

25th October 2022

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3302987 Hawthorns, Hale Road, Farnham GU9 9RL –
Cllr Hyman Statement of Evidence 25.10.22

Appeal Ref: [APP / R3650 / W / 22 / 3302987](#) ^[FN1]

Planning Application Ref: [WA/2021/03018](#) ^[FN2]

Hawthorns, Hale Road, Farnham GU9 9RL

Development: Outline Application With All Matters Reserved Except For Access; Erection Of 65 Dwellings (Including 40% Affordable Housing); Public Open Space, Car Park, Landscaping, Infrastructure And New Vehicular Access Following Demolition Of Existing Dwelling And Outbuildings.

Dear Sir,

Please accept this submission with attached appended and annexed documents and register me as an Interested Party in this Appeal. I am a Borough Councillor for an adjacent Farnham Ward and a Substitute Member of the Western Planning Committee which determined the Application on 22nd June 2022. I was not asked to substitute for the Meeting but did attend (by Zoom) and spoke briefly on the Item to update Members on the position of Natural England and Members of the Thames Basin Heaths Joint Strategic Partnership Board which had met that morning.

I wish to attend the hearing and may wish to speak on the matter of the statutory and policy constraints in respect of ‘Conservation of Habitats and Species’ and ‘Wild Birds’ legislation, and on any other relevant matters which may not have been fully addressed within the Council’s casework and/or by other participants.

As this Statement of Evidence contains active web links, all such links have been annotated with superscript ‘FootNote’ references in square parentheses and a separate Appendix is attached containing the full web addresses for the documents referenced.

Thank you for your time and the opportunity to participate,

Cllr Jerry Hyman

PERSONAL INTRODUCTION

My name is Jerry Hyman and I am a Waverley Councillor for Farnham Firgrove ward.

Born in Leicester, I was educated in Germany and moved to Farnham in 1970, attending Farnham Grammar School and College. I have a background in economics, maths, physics and engineering, and have operated my own businesses in southern England since University (BSc Applied Physics). I returned to Farnham in 1994, remaining self-employed part-time and becoming active in the community. I have a grown son and daughter plus a number of grandchildren and two stents.

From 2002 I served and led local residents' groups and friends in their opposition to a controversial major town centre development, acting as a legal and technical adviser on engineering, environmental law and strategic/planning matters.

I also served as the Chairman of the Board of Trustees of the 'Friends of Farnham Park' conservation charity for seven years, and as an ordinary Member). Farnham Park is a 650 year old Grade II Listed Historic Park & Garden and a Local Nature Reserve but has been Waverley's arbitrarily designated SANG since 2007, upon which virtually all residential development in Farnham has relied for 'SPA Mitigation' and planning consent.

In 2015 I founded the Farnham Residents party with a few friends, getting four good candidates elected to Town and Borough seats. I was elected as Borough Councillor for the Farnham Castle ward in 2016. The Party was formed with the aim of improving representation and decision-making through a simple commitment to the Nolan Principles and reaching agreement on 'the facts, the evidence and the law'. It was designed to enable independent-minded residents to remove the divisive politics and hypocrisy from local government and instil integrity and true democratic accountability. It is an intense learning process but we are halfway there, having achieved leadership of the Town and Borough in 2019. It is clear that there's plenty more to do.

I have scrutinised the authorities' approach to the Air Quality and Nature Directives since 2006, attending and participating wherever possible in most of the relevant Council meetings, Strategic Partnership Board Meetings and Planning Meetings over the past 15 years, including a range of Appeal Hearings, Inquiries and EiPs. Considerable experience has been gained in respect of the proper interpretation of the international Nature Directives. Though my position has always been doggedly opposed or lightly dismissed by the many organisations and individuals with vested interests, my commitment to *Waddenzee* candour and persistent principle-based pressure has been entirely vindicated by the 2018 [People Over Wind and Sweetman Ruling](#) ^[FN3] of the ECJ, which continues to apply through UK Regulation, the Withdrawal Bill and international Treaty obligations.

I firmly believe that the 'Habitats' legislation should be understood and cherished, as it is the only law we have that demands *convincing* objective scientific evidence before planning consents can be granted. This equates to a simple requirement for the whole truth, giving residents a genuine and precious route to the honest government to which we commit as public servants, through the Nolan Principles' requirement that we lead by example with truthfulness and integrity.

