreted as the difference between 950 and 1,000 AADT.

20. In February 2013 WDC and SDNPA issued a WCS adoption statement which was challenged in proceedings in this jurisdiction. In February 2014 Sales J (as he then was) dismissed the challenge. Issues arise as to Sales J's analysis and approach, which I will need to address later on[1].

21. Meanwhile, in January 2013 LDC and SDNPA produced a "JCS – Proposed Submission Document" which proposed provision of 4,500 net additional dwellings in the plan period, with 100 of these at Newick. Accompanying this document was an HRA which referred in terms to advice received from Natural England and thanked WDC for its assistance.

22. The HRA noted the governing legal principles as follows:

> *"2.7 Other plans and strategies that could have an impact on protected sites "in combination" with the plan under production, also have to be taken into account during the screening stage …*

[1] On 9th July 2015 the Court of Appeal overturned part of Sales J's judgment, but immaterially for the purposes of these proceedings.

2.8 Importantly, the HRA process is underpinned by the precautionary principle, especially in the assessment of potential impacts and their resolution. Therefore, if it is not possible to rule out a risk of harm, based on the evidence available, to a protected site, it is assumed a risk may exist. As a result, it would mean that such a site could not be "screened out" at the initial stage of the HRA process.

…

4.2 As the statutory nature conservation body for England, officers from [LDC] initially met with National England to discuss possible effects of the Core Strategy on the protected sites. We used the meeting to examine whether we were able to screen any of the protected sites out of the further stages of the AA [appropriate assessment] procedure.

4.3 During the meeting with NE, it was explained that it was important to assess the impact of the Core Strategy on traffic flows on routes (including routes that lie both within and outside of the District) that lie within 200m of a protected site. NE explained that if the Core Strategy resulted in any of the following consequences on such routes then its affect [sic] on the protected sites would not be of significance:

** If the expected increase in traffic is less than 1,000 cars per day …"*

** If there is less than a 1% increase in traffic generated compared to that predicted …*

…

5.15 Stage 1 (Screening) of the HRA process concluded that due to additional transport movements caused by additional development the [JCS] proposes, it could not be ruled out that nitrogen deposition caused by additional transport movements would not have a negative effect on the Ashdown Forest SAC.

…

5.18 … additional transport movements caused by the Core Strategy on the roads within 200m of the Ashdown Forest SAC would be:

- 94 AADT on A22
- 158 AADT on A26
- 71 AADT on A275
- 19 AADT on B2026

> 5.19 As the above results show, the [JCS] would not generate 1,000 AADT on the roads near to the Ashdown Forest SAC. Based on advice given by Natural England at the Screening Stage, we can "screen out" the Ashdown Forest SAC from the rest of the HRA process, in terms of potential air quality impacts.
>
> 5.20 As such, it has been determined, in consultation with Natural England, that the [JCS] would not have a significant negative effect on the Ashdown Forest SAC in terms of nitrogen deposition either alone or in combination with other plans. Therefore mitigation and avoidance measures are not required."

Further, at paragraphs 5.22 to 5.27 the HRA specifically addressed the effect of the JCS looked at in combination with the WCS in the context of Spatial Policy 2, and concluded that mitigation measures were required.

23. In March 2014 an Addendum to the HRA was promulgated. This reflected "Focussed Amendments" to the JCS Proposed Submission Document, proposing (so far as is material) a total of 5,600 houses in the plan period. Consequently, the AADTs set out in the HRA were revised as follows:

> *"119 AADT on A22*
>
> *190 AADT on A26*
>
> *92 AADT on A275*
>
> *22 AADT on B2026"*

24. It may be deduced that a 24% increase in the housing provision does not yield matching increases in the projected AADTs. For example, the increase in relation to the A22 is 26% whereas the increase in relation to the A26 is 20% (or thereabouts). I infer that the relationship between housing and AADT is not linear. Whilst I am addressing the basic arithmetic, it may even more obviously be seen that adding 950 and 190 (in relation to the A26) takes one above the 1,000 AADT threshold.

25. At this stage WDC raised no objections to the HRA. The first intimation of concern was expressed by WDC's Planning Policy Manager who wrote to comment on the Newick Parish Council Proposed NDP on 13th October 2014. She said as follows:

> *"… I wish to draw your attention to the need to assess the in combination effects of development contained with the NDP, along with other plans and projects, in relation to nitrogen deposition on the Ashdown Forest SAC …*
>
> *This is an issue which was addressed in the Wealdon District Core Strategy examination, and subsequently raised at the [judicial review]. To clarify the position, the Wealden District Core Strategy did not consider the in combination effects of other relevant plans with regards to nitrogen deposition, as other relevant plans had not been sufficiently progressed to allow in combination assessment. It is considered, based on our understanding of Article 6(3) of the Habitats Directive, that any*

> *plan must be considered in combination. As a result, Wealden District will be taking into account any Local Plan with proposals which may affect the Ashdown Forest in combination with Wealden District proposals in the Core Strategy Review."*

26. On 20th January 2015 hearings commenced into the JCS. On 10th February the examining Inspector produced an initial findings letter in which he stated that in his opinion LDC and SDNPA had met all the statutory requirements. However, he also considered that the fully objectively assessed housing need ("OAN") could not be met by the proposal. Accordingly, in this regard the proposal could not be described as "sound". The inspector asked LDC and SDNPA to attempt to get closer to OAN by making further strategic allocations.

27. Accordingly, in June 2015 LDC and SDNPA proposed by way of Main Modifications additional strategic allocations in Peacehaven and Lewes (but not elsewhere), thereby increasing the number of houses in the JSC to 6,900. For whatever reason, the addendum HRA assessment which ensued did not address the Ashdown Forest SAC (nothing on my understanding turns on this).

28. On 10th June 2015 an officer of WDC wrote to LDC setting out concerns regarding the in-combination impacts of local plans pursuant to the Habitats Regulations.

29. There then followed a period of consultation on the Main Modifications. On 2nd October 2015, which was the last day of the consultation period, WDC made a representation to the examining Inspector arguing that the methodology used by LDC and SDNPA in their HRA was flawed. The representation was duly summarised in the consultation statement and provided to the inspector, under the rubric "other comments" (strictly speaking, it did not relate to the Main Modifications). The summary (in my view, an accurate one) reads as follows:

> *"There is no in-combination assessment of the Local Plan with the adopted Wealden District Core Strategy in relation to nitrogen deposition and the [SAC]. The HRA of the proposed modifications does not assess the impact of the plan on the A26 adjacent to the Ashdown Forest. The March 2014 HRA showed the JCS to have 190 AADT. In combination with the WDCS this would exceed the DMRB screening criteria. It is not clear if the additional development will exacerbate this position."*

The summary, together with WDC's letter of representations, was made available to the examining Inspector.

30. In December 2015 resumed hearings into the JCS took place. WDC did not seek to become involved in that process.

31. On 22nd March 2016 the examining Inspector reported on the JCS and concluded that it was sound. He did not specifically comment on the conclusions of the HRA (as amended) and any environmental impact (or lack of it) on the SAC. However, speaking more generally, he expressed his overall conclusion as follows:

> *"The Habitats Regulations Assessment Report (September 2014) shows that there will be no significant adverse effect on any protected sites arising from the implementation of the plan and sets out why Appropriate Assessment is not therefore necessary, as agreed by Natural England."*

32. On 11th May 2016 LDC adopted the JCS. On 21st June 2016 WDC sent a pre-action warning letter. On 23rd June 2016 SDNPA adopted the JCS. Following further correspondence, the claim form was issued on 4th August 2016. WDC seeks a quashing order confined to two specific spatial policies in the JCS: namely, SP1 and SP2.

