

Updated 30 April 2020.

Introduction

This position statement has been issued by Epping Forest District Council to provide information about the Epping Forest Special Area of Conservation (“EFSAC”). Special Areas of Conservation are international designations which are applied to sites whose habitats and species have significant ecological importance. There are specific statutory controls in place which prohibit the granting of planning permission for development proposals that may adversely affect those internationally important habitats and species. These controls apply to the EFSAC. Further information about the habitats and species that are of importance within the EFSAC together with the statutory framework that protects these important features is provided in the Annex to this statement.

At present the Council is not able to issue planning permission for new development that may adversely affect the integrity of the EFSAC having regard to the reasons for its designation and the conservation objectives that apply to it. In this case the site’s conservation objectives are to return those parts of the EFSAC and the flora and fauna within them that currently have an unfavourable conservation status to a favourable conservation status or, for parts of the EFSAC which are currently in favourable conservation status, to maintain that favourable status.

The Council is continuing to work proactively with partners to resolve the current situation that has restricted many development schemes from coming forward since 2018. The main issue that the Council is trying to resolve relates to the effect that any new development within the District could have on the EFSAC arising from the potential for that development to increase the amount of traffic using roads in close proximity to the EFSAC. This is because a number of the important features of the EFSAC can be affected by air pollution and a key contributor to this pollution is vehicles. Consequently, where a proposed development would result in a net increase in Annual Average Daily Traffic (AADT) on roads within 200m of the EFSAC, regardless of how small that increase is, then the Council at this point in time should not, based on the current advice from Natural England, grant planning permission unless it is able to ensure mitigation measures are in place which can be relied upon to avoid adverse effects to the SAC.

The Council cannot act unilaterally in this matter by deciding not to have regard to Natural England’s advice, because it would be unlawful unless there are cogent and compelling reasons for doing so. When deciding whether planning permission should be granted, the Council is legally obliged to consult Natural England on all development proposals that are likely, either alone or in combination with other plans and projects, to have a significant effect on the EFSAC having regard to the reasons for its designation and its conservation objectives. Natural England in turn has a duty (as the organisation that acts as the government’s adviser for the natural environment in England, and which has a number of responsibilities including to promote nature conservation and protect biodiversity) to provide its view on the potential impacts of development on sites such as the EFSAC. Of particular importance in deciding whether to grant planning permission is that the Council has to take into account the level of development proposed in the Council’s emerging Local Plan as part of an in-combination ‘test’.

Therefore, in assessing individual planning applications the Council must have regard to the advice received from Natural England (“NE”) in relation to the emerging Local Plan. The Council can only depart from Natural England’s advice where it has cogent and compelling reasons for doing so. Unfortunately, since early 2018, NE has maintained an objection to the Epping Forest District Local Plan (2011-2033) – based on the Submission Version, December 2017 (“LPSV”). Similar objections have also been raised by the Conservators of Epping Forest (“the Conservators”), who act as the custodians of the Epping Forest. The LPSV is currently subject to independent examination by a planning inspector (“the Local Plan Inspector”), who held a series of public hearings between February and June 2019. The Inspector in her advice note dated 2 August 2019 ([ED98](#)) following the hearings identified a number of actions that the Council needed to take in order to demonstrate that any effects of development would not be adverse to the integrity of the EFSAC and in particular to provide robust habitat specific evidence. The Council has agreed a programme of work ([ED100](#)) with the Inspector and regular updates can be found on the Council’s Local Plan Examination website [here](#).

Current position in respect of air quality

A comprehensive Habitats Regulations Assessment of the LPSV, dated January 2019 (“the 2019 HRA”), was prepared by AECOM on behalf of the Council, and sought to address the objections of NE and the Conservators. However, both NE and the Conservators still had particular concerns about some aspects of the methodology used in the 2019 HRA in order to be satisfied that ‘no reasonable scientific doubt remains’ (which is the very rigorous test against which the LPSV has to be assessed) that the development proposed in the LPSV, even with mitigation measures, would not have an adverse effect on the integrity of the EFSAC. As noted above the Local Plan Inspector has provided the Council with written advice following completion of the hearings directing the Council to undertake additional HRA work to address the concerns raised by NE and Conservators.

Unfortunately, in order to unlock development (both for sites proposed for allocation in the LPSV and development proposals not specifically identified within the LPSV) the Council is having to undertake a significant programme of highly specialised technical work to be able to assess in much more detail the issues that exist across different parts of the EFSAC to then determine what actions need to be taken in order to secure a satisfactory resolution to the current situation. This work has included undertaking the collection of new traffic data which is very specific to the EFSAC to help understand, for example, the proportion of diesel, petrol and low-emission vehicles that use the roads now and what this mix is likely to be in the future as this is important information to help assess future air quality conditions arising from traffic in the future.

