

Mid Devon Local Plan Review: Examination

Hearing Statement: Matter Policy J27, Issue 9

This statement should be read in conjunction with the representations¹ made by GL Hearn on behalf of Friends Life Ltd (c/o Aviva Investors Global Services Ltd) (herein FLL) and seeks to complement and expand on those representations as necessary to assist the Inspector in determining the extent to which the Local Plan meets the appropriate tests of legal compliance and soundness.

9. IS THE APPROACH TO THE SAC SUFFICIENT AND LINKED TO THAT, WHAT ACCOUNT IS TAKEN OF THE PRIORITY HABITATS THAT FORM PART OF THE PROPOSED ALLOCATION?

a) Is the approach to the SAC sufficient?

- 9.1. In accordance with Section 40 of the Natural Environment and Rural Communities Act 2006, MDDC, as a competent authority, has a statutory duty to have regard, in the exercise of its function, to the purpose of conserving biodiversity. A key purpose of this duty is to embed consideration of biodiversity as an integral part of policy making throughout the public sector, which should be seeking to make a significant contribution to the achievement of the commitments made by the government in its Biodiversity 2020 Strategy².
- 9.2. The potential effects of Policy J27 on European designated sites (collectively known as Natura 2000 sites) have been considered in order to fulfil the requirements of an 'appropriate assessment' under The Conservation of Habitats and Species Regulations 2010 – the UK legislation that transposes Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (EC Habitats Directive) into national law.
- 9.3. Regulation 61(1) of the 2010 Regulations, which implements Article 6(3) of the Habitats Directive, requires that the competent authority (in this case Mid Devon District Council) complete an *"appropriate assessment of the implications [of a plan or project] for [a] site in view of that site's conservation objectives"*. The type and amount of evidence required to undertake an appropriate assessment is necessarily case-specific: case law has established that assessments should be based on "objective information"³ and that this does not equate to the need for "scientific certainty"⁴.
- 9.4. Guidance from the European Commission set out the stages required to complete an appropriate assessment as:
 - Stage 1: determination of whether there is a 'likely significant effect';
 - Stage 2: Appropriate Assessment to determine effect on site integrity;

¹ Representations To Mid Devon District Council's Consultation On Its Proposed Submission Local Plan (February 2015) On Behalf Of The Eden Westwood Partnership; Representations To The Mid Devon Local Plan Review Proposed Submission (Incorporating Proposed Modifications) January 2017 On Behalf Of Friends Life Limited (C/O Aviva Investors Global Services Limited); Eden Westwood Ecology Notes – Engain April 2015; Rackenford: Eden Westwood Impacts - Parsons Brinckerhoff April 2015; and Ecological Survey and Assessment Report [Draft] – Engain August 2016

² PPG: Paragraph: 007 Reference ID: 8-007-20140306

³ Court of Justice of the European Union case C-127/02 known as Waddenzee (dated 7th September 2004)

⁴ Bagmoor Wind Limited v The Scottish Ministers Court of Sessions [2012] CSIH 93)