The Legal Framework

33. Article 6(3) of the Habitats Directive provides:

> *"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 projects, shall be subject to appropriate assessment …"*

34. Regulation 102 of the Conservation of Habitats and Species Regulations 2010 [SI 2010 No 490] ("the Habitats Regulations") applies the requirements of Article 6(3) to domestic law:

> *"**102. Assessment of implications for European sites …***
>
> *(1) Where a land use plan –*
>
> (a) is likely to have a significant effect on a European site [including the SAC] … (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of the site,
>
> the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives."

35. The statutory framework for preparing and examining development plan documents was summarised by Patterson J in JJ Gallagher Ltd v Cherwell DC [2016] EWHC 290 (Admin), as follows:

> *"28. The statutory framework for local plans is found in Part 2 of the Planning and Compulsory Purchase Act 2004 (PCPA). In particular:*
>
> *i) A local planning authority is to prepare a scheme of development plan documents: section 15(1).*

ii) The development plan documents must set out the authority's policies relating to the development and use of land in their area: section 17(3).

iii) In preparing a local development plan document the local planning authority must have regard to the matters set out in section 19 such as national policy: section 19(2)(a).

iv) Each local development plan document must be sent to the Secretary of State for independent examination: section 20(1).

v) The local development plan document must only be sent for examination if the relevant requirements have been complied with and the plan is thought to be ready: section 20(2).

vi) Section 20(5) provides that the purpose of an independent examination is to determine whether the development plan documents satisfy the requirements of section 19 and section 24(1) (regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents), whether the plan is sound and whether the local planning authority has complied with its duty to cooperate.

vii) The purpose of an independent examination is to determine in respect of the development plan document whether it is sound: section 20(5)(b).

viii) If the inspector finds that the plan is sound he must recommend adoption of the plan and give reasons for his recommendation."

36. Section 17(8)(a) provides that a document is a local development document only in so far as it is adopted by resolution of a local planning authority. By section 37(3), a development plan document "is a local development document which is specified as a development plan document in the local development scheme".

37. Section 23 of the 2004 Act provides:

*"**Adoption of local development documents***

(1) … [I was referred to this sub-section by Mr James Findlay QC for LDC and SDNPA. In fact, it is not the relevant provision, applying only to local development documents which are not development plan documents]

(2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document –

(a) as it is; or

(b) with modifications that (taken together) do not materially affect the policies set out in it.

…

(5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority."

38. Section 28 of the 2004 Act provides in material part:

*"**Joint local development documents***

(1) Two or more local planning authorities may agree to prepare one or more joint local development documents.

(2) This Part applies for the purposes of any step which may be or is required to be taken in relation to a joint local development document as it applies for the purposes of any step which may be or is required to be taken in relation to a local development document.

(3) For the purposes of subsection (2) anything which must be done by or in relation to a local planning authority in connection with a local development document must be done by or in relation to each of the authorities mentioned in subsection (1) in connection with a joint local development."

39. By section 38(3)(b) of the 2004 Act (which is in Part 3), "the development plan is the documents (taken as a whole) which have been adopted or approved in relation to that area". So, the effect of this subsection is that, following adoption, that document (or these documents) become(s) part of the statutory development plan for the adopting local planning authority's area.

40. Section 113 of the 2004 provides in material part:

*"**Validity of strategies, plans and documents***

(1) This section applies to—

…

(c) a development plan document;

…

and anything falling within paragraphs (a) to (g) is referred to in this section as a relevant 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.

(3A) An application must not be made under sub-section (3) without the leave of the High Court.

(3B) An application for leave … must be made before the end of the period of six weeks beginning with the day after the relevant date [viz. the date of adoption of the development plan].

…

(6) Subsection (7) applies if the High Court is satisfied—

(a) that a relevant document is to any extent outside the appropriate power;

(b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.

(7) The High Court may —

(a) quash the relevant document;

(b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.

(7A) If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.

(7B) Directions under subsection (7A) may in particular-

(a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;

…

(7C) The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document -

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

> *…*
>
> *(9) The appropriate power is —*
>
> *…*
>
> *(c) Part 2 of this Act in the case of a development plan document or any revision of it;*
>
> *…*
>
> *(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document.*
>
> *(11) References to the relevant date must be construed as follows—*
>
> *…*
>
> *(c) for the purposes of a development plan document (or a revision of it), the date when it is adopted by the local planning authority or approved by the Secretary of State (as the case may be);*
>
> *…"*

41. Certain provisions of the 2004 Act and the Town and Country Planning (Local Planning) (England) Regulations 2012 [SI 2012 No 767] have been drawn to my attention, and the following are of some relevance. By regulation 17, "adoption statement" means a statement specifying the date on which a local plan was adopted. Regulation 18 obliges a plan-making authority to take account of representations about the content of a local plan made by "specific consultation bodies", here the WDC. Further, by regulation 23 an examining Inspector must take into account representations made by any person on the submission version of the plan.

42. Commendably, the parties have been able to agree a series of legal propositions relevant to this application. I am able to borrow their combined efforts, with few minor amendments.

43. A contention that a development plan document is not within the appropriate power under section 113 of the Planning and Compulsory Purchase Act 2004 brings into play conventional principles of administrative law: Blyth Valley BC v Persimmon Homes (North East) Ltd [2008] EWCA Civ 861 at paragraph 8.

44. The following legal principles apply to the application of Article 6(3) of the Habitats Directive and regulation 102 of the Habitats Regulations:

    i) the consideration of whether there are likely significant effects is a "trigger" for an appropriate assessment: R. (Champion) v North Norfolk DC [2015] 1 W.L.R. 3710 at paragraph 41; Ashdown Forest Economic Development LLP v

Wealden District Council & Anor [2015] EWCA Civ 681 at paragraph 12; R (Mynydd y Gwynt) v. Secretary of State for Business Energy and Industrial Strategy [2016] EWHC 2581 at paragraph 20;

ii) where there is a risk of significant adverse effects to a protected site, there should be an appropriate assessment; and such a risk exists "if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned"; and "in case of doubt as to the absence of significant effects such an assessment must be carried out": the Waddenzee case (Case C-127/02) [2004] ECR-1 7405 at paragraph 44; R (Hart District Council) v. SSCLG [2008] 2 P&CR 16 at paragraph 78; Mynydd y Gwynt at paragraph 20;

iii) "appropriate" is not a technical term but means that the assessment should be appropriate to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned, to a "high standard of investigation"; and this issue is a matter of judgment for the authority: Champion, at paragraph 41; Mynydd y Gwynt, at paragraph 20;

iv) in respect of the second stage the competent authority must be certain that the plan or project in question will not adversely affect the integrity of their site concerned: Waddenzee at paragraphs 56-57. There should be "no reasonable scientific doubt" remaining as to the absence of such effects (paragraph 59); Sweetman and others v An Bord Pleanála (Case C-258/11) [2014] P.T.S.R. 1092 at paragraphs 45-49;

v) this involves a "strict" precautionary approach: Smyth v. Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at paragraph 61;

vi) the appropriate assessment "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned": Sweetman at paragraph 44;

vii) a third party alleging that there was a risk that cannot be excluded on the basis of objective information must produce credible evidence that there was a real as opposed to hypothetical risk that must have been considered: Boggis v. Natural England [2009] EWCA Civ 1061 at paragraph 37;

viii) a decision-maker discharging its duties under the Habitats Directive and the Habitats Regulations should give the views of a statutory consultee considerable weight (Ashdown Forest Economic Development LLP v SSCLG, Wealden District Council [2014] EWHC 406 (Admin) at paragraph 110). However, that advice is not binding and it does not have to be given such weight if cogent reasons can be given for departing from it: see R (Akester) v. DEFRA [2010] EWHC 232 (Admin) at paragraph 112; Wealden DC v. SSCLG [2016] EWHC 247 (Admin) at paragraphs 91 and 95; DLA Delivery v. Lewes District Council [2015] EWHC 2311 at paragraph 32; Mynydd y Gwynt at paragraph 20.