The Council, Natural England and the Conservators have committed to continue to work together to identify a satisfactory solution and have been meeting on a regular basis over the past few months. As these matters involve highly technical and scientific considerations, compiling the evidence required to address the concerns raised by Natural England and the Conservators, and as set out in the Inspector’s advice, has taken many months. This evidence now needs to be remodelled and reassessed in order to further update the HRA and develop an Air Quality Mitigation Strategy. This further work is progressing well and it is anticipated that the Council will be in a position to publish a draft Mitigation Strategy for the Council’s Cabinet to consider in July 2020.

Currently there is no agreed approach as to how the effect of air pollution needs to be mitigated where development proposals anywhere in the District would result in an increase in Average Annual Daily Traffic (AADT) on roads within 200m of the EFSAC. However, the Council and other partner organisations continue to work together to devise an air quality mitigation strategy (“AQMS”) that is acceptable to NE, taking account of the Local Plan Inspector’s advice. In the absence of an approved AQMS, where individual development proposals have been supported by evidence which clearly demonstrates that there would be no net increase in AADT Natural England has confirmed that the Council is in a position to grant planning permission (subject to the acceptability of all other relevant planning considerations). The Council has now determined a small number of planning applications in line with this advice.

Both the Council and Natural England have been working together to try and find a way of being able to address the backlog of undetermined planning applications but have been unable to identify any approach which would not breach the statutory controls in place. It is important to note that this issue is not unique to the Council. There are a number of other local authorities which are having to take a similar approach, notwithstanding the fact that they are seeking to address the effects from development in relation to other pollutants on different internationally designated sites.

It should be noted that this approach is consistent with that taken by the planning inspector appointed by the Secretary of State who dismissed an appeal against the Council’s refusal to grant planning permission for a specialist housing development proposal on land at 13-15A Alderton Hill, Loughton. In his decision letter dated 4 October 2019, ([EB128 Alderton Hill Appeal Letter](#)) the Inspector explained in detail (at paragraphs 30 to 57) why it is not possible to grant planning permission for development that may increase the number of vehicle movements in the vicinity of Epping Forest SAC for the time being. Taking account of the recent Alderton Hill appeal decision, it is very doubtful that the Secretary of State, or his appointed planning inspectors, could grant planning permission for other development proposals considered at appeal.

The Council recognises that the current situation is deeply frustrating and is acutely aware of the number of planning applications that are affected by the unresolved EFSAC issue that continues to delay much needed development in the District. Councillors and Officers are exploring every avenue in an attempt to resolve this issue as soon as possible. This includes continuing to actively engage with Government in an attempt to reduce the substantial backlog of planning applications awaiting determination.

The Council will update this position statement in response to any relevant change in circumstances.

Background

Since 2017, the Council has been working with NE, the Conservators and neighbouring local planning authorities to address this issue. The Council has also raised the issue with the Ministry of Housing, Communities and Local Government (“MHCLG”) and have engaged with Government officials regularly since Natural England objected to the LPSV in early 2018. The objective of this engagement has been to try and encourage MHCLG to work with the Department for Environment, Food and Rural Affairs (Defra) to try and find a way of resolving this issue.

In response to NE's objection, the Council commissioned the 2019 HRA, which is published on the Council's Local Plan Examination website. ([EB209 Habitats Regulations Assessment, AECOM January 2019](#)). The 2019 HRA includes an appropriate assessment of the LPSV's implications on the EFSAC. The assessment identified two environmental impact pathways from the development proposed in the LPSV, namely: (i) atmospheric pollution from vehicle emissions ("atmospheric pollution"); and physical disturbance caused by increased recreational and urbanisation ("recreational pressure").

For both impact pathways, the 2019 HRA Appropriate Assessment concluded that, with mitigation, the Plan either alone or in combination with other plans or projects would not adversely affect the integrity of the EFSAC.

However, following their review of the 2019 HRA, Natural England maintained their objection to the Local Plan, citing a number of specific concerns about the HRA, which were considered at the Local Plan Examination hearing on 21 May 2019. With the assistance of its expert consultants and professional advisors, the Council robustly defended the LPSV and the 2019 HRA at the examination hearings. Nonetheless, following the completion of the examination hearings, in a letter dated 2 August 2019, ([ED98 Inspector's Advice after Hearings, 2 August 2019](#)) the Local Plan Inspector provided the Council with advice concerning the changes to the Plan required to remedy issues of soundness in the form of Main Modifications ("MMs"). The Inspector's conclusion at this stage is that further MMs are required and that in some cases, additional work will need to be done by the Council to establish their precise form.