- Stage 3: Consideration of alternatives; and
 - Stage 4: Consideration of imperative reasons of over-riding public interest, and compensation measures.
- 9.5. In this regard, the MDLPR is informed by a suite of evidence base documents that have been prepared by both MDDC⁵ and FLL⁶ in relation to the potential effects of the allocation at Junction 27 on the Culm Grasslands SAC as referenced above. In accordance with Regulation 102 of the Habitats Regulations 2010 the evidence base includes an 'Appropriate Assessment' of the implications of Policy J27 for the Culm Grasslands SAC. The following paragraphs expand upon the steps taken by MDDC and demonstrate that the approach to the SAC is sufficient having regard to the relevant legislative and policy requirements.
- 9.6. At the Options consultation stage in March 2014 Natural England raised some concern in relation to the lack of an evidence base to assess the potential impacts on the SAC; however, these concerns were subsequently addressed by FLL through submission of the 'Eden Westwood Ecology Notes' prepared by Engain (April 2015) and the 'Rackenford: Eden Westwood Impacts' note prepared by Parsons Brinckerhoff (April 2015). Both of these documents were submitted as part of FLL's representations to the Proposed Submission consultation in April 2015. This is confirmed at paragraph 1.14 of submission document ref. ENV04⁷:
- "Natural England considered that, on the basis of the Parsons Brinckerhoff and Engain Studies, significant effects on the Culm Grasslands SAC from air quality would not be likely to arise from the Eden Westwood scheme (as it was at the time)".***
- 9.7. Having undertaken the first i.e. screening stage it was established that appropriate assessment should be completed in relation to likely significant effects on the Culm Grasslands Special Area of Conservation, in order to consider the potential for an increase in deposition of airborne pollutants leading to an adverse effect on habitat quality. It was therefore necessary to base the assessment on evidence of the existing levels of deposition, to model and predict future deposition rates both with and without the development proposed by Policy J27, and to evaluate these data against the predicted ecological outcomes of any changes that would occur.
- 9.8. The most recent evidence base document (ENV04) comprises the Habitats Regulations Assessment: Appropriate Assessment dated December 2016 (HRA AA), which directly assesses the likely effects of the allocation of land at Junction 27 on the Culm Grasslands SAC in respect of potential air pollution impacts. The report has been prepared in accordance with the relevant guidance documents⁸ and Habitats Regulations⁹. The assessment considers the impacts of the MDLPR proposed allocations excluding J27, the impacts of the J27 allocation alone, and the impacts of the J27 allocation in addition to the other MDLPR site allocations. The assessment uses conservative assumptions (that all the Local Plan allocations and the J27 site allocation will be complete in 2022; the use of 2033 traffic data with 2022 emissions; and the use of CURED emissions) and thus the actual concentrations stated for year 2022 are likely to be lower than those predicted in the worst-case scenario¹⁰.

⁵ SSE03; ENV02; ENV03; and ENV04.

⁶ Eden Westwood Ecology Notes – Engain April 2015; Rackenford: Eden Westwood Impacts - Parsons Brinckerhoff April 2015; and Ecological Survey and Assessment Report [Draft] – Engain August 2016

⁷ ENV04: J27 Proposals: Habitats Regulations Assessment – Appropriate Assessment Report - LUC December 2016

⁸ Planning for the Protection of European Sites: Guidance for Regional Spatial Strategies and Local Development Documents - Department for Communities and Local Government (DCLG) (August 2006); and The HRA Handbook - David Tyldesley & Associates.

⁹ The Conservation of Habitats and Species Regulations 2010 (SI No. 2010/490); and the Conservation of Habitats and Species (Amendment) Regulations 2012 - Statutory Instrument 2012 No. 1927.

¹⁰ ENV04: HRA AA (December 2016) Para. 4.27

- 9.9. A summary of air quality impacts is provided at Table 4.3 and paragraphs 4.26 to 4.30 of the HRA AA (2016). In respect of the Culm Grasslands SAC, the HRA AA¹¹ concludes:

“The J27 site allocation, alone or in combination with the Local Plan proposals, will not have an adverse effect on the integrity of the Culm Grasslands SAC.”

- 9.10. The HRA AA confirms that the findings contained within Table 4.13 of the HRA AA compare similarly to the ‘Rackenford: Eden Westwood Impacts’ study undertaken by Parsons Brinckerhoff on behalf of FLL. The Parsons Brinckerhoff assessment took into account a proposed distribution centre (Class B8 uses) and thus the traffic figures assessed by Parsons Brinckerhoff include additional associated HGV vehicle movements. Consistent with the J27 policy composition the HRA AA excludes the distribution centre. The HRA AA does, however, use a more conservative predictor of air pollution effects (CURED)¹². In both cases, the findings can be reasonably described as representing a worst case scenario providing greater comfort to the conclusion that the J27 site allocation, alone or in combination with the Local Plan proposals, will not have an adverse effect on the integrity of the Culm Grasslands SAC.

- 9.11. It is notable that Natural England’s representations to the Proposed Submission Plan February 2017 (dated 14 February 2017) have raised no objection to the allocation of land at Junction 27. Indeed the representations made by Natural England recognise that the HRA AA has:

“Addressed potential impact on the SAC and concludes (at para 5.1) that ‘the J27 allocation, alone or in combination with the Local Plan proposals, will not have an adverse effect on the integrity of the Culm Grasslands SAC’”.