45. Policy statements must be interpreted objectively in accordance with the language used, read in its proper context: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 at paragraphs 17, 18 and 21.

46. The interpretation of policy is a matter for the courts: R (on the application of the Manchester Ship Canal Company Ltd) v. Environment Agency [2013] EWCA Civ 542 at paragraph 23.

47. A planning authority is under a duty to take all reasonable steps to acquaint itself with the information relevant to the decision in order to be able to arrive at the correct decision, albeit that the content of the duty will vary according to the context: R (Hayes) v. Wychavon District Council [2014] EWHC 1987 (Admin) at paragraph 29. Where it is alleged that the planning authority failed in its duty to make sufficient inquiry, the question to be asked is whether the inquiry made by the planning authority was so inadequate that no reasonable planning authority could suppose that it had sufficient material available upon which to make its decision to grant planning permission and impose conditions.

48. These agreed legal propositions may be supplemented to the following extent.

49. First, Mr Hobson was keen to emphasise, and I agree, that the decision of Hickinbottom J in Mynydd y Gwynt was not directed to the issue of in-combination assessments. That issue did not arise.

50. Secondly, in Sweetman Advocate-General Sharpston (at paragraph 48) stated:

> *"The requirement that the effect in question be "significant" lays down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by article 6(1), activities on or near the site would risk being impossible by reason of legislative overkill."*

51. Thirdly, at paragraph 78 of his judgment in Smyth v SSCLG [2015] EWCA Civ 174, Sales LJ drew a distinction between the bare legal requirements of Article 6(3) and the evaluative processes which must be undertaken to ensure their fulfilment (the court itself undertakes an evaluative process under section 113 which I will need to address). Specifically:

> *"Although the legal test is a demanding one, requiring a strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations. As AG Kokott explained in paragraph 107 of her Opinion in Waddenzee, the conclusion to be reached under an appropriate assessment under the second limb of Article 6(3) cannot realistically require the attainment of absolute certainty that there will be no adverse effects; the assessment "is, of necessity, subjective in nature" …"*

I will be returning to this theme in the analytical section of this judgment.

52. Fourthly, at paragraphs 73-77 of his judgment in R (oao Mott) v Environment Agency [2016] 1 WLR 4388, Beatson LJ warned against the dangers of this court substituting its own factual and evaluative assessments for those of an expert decision-maker. If "tenable expert opinion" exists, a reviewing court should be very slow to hold that the expert decision-maker, or I would add the non-expert decision-maker relying on that expert opinion, has erred in the Wednesbury sense. Here I am paraphrasing the effect of these paragraphs in Beatson LJ's judgment.

53. There was some debate at the Bar as to whether Hickinbottam J's two-stage approach is consistent with the judgment of Lord Carnwath JSC in Champion. In my judgment, there is no inconsistency between them, although one continues to need to be careful with the use of terms such as "scoping", "screening" and "trigger". "Scoping" is not a term of art; "trigger" is a metaphor. "Screening" can be a term of art, but it also can be deployed more informally. Competent authorities are quite entitled to use threshold levels and values in order to eliminate from further consideration *de minimis* environmental impacts which, on scientific evidence, fall short of engendering any relevant risk. However, and this is another point which will require development, *de minimis* is not a synonym for nugatory.

54. Since the hearing, the Court of Appeal handed down its judgment in R (oao DLA Delivery Ltd) v Lewes DC and Newick Parish Council [2017] EWCA Civ 58. At this stage I note that paragraphs 29-31 of the judgment of Lindblom LJ, containing a survey of the applicable legal principles, are wholly consistent with the parties' common ground in the case before me, as well as my reference to the application of the Wednesbury test (as per paragraph 51 above). I will be returning to this authority below. My wider researches have also taken me to the decision of the Supreme Court in R (oao Morge) v Hampshire CC [2011] 1 WLR 268 and of Lindblom J (as he then was) in R (oao Prideaux) v Buckingham CC [2013] EWHC 1054 (Admin). Upon examination, however, I do not consider that these two cases advance any party's argument.

55. I was also referred to two other authorities which I would prefer to address later.

DMRB Guidance and the Evidence of Natural England

56. The relevant part of the DMRB is Volume 11 (Environmental Assessment), Section 3 (Environmental Assessment Techniques), May 2007 edition. This Advice Note is in the nature of governmental advice across the UK (the then Highways Agency, now Highways England, taking the lead for England) and "gives guidance on the assessment of the impacts that road projects may have on the air environment". Paragraphs 3.10 and 3.14 make clear that there is an initial or "scoping" stage, based on a preliminary assessment of whether there are likely to be significant impacts resulting from a specific plan or project. In this regard, paragraph 3.12 is crucial:

> *"Obtain traffic data for the Do-Minimum and Do-Something scenarios for the years to be assessed. Identify which roads are likely to be affected by the proposals. Affected roads are those that meet any of the following criteria:*

- *…; or*
- *daily traffic flows will change by 1,000 AADT or more …"*

57. The DMRB is not wholly clear as to the extent to which cumulative impacts need to be considered, and at which stage. On my understanding of his submission, Mr Findlay's contention was that paragraph 3.12 does not require any evaluation of possible cumulative impacts at the scoping stage. This is because the DRMB does not say in terms that the identification of any affected roads should be in combination with any other proposals. Strictly speaking, that is correct. The submission of Mr Richard Moules for SSCLG was that cumulative effects should be considered, but not at the scoping stage, and only – if that point is reached – during the course of an appropriate assessment. However, in my view paragraph 3.6, upon which he relied, is neutral. This refers to DMRB 11.2.5 which I take to be Volume 11, Section 2, Part 5, paragraphs 1.53 – 1.60 in particular. These paragraphs do refer to the assessment of cumulative impacts in what I take to be the context of the second stage (viz. appropriate assessment) rather than the first stage (viz. scoping). Volume 11, Section 2, Part 4 deals with "Scoping of Environmental Impact Assessments" and states that consideration may have to be given to the possibility of cumulative effects "beyond the project boundary" (see paragraph 1.7(v)).

58. I will be reverting to the DMRB below.

59. Natural England is an Interested Party to this claim, and has submitted a witness statement from Ms Marian Ashdown, an expert in environmental science. Natural England is a non-departmental governmental body "providing its advice on the best scientific evidence available". I bear in mind that Ms Ashdown's evidence, at least in its current form, was not available to any of the decision-makers; it serves to explain (at least for my benefit if not theirs) the basis for the 1,000 AADT threshold.

60. Ms Ashdown's explanation is that the AADT limit of 1,000 is another way of expressing a screening threshold of 1%, representing a "reasonable guideline threshold for determining likely significant effects on an [SAC]". Further, it has been used for "almost 10 years as an air quality assessment tool, having been first developed in 2004". Ms Ashdown explains that the 1% threshold has been agreed by another expert body, the Air Quality Technical Advisory Group ("AQTAG"). The bundle includes AQTAG's "Interim Advice", dated October 2013, which – although not available to any decision-maker – requires some examination. The following points arise.

61. Slightly confusingly, AQTAG's methodology has three stages, not two. In fact, stages 1 and 2 match DMRB's scoping stage, with stage 1 reflecting the distance between the road and the SAC (200m) and stage 2 reflecting the preliminary assessment of likely significant effects, i.e. what is described as "significance screening". The overall thrust of AQTAG's interim advice is that DMRB's 1,000 AADT threshold broadly equates to the 1% change in critical loads/levels, being the preferred benchmark. Mr Hobson submitted that I should be focussing on the 1,000 AADT threshold and not the 1%. In my view, these are simply different ways of measuring the same outcome, and it does not matter which yardstick is considered.