As 'competent authorities' we are required to protect the biodiversity and endangered species within our care, and we have been blessed with the legal tools to do so. If we do not, then there is little hope for the precious flora, fauna and precious natural environment that isn't blessed with such enviable protection. My concern is that the authorities' strategies may prove to have the opposite effect to intended, as happens when due process gives way to carelessness.

SUMMARY AND PURPOSE

1. My purpose here, as at the Western Planning Committee Meeting on 22nd June 2022, is to place before the hearing the relevant facts, evidence and legal principles which demonstrate that in the absence of the requisite detailed assessment of the extent to which SPA mitigation measures are (or are not) effective, consent cannot be lawfully granted and the 'Presumption in Favour of Sustainable Development' and 'tilted balance' of paragraph 11 of the NPPF are not engaged. As a result, statutory obligations and the Development Plan have primacy.
2. At the Planning meeting I informed Members that at the TBHSPA Joint Strategic Partnership Board (JSPB) Meeting that morning, Natural England officers had confirmed that they are still unable to provide any robust evidence of the effectiveness of their SANG and SAMM mitigation measures.
3. It is therefore clear that the inability to produce satisfactory appropriate assessments constitutes the main statutory reason for refusal.
4. The statutory constraint is explained in the Planning Practice Guidance on Appropriate Assessment (Ref ID 65-006) which concludes that, "... **Competent Authorities must now assess the robustness of mitigation measures through an appropriate assessment**". Those who have been evading assessment of the SPA mitigation "**must now**" change their ways.
5. **It is Common Ground that the proposed development conflicts with WLPP1 Policy RE1 and Neighbourhood Plan policies FNP10 and FNP14 (inappropriate location/BUAB), and with WLPP1 policy RE3 and Neighbourhood Plan policy FNP1 (urbanisation).** I support the Council's position in respect of the two given reasons for refusal.
6. **However, it appears that the Council erred in failing to add the 'standard' reasons for refusal where, in the absence of a suitable and signed s106 agreement, the failure to secure (e.g.) SPA mitigation, Affordable Housing provision, management of SuDs and open space (and CIL?) should also be considered to be valid reasons for refusal.**
7. It is understood that at Appeals we are obliged to give due consideration to all material planning matters, regardless of whether they have been identified within the LPA's Decision Notice. I respectfully request that the Inspector allows consideration of the matters identified above.
8. Furthermore I cannot agree with the approach taken by the Council, the Appellant and previous decisionmakers regarding SPA mitigation.
9. As the development is within the 95 percentile visitor catchment areas of both the Thames Basin Heaths SPA (8km) and the Wealden Heaths SPAs (15km), and as it is established that development likely to impact their protected interest features must be subject to appropriate assessment (AA), it is disappointing that no such ecological risk assessments have been produced.

10. Frensham Common is a favourite destination of residents from right across Farnham and is part of the Wealden Heaths Phase 1 SPA, where for the past decade the number of surviving Dartford warblers appears to have been so low that neither the Council nor Natural England will disclose the population data. In the absence of that data, an appropriate assessment for the WH1SPA cannot be produced.
11. In the absence of any appropriate assessment, consent cannot be lawfully granted and the 'Presumption' and 'tilted balance' are not engaged – irrespective of any consideration of the lack of Five Year Housing Land Supply (5YHLS) and 'Gladman'.
12. It appears that both the Appellant and the Council intend to argue that the need for detailed assessment of the effectiveness of SPA mitigation measures can be evaded by paying 'SANG' and 'SAMB' tariffs to the Council and Natural England. This is appropriately known as the 'Avoidance Strategy', and is still being promoted by the Council despite the courts having determined such a strategy to be an unlawful approach that seeks to bypass the purpose of the legislation, by 'screening out' the need for assessment of mitigation on the basis of hopeful but unevidenced assumptions.
13. I cannot support the Officers' unwillingness to admit that accepting TBHSPA Tariff payments through a s106 agreement does not satisfy or replace the legal requirement for complete appropriate assessments of the possible cumulative impacts on both of the affected SPAs.
14. Nor can I support the apparent intention of the Council to argue that it is acceptable to defer the securing of effective SPA mitigation to the Reserved Matters stage. The Appellant is seeking an 'In Principle' consent, and it is settled law that in a multi-stage planning consent system, consent cannot be granted at the Principal Decision stage (e.g. Outline or PIP) unless a complete and satisfactory Appropriate Assessment has been compiled and consulted upon, and the necessary proven mitigation measures secured.
15. **This is not a case of zealous environmental overkill. In the absence of honest and detailed assessment of mitigation measures, unintended consequences can result from the failure to identify and adequately consider all the potentially ineffective, negative, self-conflicting and/or self-defeating aspects of the initiative. Whilst experts and observers have drawn attention to numerous shortcomings in the TBHSPA strategy over the past 16 years, to my knowledge no appropriate assessment has yet collated and addressed all of the identified risks.**
16. **Given the time delay between granting consents, construction, occupation, becoming dog owners and discovering the attractive wilderness of the heathland SPAs, there is a very real risk that unintended consequences may compound to cause or contribute to species loss. The Precautionary Principle is a necessary inconvenience as the endangered species cannot speak for themselves, and ignoring it to sell unlawful planning consents is not an acceptable solution.**