In her post-hearing advice, the Inspector noted the conclusion in the 2019 HRA that, with mitigation, the LPSV would not adversely affect the integrity of the EFSAC and said:

"However, in their written representations and at the hearing itself, both Natural England and the Conservators of Epping Forest (the Conservators) strongly challenged the robustness of the HRA in terms of its methodology and conclusions. Given the uniqueness of the Forest, its high-risk status and the professed engagement between these key representors and the Council, the dispute at this stage seems most unfortunate. Nevertheless, I cannot conclude beyond reasonable scientific doubt (as the parties all agree that I must) that the Plan will not adversely affect the integrity of the SAC until steps have been taken towards resolving it."

The Local Plan Inspector has identified a number of actions which she considers necessary for the Council to take to remedy the areas of concern with the 2019 HRA arising from the objections maintained by NE and the Conservators. Since receiving the Inspector's advice, the Council has been working with its professional advisors, NE and the Conservators to identify the most appropriate way forward.

The current position in relation to recreational pressures

In respect of the recreational pressure impact pathway, the Council's Cabinet adopted an interim mitigation strategy (agreed with NE) on 18 October 2018. The Local Plan Inspector has advised that this strategy, kept under review, together with a strategy to deliver Suitable Alternative Natural Greenspace will address the recreational impact of development on the EFSAC. This interim strategy currently requires the payment of a financial contribution, secured by way of a legal agreement, of £352 for Strategic Access Management and Monitoring mitigation measures for each net additional

dwelling within 0-3 km of the Epping Forest SAC. Further work is being undertaken to finalise the strategy which will be informed by the results of a further Visitor Survey which was undertaken in September 2019.

Additional document added February 2020

SAC Planning Applications (pdf 425KB)

Epping Forest Special Area of Conservation – Annex

Epping Forest is a large ancient wood-pasture with habitats of high nature conservation value including ancient semi-natural woodland, old grassland plains, wet and dry heathland and scattered wetland. The semi-natural woodland is particularly extensive but the Forest plains are also a major feature and contain a variety of unimproved acid grasslands.

Epping Forest covers a large area of land within the District and much of the Forest is designated as a Special Area of Conservation (“SAC”) under the EU Habitats Directive (92/43/EEC). Biodiversity features within, or associated with, a SAC enjoy a high level of protection under UK and EU Law. The provisions of the EU Habitats Directive are given effect in UK domestic law by the Conservation of Habitats and Species Regulations 2017 (as amended) (“the Habitats Regulations”).

Under the Habitats Regulations, the Epping Forest SAC (“EFSAC”) is classified as a ‘European site’ and, as the competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on the SAC (either alone or in combination with other plans or projects), the Council must make an Appropriate Assessment of the implications of the plan or project for the EFSAC in view of that site’s conservation objectives.

The requirement to make an Appropriate Assessment under Regulation 63 of the Habitats Regulations is a legal duty that obliges the Council to ensure that the internationally important natural habitats and/or species for which the EFSAC has been designated are guaranteed a high level of protection, by ensuring the integrity of the site is protected.

The Council cannot make decisions in breach of its legal duties and it is not for this Council to comment on whether other competent authorities are meeting their legal obligations. However, it is very important to remember that that the vast majority of the EFSAC lies within the boundaries of Epping Forest District. Consequently, the onerous burden of the legal obligations under the Habitats Regulations falls most heavily on this Council.

This legal duty applies to the adoption of the Epping Forest District Local Plan (2011-2033) and to the determination of applications for planning permission proposing new housing and other forms of development in the District. It is important to note that the legal duty applies to development proposals that are likely, either alone or in combination with other development, to have a significant effect on the EFSAC.

For the purposes of assessment, as competent authority the Council must consult NE and have regard to any representations made by NE in response. The Council must, if it considers it

appropriate, take the opinion of the general public, including any representations made by the Conservators.

Having regard to the conclusions of the Appropriate Assessment, as competent authority, the Council may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the EFSAC (subject to certain exceptions which apply in the case of overriding public interest). In other words, the Council cannot adopt the EFDLP, or grant planning permission, unless it is convinced that the plan or project will not adversely affect the integrity of the EFSAC.

In accordance with recent decisions of the Court of Justice of the European Union (“CJEU”), an Appropriate Assessment of the implications of a plan or project for a protected site entails, first, that, before that plan or project is approved, all aspects of that plan or project that might affect the conservation objectives of that site are identified. Second, such an assessment cannot be considered to be appropriate if it contains lacunae (i.e., omissions) and does not contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the plan or project on that site. Third, all aspects of the plan or project in question which may, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field (see e.g., *Holohan v An Bord Pleanála* (Case C-461/17)).

Where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the Appropriate Assessment must include an explicit and detailed statement of reasons, capable of dispelling reasonable scientific doubt concerning the absence of adverse effects to the integrity of the site concerned (see *Holohan* (above)).