- 9.12. Natural England goes on to recommend that criterion E of the draft allocation is revised in light of the findings of the HRA AA, and this comment has been reflected within MDDC’s Schedule of Proposed Minor Modifications March 2017 (doc ref. SD13).

- 9.13. The Local Plan Review Proposed Submission Sustainability Appraisal¹³ (February 2015) references concerns regarding potential impacts of commercial development at Junction 27 on the Culm Grasslands SAC and the need to undertake an HRA. This position has, however, now been updated via the Sustainability Appraisal Addendum¹⁴ (January 2017), which confirms that an HRA (i.e. the HRA AA 2016) of the MDLPR including Policy J27 has been undertaken. The HRA AA negates all outstanding concerns in respect of the potential impact of the allocation on the Culm Grasslands SAC.

- 9.14. Having regard to the relevant legislative and policy framework, and the statutory duty placed on MDDC, the evidence base described above represents an adequate, proportionate, up to date, and relevant approach that directly informs the allocation. The HRA AA in addition to evidence base documents SSE03, SSE04, ENV02 and ENV04 represents a sound basis on which to consider the potential impacts of the allocation on the SAC., and supports the conclusion that the J27 site allocation, alone or in combination with the Local Plan proposals, will not have an adverse effect on the integrity of the Culm Grasslands SAC.”

b) What account is taken of the Priority Habitats that form part of the proposed allocation ?

- 9.15. Priority habitats are published as part of Local Biodiversity Action Plans. The purpose of the lists is to promote the conservation of these habitats and species and this includes making effective use of the planning system for this purpose. The original UK Biodiversity Action Plan (UK BAP) developed

¹¹ ENV04: HRA AA (December 2016) Paras. 4.38-4.40

¹² ENV04: HRA AA (December 2016) p.19, footnote 19

¹³ SD04: Sustainability Appraisal 2015

¹⁴ SD03: Sustainability Addendum 2016. p. 23

between 1995 and 1999, which first identified priority habitats for conservation, was refined and eventually replaced in 2012 by the 'UK Post-2010 Biodiversity Framework'. Devon's Biodiversity Action Plan, as revised in 2009, lists the 20 habitat types that have been identified as a priority for nature conservation within the county.

- 9.16. Circular 06/05: Biodiversity and Geological Conservation provides guidance on the application of the law relating to planning and nature conservation and complements the NPPF. Underpinning this policy is Section 41 of the Natural Environment and Rural Communities (NERC) Act 2006, which lists the habitats that are a priority for conservation, and places an obligation on the Secretary of State:

“To further the conservation of the living organisms and types of habitat included in any list published under this section.”

- 9.17. The NPPF further establishes the importance of the consideration of the conservation of habitats in the planning system. In particular, in relation to planning policy, Paragraph 117 requires that planning policies should

“Promote the preservation, restoration and re-creation of priority habitats”.

- 9.18. Priority habitats are, therefore, important and relevant considerations when developing a Local Plan. The legislation and policy requirements outlined above make it a requirement of policy making that sufficient evidence is available to ascertain the likely effects of that policy on Priority Habitats. The level of detail required to make that assessment is case-specific, and decision-making may draw on published data about the distribution of habitats within the County, and on survey data from a specific site.

Policy DM28 – Other Protected Sites

- 9.19. Priority habitats are addressed under policy DM28 (Other Protected Sites) of the MDLPR. This states:

“Where development proposals would lead to an individual or cumulative adverse impact on....priority habitats defined under the UK and Devon Biodiversity Action Plans, the Council will balance the overall benefits of the proposal against the impacts”

- 9.20. Policy DM28 further sets a requirement for sufficient information to be provided by applicants to the Council to assess the significance of the impact of proposed development against the importance of the protected site and the species that depend upon it and this is consistent with the legislative and policy framework described above. In respect of priority habitats, the supporting text to Policy DM28 states:

“While the loss of irreplaceable habitats will not normally be permitted, the Council will seek the replacement of a priority habitat where it is significantly affected and its replacement can be achieved, through a planning obligation as appropriate.”