17. **I cannot believe that it is beyond the wit of man to devise genuine effective mitigation, but as long as planning authorities are able to continue to evade the need for proper assessment of mitigation and residual risk, there is no perceived need or incentive for integrity, investigation of unknowns and consequent improvement.**
18. It is not rocket science. In summary, Regulations [63\(1\) and 63\(5\)](#) of the Conservation of Habitats and Species Regulations 2017 ^[FN4] require that in the absence of a complete appropriate assessment, the decisionmaker **must not** grant consent to developments which could contribute to causing the loss of protected habitats and species. **Thus the law demands that the Appeal is Dismissed**, due to the Appellant's failure to meet the [Habitats Reg.63\(2\)](#) ^[FN4] requirement that he provides all of the necessary information for the decisionmaker to conduct comprehensive ecological risk assessments ('appropriate assessments', AA) for both the Thames Basin Heaths and the Wealden Heaths. Given the best available evidence in a complete AA and a proportional approach, along with the necessary culture change, it is quite possible that consent could be lawfully granted for developments such as is proposed here, through the 'exceptions tests' of the Art.6(4) derogation.
19. Though the law does not specify any particular format for appropriate assessments, legislation has firmly established the minimum content of an AA, such that it must specifically include :
- quantification of possible impacts in combination with other plans and projects
 - past and present bird population and habitat condition data and dynamics
 - 'Favourable Status' Conservation Management Plan Objectives
 - details of the possible risks to each of the protected habitats and species,
 - a detailed assessment with no *lacunae* demonstrating the extent to which any mitigation measures can be shown to be effective, including consideration of any known uncertainties and any potentially self-conflicting aspects or unintended consequences of the mitigation proposals, and
 - any residual risk to achieving/restoring and maintaining the SPA's 'Favourable Condition' Conservation Objectives and restoring/maintaining the integrity of the SPA.
20. **It is a simple matter of agreeing what the law requires and whether that information is available.**

Conclusion

21. **My position is that if the Appellant, Council and Natural England were able to provide the above information for competent authorities to carry out (and consult upon) appropriate assessments as required by law, then they would have done so, and that in its absence the 'presumption' and 'tilted balance' of paragraph 11 of the NPPF (2021) does not apply and the Appeal must be dismissed.**