62. Mr Moules drew my attention to another AQTAG's document, "AQTAG21, 'Likely Significant Effect – use of 1% … Threshold'". The following points arise. First, if the 1% long-term benchmark is not exceeded, the decision-maker may conclude that there is "no likely significant effect". This means that the plan or project requires no detailed/appropriate assessment at AQTAG's stage 3 or DMRB's stage 2. Secondly, exactly the same consequence flows, by parity of reasoning, if the 1,000 AADT threshold is not exceeded. Thirdly:

> *"The choice of the 1% assessment level as a standard approach is a matter of professional judgment. This professional judgment takes account of:*
>
> - *The absolute contribution of a pollutant to an ecosystem which receives an impact at this level. For example, a contribution of 1% of the critical load for nitrogen of 10kg/ha/yr is equivalent to 0.01g of nitrogen per square metre per year …*
>
> - *The low level of likelihood of in-combination effects meaning that a conclusion of 'no adverse effect' cannot be reached at a particular location during the appropriate assessment (Stage 3) when the process contribution is less than 1%. Experience of permitting allows us to be confident that it is unlikely that a substantial number of plans or projects will occur in the same area at the same time, such that their in-combination impact would give rise to concern at the appropriate assessment stage. If such a situation was [sic] to arise then the assessment could be determined on a case-specific basis.*
>
> - *The 1% screening threshold is intended to cover a wide range of situations … The threshold therefore needs to be sufficiently precautionary to minimise the risk of screening out a situation when in fact it merits further consideration …"*

63. At this stage I observe that all three bullet points need to be considered together, and not in isolation from one another. Further, although the second bullet refers only to "appropriate assessment" and stage 3, there is no reason why the same methodology should not apply to the scoping stage.

64. Mr Findlay drew my attention to a Memo from AECOM dated 21st October 2016 which provided a further gloss on the AQTAG analysis:

> *"AQTAG has drawn a clear distinction between 'plans and projects considered to be inconsequential and never likely to have an in-combination effect (and so not included in any assessment of likely significant effect in combination with a new plan or project) and those concluded to have 'no likely significant effect' (insignificant alone but which may need to be considered in the assessment of any other new plans or*

> *projects) [March 2015 correspondence]. To fail to draw such a distinction would be to make the [Habitats Regulations] unimplementable [sic] since all plans, projects and schemes across a region (or greater area) that could contribute to any increase in pollution, even to the smallest extent (e.g. one car journey), could not otherwise legally be consented until they had all been considered in combination with one another."*

65. I will be reverting to Natural England's evidence, and to the AQTAG materials, below.

The Rival Contentions

66. Mr Hobson's first ground is that both the Habitats Directive and the Habitats Regulations make it clear that possible in-combination effects must be considered. It is also clear from the HRA, and LDC's and SDNPA's approach overall, that in-combination effects either have not been considered at all, or have not been properly considered. This is an irresistible inference from the known facts, namely that the HRA fails to aggregate the two relevant AADTs – 190 and 950 – and considers only the first datum. Had the requisite aggregation occurred, the 1,000 AADT threshold would have been exceeded and an appropriate assessment would or should have been undertaken. Further, to the extent that the DMRB does not require an in-combination assessment, Mr Hobson submitted that it contains legal error which vitiates the relevant decisions.

67. Ultimately, Mr Hobson accepted that his second ground could not add to his first. I agree: if he wins on his first ground, he does not need the second; if he loses on his first ground, the examining Inspector did not err in failing to address a matter which could make no difference to the outcome. In any case, it is clear that the examining Inspector did consider all the representations which were made to him; and there is no legal requirement on him to address each and every of them *seriatim*.

68. Mr Hobson submitted that he was not out-of-time to bring this challenge against LDC's adoption of the development plan. The effect of section 28(3) of the 2004 Act was that LDC's adoption of the plan had no legal effect until SDNPA adopted the self-same plan on 23rd June 2016. Thus, the relevant date for the purposes of the six-week time limit, which is non-extendable, is 23rd June; and the claim was brought in time.

69. Mr Moules submitted that it is clear from the HRA that in-combination effects were properly considered. His essential argument was that Natural England gave expert advice to LDC and SDNPA (being the same advice it had previously given to WDC) that the 1,000 AADT threshold was sufficiently robust and precautionary to cover any likely scenario of in-combination effects. The amounts of nitrogen dioxide in play are so small that they are effectively *de minimis* and of neutral effect. Given that (i) the HRA is based on expert advice which I should be slow to second-guess, and (ii) the correct approach is in any case Wednesbury unreasonableness, I should not hold that there was any error of law in the decision-making process.

70. Mr Moules also submitted that WDC itself had followed exactly the same approach as did LDC and SDNPA in relation to its HRA. In my view, that was at best a jury point. Further, my reading of the WCS is that in-combination effects could not be considered because the JCS the subject-matter of these proceedings was not sufficiently developed to enable any sensible AADT data from over-the-border plans to be accommodated. That, on any view, was a Wednesbury reasonable approach.

71. I suggested to Mr Moules that the identification of legal error in the Interested Party's advice might not be sufficient for WDC's purposes. The challenge was not to Natural England; it was to the LDC/SDNPA development plan as recommended to them by SSCLG's Inspector following independent examination under section 20 of the 2004 Act. Although this point had not been foreshadowed in Mr Moules' skeleton argument, he took the baton from me and ran with it. His submission was that the relevant decision-makers were entitled to rely on expert advice which was not flawed on its face.

72. Mr Findlay adopted Mr Moules' submissions in their entirety. He relied on Mott as authority for the proposition that expert advice should not be subjected to meticulous scrutiny by the court, particularly in circumstances where no contrary expert opinion has been adduced by WDC. He submitted that it is clear from the HRA that in-combination effects were considered. Exactly *how* they were considered, in the context of the expert advice which was available to the decision-maker, is outwith the realistic scope of a section 113 challenge.

73. Mr Findlay's submission on the time point was elegantly simple. Given that I was persuaded by his argument, I do not feel it necessary to summarise it at this juncture.

74. I am grateful to all Counsel for their submissions. In this judgment I have tended to focus on the oral argument, although I continue to bear in mind the skeleton arguments, which I carefully studied before the hearing started.

Discussion and Conclusions

Timing

75. The six-week time-limit under section 113(3B) is absolute, and cannot be prolonged on any discretionary basis. Had I been able to apply any exercise of discretion to these facts, I would have done so.

76. Further, the section 113 challenge is within time as regards SDNPA's adoption of the JCS. Mr Findlay's objection related only to LDC's adoption of the JCS in May 2016. Strictly speaking, the challenge is to the JCS *qua* development plan, and not to the decision to adopt it; but it is common ground that time runs from a local planning authority's adoption of the plan. My analysis should be understood in these terms.

77. Ultimately, the contest between Mr Hobson and Mr Findlay resolved into one issue: which sub-section of section 28 of the 2004 applies? *If* section 28(3) is applicable (Mr Hobson's analysis), it would follow that the JCS would not be "done" by the LPAs – in other words, be adopted and have full legal effect – until the relevant step had been

taken by both local planning authorities. *If* section 28(2) is applicable (Mr Findlay's analysis), it would follow that the whole of Part 2 of the 2004 Act would apply to joint development documents in the same way as Part 2 applies to (single) development documents. Before analysing the effect of this being a sub-section (2) case, which in my judgment it is, I need to explain why I consider that this is not a sub-section (3) case.

78. Section 28(3) applies only to steps which "must be done by or in relation to a local planning authority". Thus, if one takes section 19 as an example, a LPA must prepare development plan documents in accordance with the local development scheme. The effect of section 28(3) is that joint local development documents must be prepared in accordance with the local development schemes for each of the LPAs.