- 9.21. In accordance with S38(6) of the Planning and Compulsory Purchase Act 2004, an application for planning permission for development on land at Junction 27 would be determined in accordance with the Development Plan¹⁵. This would of course include Policy DM28 of the MDLPR. Therefore, any potential impact on the priority habitats contained within the allocation site can be adequately

¹⁵ Unless material considerations indicate otherwise

considered and assessed against the wording of this policy. It is not necessary to repeat this requirement as a criterion within the wording of Policy J27. In this regard, the PPG¹⁶ confirms:

“In drafting policies the local planning authority should avoid undue repetition, for example by using generic policies to set out principles that may be common to different types of development. There should be no need to reiterate policies that are already set out in the National Planning Policy Framework.”

- 9.22. Natural England’s comments to the MDLPR dated 14 February 2017, raises a concern that the wording of Policy DM28 is inconsistent with paragraph 118 of the NPPF. This comment relates specifically to Policy DM28 of the MDLPR and not to Policy J27. As set out above, any development on land at Junction 27 would be determined in accordance with Policy DM28; therefore in the event that the Inspector considers it necessary to recommend modifications to ensure consistency with paragraph 118 of the NPPF, the appropriate way to do this is to amend Policy DM28.

Policy J27 – Land at Junction 27 of the M5 Motorway

- 9.23. Natural England has raised no concerns in respect of the priority habitats on land at Junction 27 other than to pass comment that priority habitats exist and should be acknowledged within the supporting text. FLL raises no objection to this suggestion. In this regard, FLL suggests that the following text could be inserted into the supporting text to Policy J27 as a modification, if the Inspector considers it appropriate:

Suggested supporting text wording:

“The allocation contains priority habitats within the site boundary. The development shall be carefully planned to preserve the existing priority habitats set out on the policies map. In the event that the loss of these priority habitats is necessary to facilitate the development, appropriate mitigation, or at a last resort compensation, shall be provided.”

- 9.24. Policy J27 allocates land at Junction 27 for tourism, leisure and retail development across circa 71 hectares of land. The allocation includes a substantial provision of land (circa 43ha) for landscaping and green infrastructure, supporting access roads, parking and infrastructure. The policy map for Junction 27 accompanying the MDLPR identifies five priority habitats within the allocation site. These relate to areas of existing broad leaved woodland.
- 9.25. The allowance within the wording of Policy J27 for circa 43ha of land (which is 60% of the overall allocation), is sufficient to accommodate the retention of the existing priority habitats as shown on the policy map, in addition to the infrastructure necessary to facilitate the development, landscaping, and planting to achieve biodiversity gain. In this regard, FLL and its design team have developed a comprehensive set of illustrative development proposals and draft supporting documents. These have been submitted to MDDC and the Inspector via the MDLPR Proposed Submission Consultations, most recently in February 2017.
- 9.26. The Illustrative Masterplan (11034/SK-91) dated January 2016 and the Illustrative Land Use Plan (11/034/SK124 rev.C) dated May 2016 are both consistent with the draft allocation and include the provision for circa 43ha of infrastructure and landscaping. The illustrative plans prepared by FLL are informed by a suite of site-specific evidence base documents and demonstrate in illustrative terms that the allocation proposals can be adequately accommodated within the site area while providing the infrastructure necessary to facilitate the development; retaining the existing priority habitats as shown on the policies map; and providing significant additional new planting. The draft ecological appraisal prepared by Engain (August 2016) establishes the ecological baseline conditions and concludes that there is sufficient scope within the site allocation boundary to avoid, mitigate and

¹⁶ PPG: Paragraph: 010 Reference ID: 12-010-20140306. Revision date: 06 03 2014

compensate for any adverse ecological impacts. Indeed the illustrative proposals prepared by FLL allow for, habitat creation, management and enhancement, and have the potential to: increase functional connectivity between the currently isolated priority habitats (woodlands); increase the net amount of habitat available to species such as bats and dormice; and create a landscape better able to support breeding populations of these and other species.

- 9.27. The priority habitats contained within the allocation boundary are clearly marked on the policies map for Junction 27 accompanying the MDLPR. As set out above, the MDDC has taken account of priority habitats within the District and these are addressed under the provisions of Policy DM28. Further, Policy J27 has allocated adequate land for the provision of landscaping and infrastructure (43ha) and FLL's illustrative proposals demonstrate that this is sufficient to accommodate the priority habitats as shown. It can, therefore, be concluded that the approach to priority habitats on the allocation site is sound.