STATEMENT OF EVIDENCE

BACKGROUND – THE PROTECTED BIRD SPECIES

22. The protected ground-nesting bird species on the Thames Basin Heaths (TBH) and Wealden Heaths (WH) Special Protection Areas (SPAs) are the nightjar, the Dartford warbler and the woodlark. Natural England's 6-monthly Reports to the Thames Basin Heaths Joint Strategic Partnership Board (JSPB) tell us that nightjar numbers are generally healthy, but there is growing concern about slowly declining woodlark numbers, and great concern for the Dartford warbler, of which the numbers crashed after the successive harsh winters of 2009 and 2010.
23. Dartford warblers can lay two or three clutches between February to September, but exponential growth is limited by habitat and food availability, predation by cats, foxes, and corvids (following flushing of adults from their nests, typically caused by visitor pressure and dogs roaming off-lead) and occasional major losses due to fires or prolonged snow cover.
24. UK populations are still recovering from the extreme 1963 snowfall which only 11 pairs of Dartford warblers survived. They had become temporarily extinct locally, but after 40 years of repopulation and steady growth the numbers had recovered well. By 2004/5 there were around 1000 breeding pairs across the Thames Basin and Wealden Heaths (approx. 600 and 400 resp. – a quarter of the UK population) but numbers then declined, most likely due to fires, disturbance and predation. The heavy winter snows of 2009 and 2010 caused a severe crash in numbers from 387 pairs to 47 on the TBHSPA, from 136 to 4 on the WH1SPA and from 139 to 2 on the WH2SPA.
25. The bird surveys are conducted by 2Js Ecology of Fleet, who published an interesting and definitive paper [Dartford Warblers on the Thames Basin and Wealden Heaths \(2012\)](#) (JM Clark & J Eyre, 10pp) ^[FN5], attached as Annexe 1.

Though quite brief, it provides vital understanding and historic population data which are essential to the production of the ecological risk assessments ("appropriate assessment", 'AA') required to enable new housing development within the 10km and 15km visitor catchments of the TBH and SH SPAs respectively. There is a useful map of the heaths on p2, linked to a tabulated summary of past Dartford warbler population data on p3 and two bar charts of historic population data on p6. Overall the numbers always increased steadily, until 2006.

The Report concludes,

“The protection afforded by SPA status should ensure that the area of lowland heath in the Thames Basin and Western Weald is not further eroded. However, plans to build many new houses in proximity to both areas means that recreational pressures at some of the sites are likely to increase, leading to more fires and higher levels of disturbance. If the SPAs are to retain their value as prime sites for Dartford Warblers in the UK, it is crucial that the habitat is maintained in the best possible condition and plans to minimise disturbance are implemented as soon as possible. Then, weather permitting, the population of this iconic species should recover and be sustainable at the high level recorded in recent years.”

LEGAL FRAMEWORK – HABITATS & SPECIES

26. The attached document “*Cllr Hyman Ann.2 – Habitats & Circ.06-05 Extracts, single page*” (Annexe 2) provides a simple summary of the overriding legal constraints where ‘habitats applications’ are concerned, containing links to and the text of [Habitats Reg.9\(3\)](#) ^[FN6], Articles 6(2),(3) and (4) of the [Habitats Directive 92/43/EEC](#) ^[FN8] and paragraphs 13, 20 & 21 of [Government Circular 06/2005](#) (Statutory Obligations) ^[FN8]. The latter is referenced in Policy through Footnote 61 of the [NPPF 2021](#) ^[FN9] and explains to decisionmakers how the landmark judgement in the C-127/02 (*Waddenzee*) case determines how the Habitats Directive must be interpreted and applied, in accordance with the Precautionary Principle.
27. It is common ground that the possibility of the resulting increase in visitor pressure on the protected interest features of the Thames Basin Heaths Special Protection Area (TBH SPA) from the proposed development, in combination with other housing plans and projects, cannot be ruled out. For this reason, the Appellant proposes mitigation in the form of a financial contribution to maintain Farnham Park as Suitable Accessible Natural Greenspace (SANG) and to Natural England’s TBH Strategic Access Management and Monitoring (SAMM) Strategy.
28. The development is within the 15km (95 percentile) visitor catchment areas of the Wealden Heaths SPAs, as evidenced in the HRA for the Council’s Dunsfold Park SPD. Frensham Common is a favourite destination of residents from right across Farnham and forms the major part of the Wealden Heaths Phase 1 SPA (WH1SPA), where for the past decade the number of surviving Dartford warblers appears to have been so low that neither the Council nor Natural England will disclose the population data. The extent to which the populations’ slow recovery from the 2008/9 winter crash may be due to visitor pressure is not known. In the absence of that crucial population data and information, an appropriate assessment for the WH1SPA cannot be produced, and a precautionary approach to development affecting the WH1SPA should be taken.
29. The possibility that the in-combination effect of housing development in Farnham may be having a significant effect on the Wealden Heaths cannot be ruled out. It cannot be assumed that the Farnham Park SANG is capable of mitigating impacts on the WHSPAs, as there is no evidence of the extent to which that SANG is effective, and it certainly cannot be assumed that TBHSPA wardening in any way mitigates impacts on the WHSPAs. In the absence of an AA and any necessary mitigation for the WHSPAs, consent for the Appeal scheme must be refused.
30. Although the Appellant and the Council agree that mitigation of impacts on the TBHSPA is necessary, it appears that they intend to defer addressing the matter to the Reserved Matters stage, which if so, would mean that they are seeking a Principal consent in complete defiance of the statutory constraints. It is settled law that in a multi-stage planning consent system, consent cannot be granted at the Principal Decision stage (e.g. Outline or PIP) unless a complete and satisfactory Appropriate Assessment has been compiled and consulted upon, and the necessary proven mitigation measures secured (‘the *Barker* principle’).
31. [Habitats Reg.63\(2\)](#) ^[FN4] requires that the Appellant provides all the necessary information for the decisionmaker to produce a complete ecological risk assessment (‘appropriate assessment’, AA). In practice the developer may be reliant upon Natural England (NE) and/or the Council to provide them with the information, but it is the developer’s responsibility to obtain and collate all the information into a ‘shadow’ AA. [Reg.63\(5\)](#) ^[FN4] prevents the decisionmaker from Allowing the Appeal unless they have produced an AA. The Inspector is therefore obliged to examine whether any existing assessment(s) constitute a complete and satisfactory appropriate assessment, and if not, they can Allow the Appeal only if the necessary additional information can be obtained and a complete AA produced.