79. The adoption of a development plan document is not a mandatory step. Under section 23(2), the authority may adopt the plan, but it is not obliged to do so. It is no answer, *pace* Mr Hobson's submission, to say that the adoption of the plan is a mandatory precondition to its validity, because that is to confuse two separate questions.

80. It follows, in my judgment, that section 28(3) does not apply to this case. Sub-section (3) is worded as a sub-set of section 28(2); and in my view the earlier sub-section applies. Section 28(2) applies in terms to steps which may be taken by an LPA, and such steps include adoption of plans under section 23. In my opinion, the effect of section 28(2) is that the whole of Part 2 of the 2004 Act applies to steps taken in relation to joint local development documents as they are expressed in that Part to apply to (single) documents. Thus, and taking section 23 as an example, it is expressed to apply to "local development documents". Without more, that would be a reference to documents prepared by one LPA (sub-section (1) uses the singular, "authority"). So, section 28(2) operates so as to apply section 23 to joint development documents prepared by more than one authority. Further, the operation of the sub-section is not that adoption does not take effect until all relevant authorities have adopted the plan (c.f. sub-section (3)), but merely that section 23 applies in the same way to joint plans as it does to single plans. On this approach, the adoption of a joint plan under section 23 takes effect for that authority when "it is adopted by resolution of the authority" (see section 23(5)). The effect of section 28(2) is not that section 23(5) should be applied in such a manner that "resolution" means "joint resolution" and/or that "authority" means "authorities".

81. Further, section 28(3) operates in situations where the step must be carried out jointly and simultaneously. It cannot apply to a situation where, as Mr Hobson accepts, each LPA may adopt the JCS on different dates.

82. The whole structure of Part 2 of the 2004 Act is predicated on a development plan document being the development plan for the relevant local planning authority, which means that authority's geographical area. In the present case, the JCS became the development plan document for LDC's area once adopted by LDC; it did not become the development plan document for SDNPA's area until it was adopted by SDNPA. Conceptually and juridically, therefore, the JCS had a separate status before it was adopted by both authorities; and, I would add, thereafter – it continues to apply to each authority's area on a discrete basis.

83. It follows that WDC is in-time to challenge SDNPA's adoption of the JCS but out-of-time to challenge LDC's adoption of the JCS. Whether this matters will be addressed in the final section of this judgment.

The First Ground

84. Mr Hobson's submissions had two essential limbs or elements, which at times were in danger of becoming conflated. As I shall explain at the end of this judgment, the reasons for the conflation may not be difficult to understand, but at least for analytical purposes I consider that the two elements should be separated. The first limb of his argument was that the HRA did not even purport to undertake an evaluation, for these scoping purposes, of combined effects. The second limb was that, if it did, it was based on Natural England's advice which was vitiated by legal error.

85. Examining the first limb, it cannot be seriously in dispute that Article 6(3) of the Habitats Directive requires an assessment of possible in-combination effects. It says so in terms. It is also clear that, by the time the HRA was being prepared for the purposes of this JCS, the neighbouring district council had adopted its JCS (in alliance with SDNPA) which had been based on an HRA stating that the impact of the plan on the relevant stretch of the A26 adjacent to the SAC was "neutral". However, it is also clear that it was "neutral" in the sense that it was below the threshold of 1,000 AADT.

86. Did this HRA purport to examine possible in-combination effects, or did it exclude these as being legally irrelevant? I have already mentioned the debate between Counsel as to the true interpretation and effect of the DMRB, and whether it requires the evaluation of in-combination effects at the scoping stage. Mr Findlay's attempt to persuade me that it does not was in danger of being counter-productive. If the HRA, based as it was at least in material part on the DMRB, failed to address in-combination effects on grounds of principle, I would have held that the HRA would be vitiated by legal error. It would be based on policy or guidance, alternatively an interpretation of it, which was flawed, being contrary to Article 6(3) of the Habitats Directive. Further, if I understood Mr Moules' submission correctly, he was contending that the upshot of the DMRB was that in-combination effects only fell to be considered at the "appropriate assessment" stage, and not at the scoping stage. He directed my attention to paragraph 3.6 (see my paragraph 57 above). I have already said that this is not my reading of paragraph 3.6, but if I am wrong about that I see no logical distinction between (a) in-combination effects relevant to scoping, and (b) in-combination effects relevant to "appropriate assessment". Article 6(3) draws no such distinction, and none can sensibly exist. If cumulative effects are not considered at the scoping stage, they clearly risk not being considered at all.

87. Despite the Defendant's collective efforts to blow me off course, I will hold fast to the right co-ordinates. In my judgment, the better interpretation of the DMRB is that, at least in principle, in-combination effects are potentially relevant at both stages. The DMRB may not be as clear as it might be, and I have already pointed out that paragraph 3.12 does not expressly require a cumulative assessment (it does not expressly preclude one either). But in my view that is the effect of paragraph 1.7(v) of Volume 11, Section 2, Part 4, dealing with "*Scoping* of Environmental Impact Assessments" (my emphasis). Furthermore, there is nothing in this HRA which

indicates that a restrictive approach to the DMRB was taken. On the contrary, the HRA stated that in-combination effects fell for consideration at the scoping stage: see paragraphs 2.7, 5.20, and 5.22 – 5.27.

88. It follows that I must reject the first limb of Mr Hobson's submission that in-combination effects were eliminated from consideration within the HRA on *a priori* grounds.

89. However, in my judgment there is much greater force in the submission (the second limb) that Natural England's advice was plainly erroneous.

90. I appreciate that this is a specialist area and that the court must avoid delving into the minutiae of expert opinion evidence which is beyond its competence. The court should be doubly slow to criticise expert opinion where there is no contrary evidence being advanced by WDC. Even so, these self-denying ordinances, although salutary, are by no means absolute.

91. I return to the AQTAG21 document (see paragraph 62 above), and the second bullet point. This provides the only reason, beyond bare assertion, for Natural England's conclusion that in-combination effects are in practice covered by the 1,000 AADT threshold. I repeat the relevant portions:

> *"Experience of permitting allows us to be confident that it is unlikely that a substantial number of plans or projects will occur in the same area at the same time, such that their in-combination impact would give rise to concern at the appropriate assessment stage. If such a situation was [sic] to arise then the assessment could be determined on a case-specific basis."*

92. It is true that this bullet point is directed to stage 3 and not to stage 2 (on AQTAG's numbering), but I have already said that there can be no difference between the stages for these purposes. I do not know the empirical basis for this professional judgment, but it is not scientific. To the extent that it is a planning judgment, it is anecdotal and little more than an assertion. On the facts of the instant case, it is not a question of a couple of minor developments or projects being sought to be taken in combination, but a Core Strategy covering a twenty-year period which has already assessed the impact of additional traffic flows on an SAC within its borders. There is no sensible or logical basis for excluding the WCS from account. The final sentence of the cited passage states that were there to be a substantial number of other plans these should be taken into account on a case-specific basis. This sentence is probably envisaging a situation where the AADT levels have not yet been modelled in relation to the other plans. Yet, in a case where the relevant AADT levels referable to two plans are known, the logic of the final sentence indicates that these should be considered in tandem.

93. The point may be tested in this manner. If the HRA for the WCS had stated that the modelled AADT value was 1,050 rather than 950, Mr Moules agreed that an "appropriate assessment" would have had to be made at the second stage: in other words, that these impacts could not be regarded as *de minimis*, or neutral, or be removed from scope. However artificial it may be to take a fixed threshold, and

however minor in reality any predicated environmental impact may be, Mr Moules rightly accepted that the assessment would have to proceed to the next stage. This would be the case, therefore, despite the 1,000 AADT level being robust and extremely precautionary. In my judgment, there may be no distinction logically to be made between 1,050 additional traffic flows from one district and 1,050 (on our figures, in fact 1,140) additional traffic flows from two districts. The cars are the same and the nitrogen dioxide is the same. Mr Moules would have made the identical submission (and it would have been incorrect) had both AADT figures been 950. The >1,000 AADT figure is also above the *de minimis* threshold mentioned by Advocate General Sharpston.

94. Mr Moules came close to submitting that anything below 1,000 AADT was nugatory, and that this was a "zero sum game" (my attempt in oral argument to summarise the point he was making). I cannot accept that. A toxicologist would no doubt agree with Mr Moules that a rat subjected to one million of the lowest homeopathic doses of a toxin (i.e. zero) would suffer no adverse effects. But the same toxicologist would also point out that one dose at 95% of the relevant safety threshold for the toxin might have an effect if added to another small dose. This is very basic science. There can be no difference for these purposes between adverse animal and environmental effects.

95. I should return to the AECOM Memo referred to under paragraph 64 above. It refers to correspondence with AQTAG in March 2015 which has not been made available. AECOM assert that AQTAG has always drawn a distinction between, I paraphrase, minuscule effects which can be ignored, even in combination, and effects which are capable of being non-neutral, once combined. I can discern no explicit or implied reference to that distinction in anything I have been shown. In any event, an AADT of 950 is not minuscule. Even so, I can well see that distinctions may be capable of being drawn in practice, because if it is known that specific impacts are very low indeed, or are likely to be such, these can properly be ignored (e.g. if each AADT were known to be 20, it would require 50 of these to attain the threshold: depending on the precise facts, a reasonable planning judgment could be made that 50 plans or projects is inherently unlikely). This largely addresses the practical difficulty referred to in the AECOM Memo, but I appreciate that it does not give a complete answer to all situations, in particular where any given plan yields an impact close to the threshold. It is unnecessary for me to examine how these practical issues should be resolved because they do not in fact arise in the present case.

96. Finally, in a further AECOM memorandum dated 21st October 2016, which must also therefore be seen as post-decision evidence, the following assertion is made:

> *"Based on AECOM's experience of hundreds of air quality assessments we can confirm that a change in flows of 190 AADT on the A26 within 200m of [the SAC] would be very likely to result in an imperceptible change in concentrations of nitrogen oxides and nitrogen deposition rates. This is based on the traffic scoping criteria presented in the air quality assessment guidance within [the DRMB] which indicates that at changes in traffic flows of less than 1,000 AADT significant changes in air quality are not expected … In practice such small changes would be well within the limits of natural fluctuation that would be expected on this site year to year."*

In my view, this merely repeats the basic error. I repeat: 1,050 AADT is above the threshold; each tranche of 190 AADT (or whatever) is well below the threshold, and taken in isolation may well be regarded as making little contribution; 950 AADT + 190 AADT (from two sources) is exactly the same as 1,140 AADT (from one source). In my latter example, one could notionally disaggregate the composite figure and assert, making the same methodological error, that each relatively small amount may be disregarded.

97. I must mention the two authorities which I have held in abeyance, and revert briefly to the recent case of DLA Delivery Ltd.

98. First, in Ashdown Forest Economic Development LLP v SSCLG and others [2014] EWHC 406 (Admin), Sales J (as he was then) was considering WDC's decision to limit the housing requirement figure to 9,440, rather than the higher figure suggested by the claimant developer, in the light of the HRA and the 950 AADT figure. Part of WDC's reasoning process, as endorsed by the examining Inspector, was that there was little headroom (i.e. little space between 950 and 1,000) and that collaborative work with neighbouring districts would be required to ascertain whether there was really any scope for further proposed development. Sales J rejected the developer's contention that this was over-precautionary, and paragraphs 79-82 of his judgment must be read in that context. Although WDC's stance in that case was consistent with the stance it is taking now, I do not read Sales J as impliedly endorsing it; the issue simply did not arise for consideration in that case.

99. In SSCLG and another v Wealden DC [2017] EWCA Civ 39, WDC was challenging an inspector's grant of planning permission following an appeal by the developer. The 950 AADT figure featured in this case too. However, the issue for the Court of Appeal was not the same as the issue for this court: the case hinged on whether the inspector was entitled to take into account potential mitigation measures. That said, Natural England had given the same advice about in-combination effects as it had given in our case (see paragraph 70 of the inspector's decision letter). Mr Moules submitted that, if Natural England's advice was incorrect, Lindblom LJ would have said so. The answer to that submission is that no-one argued before the Court of Appeal that it was wrong.

100. In DLA Delivery Ltd a developer brought a procedural challenge to LDC's decision to allow the Newick Neighbourhood Plan to proceed to a referendum. The second ground of appeal to the Court of Appeal was whether LDC had discharged the requirements of Article 6(3) of the Habitats Directive. In the HRA dated January 2013 (which I deduce to be the same HRA at issue in the instant case, although nothing turns on that), it was recognised that mitigation measures would be required in relation to new residential development within 7 kms of the Ashdown Forest SAC, as there was "no evidence to suggest that there would not be significant negative effects alone and in combination, on the [SAC] by increasing recreational disturbance". Thus, the real question was the suitability of the mitigation measures. I have considered the whole of Lindblom LJ's judgment, in particular paragraphs 29-52 and 73-76, but it does not bear directly on the issues I have to determine. Nonetheless, it might be said to lend some general support for my rejection of what I have called the first element or limb of Mr Hobson's primary submission. It does not support his second limb.

101. The examining Inspector in the instant case was not bound to follow the HRA, based as it was (at least in material part) on Natural England's advice, but in my judgment it is clear that he did so. It is also clear that Natural England's expert advice cannot be supported on logical and empirical grounds. I have reached this conclusion taking into account all the materials the Defendants expressly invited me to consider, but – as I will be explaining below – the same result flows even if all post-decision evidence were excluded from consideration. The second limb of Mr Hobson's submissions must be upheld.

102. This holding is necessary for Mr Hobson's forensic purposes, but is it sufficient? In order accurately to answer that question I must return to the jurisdiction of this court under section 113 of the 2004 Act. This jurisdiction is certainly wide enough to embrace error of law, including Wednesbury error, in the development plan documents. It was the role of the examining Inspector to determine whether the development plan documents were "sound" and in conformity with relevant regulatory requirements, including (in my view) the provisions of the Habitats Regulations. Thus, the current challenge is not directed to Natural England's advice; it is a challenge to the JCS based, at least in material part, on that advice.

103. There are a number of factual matters which need to be mentioned:

(1) LDC and SDNPA accepted Natural England's advice in good faith. Indeed, it is clear from paragraph 29 of the witness statement of LDC's senior strategic planning officer, Tondra Thom, that she sought a second opinion from Dr James Riley of AECOM in March 2016; and that he supported the Natural England position. She has exhibited a number of internal memoranda from AECOM, including those I have analysed at paragraphs 64, 95 and 96 above, but these all appear to post-date the decisions. Nothing particularly turns on this, but I am not clear which AECOM documents, if any, Ms Thom was considering in March 2016.

(2) The AQTAG material was not made available to any relevant decision-maker in this case, including those responsible for preparing the HRA. The decision-makers were simply told that it was Natural England's expert view that "1,000 AADT" was a sufficiently protective threshold to cover in-combination effects, or words to that effect.

(3) WDC did not attend the JCS hearings but two letters were written (see paragraphs 28 and 29 above). WDC clearly stated that adding 190 to 950 takes one above the 1,000 AADT threshold, and also clearly stated that no in-combination assessment had been carried out. However, WDC did not clearly state that Natural England's advice, to the effect that the 1,000 AADT level was sufficiently protective to accommodate in-combination assessment, was or must be incorrect. WDC knew the nature of Natural England's advice although, in parallel with LDC and SDNPA, it did not know on what methodology it was based. Even so, the author of WDC's correspondence may have thought that the point being made was so obvious that it did not need to be driven home.