32. That 'new' AA would need to undergo public consultation in accordance with paragraph 39 of the C-323/17 [People Over Wind and Sweetman Ruling \(2018\)](#) ^[FN3A] which states that,

“It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment.”

33. It is the Planning Inspectorate's position that were the Inspector to determine that the Appeal should also be Dismissed on grounds other than Habitats compliance, with NPPF (2021) para 182 negating the para 11 Presumption and tilted balance, then they may choose not to attempt to produce an AA and may instead state in the Decision that an AA has **not** been conducted.

THE 'PRESUMPTION' AND 'TILTED BALANCE'

34. Paragraph 182 of the [NPPF \(2021\)](#) ^[FN9] states,

“The presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site.”

35. In the absence of any compliant appropriate assessment, it is clear that the Appeal scheme cannot legitimately claim that the Presumption and tilted balance are engaged

ASSESSMENT OF MITIGATION

36. In the UK, the controversial *Hart* judgement (2008) has been relied upon by authorities to enable the effectiveness of proposed mitigation measures to be assumed at the Screening stage (with NE's agreement), thus evading the requirement for detailed assessment of the effectiveness of mitigation measures to the exacting standard of 'Waddenzee' candour. Natural England's [2009 TBHSPA Delivery Framework](#) ^[FN10] states its reliance on the *Hart* Judgement at paragraph 3.1 and Footnote 1
37. The *POW/Sweetman Ruling* (2018) ^[FN3] overturned Sullivan LJ's 2008 *Hart* (Dilly Lane) Judgement. The 2019 Judgement in the local [Cron dall](#) case ^[FN11] further established the [POW/Sweetman](#) principles ^[FN3A] in UK law. [Paragraph 77](#) ^[FN11] of the twinned [Canterbury & Cron dall cases](#) ^[FN12] provides a clear and comprehensive summary of the situation.
38. The Inspector will no doubt be aware that [PINs Note 05/2018](#) ^[FN16] explains in paragraphs 1 to 6 and 12 to 17 that the *Hart* and *Smyth* practice of evading appropriate assessment by merely assuming that it is fully effective is **not** a lawful approach.
39. It should be noted that since the 2021 revision of the NPPF, the reference to paragraph 119 in paragraph 12 of the PINS Note should now refer to paragraph 182 of the NPPF (2021), such that the Presumption in favour of sustainable development and 'tilted balance' (now NPPF paragraph 11) do not apply where habitats development is being considered unless complete and satisfactory ("negative") appropriate assessments have been carried out. – in this case, for both the TBH and WH SPAs. As Natural England and Waverley have never yet been able to provide any evidence that apart from arbitrarily designating it as

a SANG doing nothing to 'improve' Farnham Park is effective as mitigation, and as Natural England have produced no evidence that the SAMM Strategy is effective, and as there is no Strategy for the Wealden Heaths, we can be quite certain that no lawful satisfactory (negative) appropriate assessment has ever been produced for housing development in Waverley.