104. The undertaking of an HRA is a condition precedent to the soundness of the development plan documents. That said, an HRA has here been undertaken. But I would also hold that an HRA infected by public law error would undermine the

soundness of the development plan documents. Thus, if it were clear from the HRA, or any other document, that relevant policy or guidance had been misconstrued, or that such policy or guidance was itself legally flawed, the court would have to intervene. That said, I have held that the HRA did not commit errors of this nature. In so doing, I have rejected the Defendants' interpretation of the DMRB. Had I accepted their interpretation, I would have held that the HRA was legally flawed because the DMRB was erroneous. Thus, the real issue which arises is whether this HRA was infected by public law error because key advice on which it was based was plainly wrong.

105. Here, we have an HRA which refers to Natural England's advice and grounds itself upon it. As I have said, very little if any detail is given as to the basis of that advice, and as to any supporting reasoning and methodology. In my judgment, that advice cannot be characterised as a condition precedent to the validity of the HRA, in the sense of being an objective fact. Rather, it is part of the overall judgmental or evaluative basis for the conclusion set out in the HRA that, even taking into account cumulative effects, the impact would be neutral on this section of the A26. Accordingly, in terms of public law categories (to the extent that they illuminate) we fall under the rubric of Wednesbury unreasonableness rather than of "error of fact" or anything else.

106. I accept that these decision-makers have obtained expert advice and that LDC took additional counsel from AECOM. In my judgment, the issue hinges in the first instance on whether it was obvious from the face of Natural England's advice, having regard to any reasons given for it, that it was plainly wrong.

107. In my view, it was not apparent why Natural England was advising that a cumulative assessment did not require an aggregation of two figures. Of course, had the decision-makers seen the additional material which has been made available to me through Natural England itself, in discharge of its public law duty to place its cards on the table, the position would (on my analysis) be entirely straightforward. Although the Defendants were astute to ensure that I take post-decision evidence into consideration, there may be difficulties with an analysis which proceeds from the perspective of hindsight.

108. I have pondered whether there could be technical or methodological reasons pertaining to the science of environmental modelling militating against the need to undertake what looks to me like simple addition. Yet no such reasons have been suggested; it would be speculative to imagine that these might exist; and, I believe that Natural England's advice, brief as it was, cried out for further explanation. I return to the point that the cars are the same and the nitrogen dioxide is the same, regardless of their provenance. This case falls within the exceptional category of case where, at the very least, further specific inquiry of Natural England was necessary. Had the straightforward question been asked (namely, why does a cumulative assessment not entail the addition of two figures?), we know what the answer would have been: the relevant documents would have been produced, and/or an explanation identical to that contained in Ms Ashdown's witness statement would have been given. On that premise, I would hold that the only rational conclusion would have been for the decision-makers to have rejected Natural England's advice. For these purposes, it makes no difference if the decision-makers are the local planning

authorities or the examining Inspector. The latter should have found that the development plan documents were unsound.

109. In any event, I would be prepared to go further. Even if one ignores all the post-decision evidence, the advice that in-combination effects are somehow catered for by the 1,000 AADT threshold lacks coherence, particularly in a situation where both figures are known – and one of them is already close to the margin. I have found that an HRA existed as a matter of precedent fact, and I have also fastened on Sales LJ's analysis in Smyth that evaluative assessments must be made. This must include an evaluation of expert evidence. However, if expert advice induces a decision-maker into error in carrying out the judgments mandated by Article 6(3), I consider that it would be both artificial and wrong to hold that the court should not characterise what has occurred as irrational. The Wednesbury error in the underlying advice[2] creates, without more, an equivalent Wednesbury error in the evaluative assessments carried out in formulating the HRA. If, for instance, the decision-makers had taken in-house advice which was plainly wrong, this court would intervene. The position can be no different because that advice was taken from a third party. Overall, it follows, I regret to say, that the baton I handed to Mr Moules (see paragraph 71 above) has helped nobody.

110. The Wednesbury error is even more obvious, in my judgment, if the post-decision evidence is taken into account, as I have already done in the context of what I have called the second limb of Mr Hobson's submission. It is not open to the Defendants to complain about this; the evidence was relied upon by them, and not by WDC. For the avoidance of doubt, I believe that this evidence is probably admissible in these proceedings because it served to explain, rather than to supplement, the advice that Natural England gave to the decision-makers.

111. Accordingly, applying traditional public law principles to this case, I am driven to conclude that the HRA is vitiated by Natural England's plainly erroneous advice. I have reached this conclusion on two bases: the first, because the decision-makers should have undertaken further inquiry of Natural England in circumstances where no explanation had been given for not aggregating two amounts; the second, because Natural England's error directly infects the decision-making process.

112. Although I have rejected Mr Hobson's submissions on what I have called his first limb of ground 1, and have upheld them on his second limb, I am not ignoring the obvious point that the distinction between these limbs is very fine indeed. As I have found, the premise of the HRA was that a cumulative assessment is required. Natural England was not saying otherwise. I have identified no guidance, policy or what I have called *a priori* basis which led those responsible for the HRA to fail to undertake what at least purported to be such an assessment. On the other hand, in reality no cumulative assessment *was* carried out because the only proper way in which it could be, in the circumstances of this case, was to do the addition. To all intents and purposes, therefore, Natural England's advice removed the premise of the HRA – that a cumulative assessment is required - and brought about a clear breach of Article 6(3) of the Habitats Directive.

[2] If the point were made that the Natural England advice could not be judicially reviewed, I would revise this wording to reflect a form of Bolam test. The substance of the matter would remain the same.

Disposal

113. I have held that WDC is out-of-time to challenge LDC's adoption of the JCS. No such issue arises as regards WDC's challenge to SDNPA's adoption of the JCS. I have also held that the development plan documents in this case, in particular the HRA (together with other documents which are based on the HRA), are flawed for legal error in reliance on advice from Natural England that was plainly incorrect.

114. Natural England must reconsider its advice in the light of this judgment. Further, I direct that the Government Legal Department send a copy of this judgment to Highways England: the DRMB should be re-examined, and clarified, to reflect the concerns I have indicated.

115. When I handed down a first draft of this judgment to the parties, I invited submissions in writing on the issue of relief. I anticipated that there might not be agreement at the Bar as to the correct approach. Given the complexity of the issue, I invited two rounds of submissions from the parties, and posed a number of specific questions for Mr Moules in particular to address. I continue to be grateful to Counsel for their assistance.

116. Mr Hobson submitted that it has been sufficient for WDC's purposes to have succeeded against SDNPA. The focus of the challenge is to a "development plan document" (see section 113(7)) which is a joint document with two authors. It is the document which falls to be quashed, in whole or in part, not the decision to adopt it. The reference to quashing in part (see section 113(7)(a) and (7C)(a)) can only relate to specific policies in the JCS "which are of general coverage, and not to their geographical extent". Accordingly, Mr Hobson invited me to quash policies SP1 and SP2 of the JCS, in line with the relief sought in his Grounds.

117. In his further written submissions Mr Hobson relied on section 28(6) - (9) of the 2004 Act, but these subsections do not in my view take the argument any further. In so far as they have any potential relevance, that relates to the conclusion I have already reached on the time point (see paragraphs 75-83 above). Mr Hobson did not rely on section 28 at that stage of the debate, and having now looked at these provisions for the first time I consider that he was right not to do so.

118. Mr Moules and Mr Findlay both submitted that the effect of Mr Hobson's argument was to subvert my ruling that WDC is out-of-time to challenge LDC's adoption of the JCS. Although the challenge is to the JCS as a "development plan document", Counsel submitted that section 113(7) should be interpreted in such a way that any appropriate remedy is limited to the administrative area of the local planning authority against whom an in-time challenge has succeeded. Mr Moules initially submitted that I should quash policies SP1 and SP 2 insofar as the JCS is a development plan document for the administrative area of SDNPA, but in his further written submissions on the issue of relief indicated that I might consider other possible options. Mr Findlay advanced a number of additional submissions, giving me a range of options, all directed to the point that, on analysis, the contribution of additional housing in SDNPA's administrative area is so small that I should effectively ignore it for these purposes, and abstain from granting any relief.

119. I agree with Mr Moules that Mr Hobson's submission possesses a beguilingly simple quality. For that reason, it has attraction. However, I also agree with him that the submission is incorrect. In my judgment, it neatly, and erroneously, circumvents the combined effect of section 113, subsections (2), (3), (3B) and (11). These provisions make clear that the challenge is directed to the JCS *qua* "relevant document", and in my opinion it stands as a development plan document for LDC and for SDNPA separately. This is the effect of sections 17(8), 37(3) and 38(3)(b), as previously analysed in this judgment. Ultimately, the ability to challenge a development plan document under this section is inextricably intertwined with the adoption of the document as such by the LPA sought to be impeached. Or, put another way, it would be contrary to the intendment and policy of section 113 for an in-time challenge in relation to SDNPA's adoption of the JCS to have any remedial effect in relation to LDC's development plan document.

120. Further, on their true construction subsections (7), (7A) and (7B) enable the court to grant relief, including partial quashing, on the basis of what Mr Hobson characterises as geographical coverage and/or in respect of individual decision-makers. This, again, reflects the status of the JCS as a "relevant document" for each separate local planning authority. If power were exercised under section 113(7)(b), for example, the JCS would, in the circumstances of the present case, have to be remitted to SDNPA and not to LDC.

121. Considering the same point but from a different perspective, it follows that I do not have power to quash the JCS insofar as it is a development plan document for the geographical area of LDC. Nor do I have power to grant any other relevant relief against LDC under section 113(7B). As regards LDC, my judgment is solely of declaratory effect and, as Mr Moules puts it, "will necessarily be relevant to the weight decision-makers give to policies SP1 and SP2 and also their decision whether an appropriate assessment is required for individual planning applications".

122. The next question which arises is the form and nature of the relief I should grant against SDNPA, if any. Given the discretionary nature of this jurisdiction, I should refrain from granting any relief if satisfied that the legal error I have identified could have made no material difference to the outcome. The level of satisfaction would have to be high: in cases of reasonable doubt, the court should nonetheless grant relief in the appropriate form.

123. Policy SP1 covers both plan areas without clearly differentiating between them for these purposes. However, SP1 and SP2 come as a pair of spatial policies, and are mutually interdependent.

124. Mr Findlay took me to the fine detail of the breakdown of new homes in policy SP2. It seems clear that, of the 6,900 homes that policy SP1 identifies to be provided in the plan period, only 1,177 homes plus windfall are planned to be provided in the area of SDNPA - the figure is reached by adding all the homes in Lewes and Ditchling which are the two main settlements in the National Park. Further, an examination of the HRA Addendum dated March 2014 shows that the AADT referable to the A26 and attributable to these 1,177 homes is, on a reasonable worst case basis, 49. I note that Mr Hobson chose not to enter this discussion. In my judgment, Mr Findlay's factual analysis is correct, but where that takes him is another matter.

125. The basic arithmetic is entirely straightforward. Mr Findlay invites me to conclude that 950 + 49 is still below the threshold of 1,000 AADT. He relies on further arguments too, but in my view these are either an attempt to revive points I have already rejected, or go behind what was common ground before me (sc. the irrelevance of the 7 km and 15 km notional boundaries). Mr Moules recognises that there may be two possible approaches, although observes that the logic of my judgment on the main issue means that a cumulative assessment of all known elements (including LDC's contribution) takes the AADT figure above the 1,000 threshold.

126. The point is not free from difficulty, although I reject Mr Hobson's submission that this difficulty is a reason for not limiting any quashing order to SDNPA. The 950 AADT contribution from WDC must be taken as a "given" and included in the calculation. By parity of reasoning, the 141 AADT contribution from LDC must be treated in the same way, although no separate challenge may now be made to it. Thus, the in-combination assessment which should notionally (for these purposes) be undertaken by SDNPA, or by the court considering the question of relief, must proceed on the basis of an AADT contribution of 1,091 coming from elsewhere. In these circumstances, I would frame the issue slightly differently than did Mr Moules. Should I just be considering the *additional* contribution coming from SDNPA taking a baseline figure which is already above the threshold, or should I be taking a more holistic view, being aware of the fact that no proper in-combination assessment has yet been undertaken?

127. I would agree with Mr Findlay that the difference between an AADT of 1,091 and one of 1,140 cannot be regarded as significant. This is not because an AADT of 49 should always be regarded as minuscule, but rather because no relevant threshold is being breached. The position would be different if the figures under scrutiny were, for example, 991 and 1,040. Furthermore, I would also agree with Mr Findlay that, on the alternative approach which I have disfavoured, and which ignores LDC's contribution, SDNPA's contribution viewed in isolation is just below the threshold of 1,000 AADT.

128. However, the real question in my judgment concerns the correct treatment of what I have called the baseline AADT figure of 1,091. The logic of my judgment is that WDC's contribution must be taken into account. It is also the logic of my judgment that LDC's contribution should be taken into account. Both contributions cannot be separately challenged, for different reasons, but both are relevant for these purposes. I agree that SDNPA's contribution has not brought about the exceeding of the threshold, whichever way the arithmetic is done. Taking a narrow view of causation, SDNPA's contribution has not *caused* the transcending of the threshold. Even so, I have concluded that this is too circumscribed an approach. Article 6(3) of the Habitats Directive is not predicated on the sort of fine causative distinctions which may appeal to a common lawyer but approaches the issue more broadly and purposively, in line with the precautionary principle. It requires an in-combination assessment which (on these facts) does not differentiate between the separate contributions of WDC, LDC and SDNPA. In my judgment, the contributions must be aggregated; and, if the total figure indicates a likely significant effect, it is incumbent on the plan-maker to proceed to the next stage in the assessment process.

129. I have considered Mr Findlay's submission that it is unnecessary to quash policies SP1 and SP2, and that it is sufficient to remit with a direction, alternatively sufficient to quash these policies in part. I am not convinced that Mr Findlay's panoply of potential options makes much difference in practice, because whatever relief is granted these policies would need to be reconsidered by SDNPA in the light of this narrative judgment. The parties did not assist me with submissions as to the practical effect of my judgment, in particular what would need to be done if a detailed assessment of environmental impact had to be carried out. In my view, it is simpler, neater and more appropriate to quash policies SP1 and SP2 to the extent that they form part of the development plan for SDNPA's area.

130. I am not minded to grant any form of additional declaratory relief.

ORDER

UPON HEARING J. Hobson QC and S. Lyness of Counsel on behalf of the Claimant, and R. Moules of Counsel on behalf of the First Defendant and J. Findlay QC and C. Parry on behalf of the Second and Third Defendants, on 8 February 2017

IT IS ORDERED THAT:

(1) Policies SP 1 and SP 2 of the Lewes District Local Plan Part 1 Joint Core Strategy 2010-2030 are hereby quashed to the extent that they form part of the Development Plan for the Third Defendant's administrative area;

(2) The First and Third Defendants shall each pay 50% of the Claimant's costs (referable to the claims against those Defendants), to be assessed if not agreed;

(3) The Claimant shall pay the Second Defendant's costs (referable to the claim against that Defendant), to be assessed if not agreed;

(4) All applications for permission to appeal refused.

Dated this 20th day of March 2017