40. The PINS Note serves to confirm that since 2008, all planning permissions for residential development within the 10km and 15km visitor catchment areas of the TBH and WH SPAs (respectively) have been unlawful, and that the positions of Natural England, PINS, almost all the decisionmakers, Officers, lawyers and consultants were wrong. Nevertheless, those who have supported the lawbreaking for years and/or have vested interests in doing so are perhaps understandably unwilling to admit their error, so are refusing to answer straight questions and continuing to defy the law. Of course, as public servants bound by the law and the Nolan Principles it is our duty to stand up against the relentless deception and selling of planning permissions.
41. The [National Planning Practice Guidance](#) on appropriate assessment (2019) ^[FN13] explains the implications of the Judgement in *People Over Wind* for decisionmakers, concluding that,

“ ... the competent authority must now assess the robustness of mitigation measures through an appropriate assessment.” [Para 006, Ref. ID: 65-006-20190722]

42. There is no ambiguity in **“must now”**. It can only mean that Natural England (and the advisers and decisionmakers who have been evading assessment) **must now** mend their ways. We know that no detailed and/or robust assessment exists as yet by which the efficacy of Natural England's mitigation strategies can be gauged, because if any such risk assessment existed then Natural England would be proclaiming it widely and it would be in the Appeal Documents library.
43. Paragraph 38 of [People Over Wind & Sweetman](#) (C-323/17) ^[FN3A] states that,
- “.. the assessment carried out under Article 6(3) of the Habitats Directive may not 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 proposed works on the protected site concerned”***
44. **The fact that the Council is relying upon a bare “AA Proforma” Screening Assessment, rather than produce a compliant AA, is clear evidence that Waverley and Natural England are still unable to compile a genuine evidence base to support compliant AAs of the SANG and SAMM Strategies.**

BIRD POPULATION DATA

45. The requirement that the ecological risk assessment considers the possible impact of the proposals on achievement of the Art.6(1) SPA Management Plan's conservation objectives for the protected habitats and species clearly requires that details of the current and past bird population data (and habitat condition) are available. The risk of contributing to or causing local species extinction depends upon the species abundance. The extent to which harmful effects are avoided or mitigated and the status of habitat condition and species abundance in relation to the SPA management plan objectives determine the level of risk, and decisionmakers are not free to take risks that could, in combination, have a significant effect except through the allowed limitation of the residual risk demonstrated by the detailed evidence in the appropriate assessment and the 'public interest' test of the Art.6(4) (Regs 64 and 68) derogation. For this reason, the Courts have established that the decisionmaker must consider species population levels. It is stated most simply in paragraph 115 of [C-43/10 Greece](#) ^[FN14] :

“... it cannot be held that an assessment is appropriate where information and reliable and updated data concerning the birds in that SPA are lacking.”

46. If the assessment does not contain bird population data for each of the species, it is not an appropriate assessment and consent cannot be granted.
47. **Unfortunately no collated bird population data for the Wealden Heaths appears to have been published since 2012. Without that data it is not possible for any Competent Authority to conduct an appropriate assessment.**
48. Numbers for the three species for the TBHSPA are now regularly published in the TBHSPA Joint Strategic Partnership Board agenda papers. Concerns about an unexpectedly slow recovery since 2012 and the failure to achieve and surpass the 2004/5 numbers, despite habitat restoration and favourable weather, have lessened as numbers have recently risen to around those of 20 years ago. We may soon learn more when we see the effect of the recent move to exclude visitors from Ash Ranges, returning it to military training use, and the effect of the Covid-19 lockdown in March and April 2020 and the subsequent increase in visitor numbers and dog ownership.
49. Following pressure to ensure good governance, the Council's Head of Planning provided a verbal update report to the [Audit Committee meeting of 8th November 2021](#) ^[FN15] in respect of the continuing obvious shortcomings of Waverley's habitats assessments. The webcast of the meeting is on the Council's YouTube channel. The following two minute section of his update informs us that as a first move toward compliance, Waverley are contacting Natural England to obtain the necessary WHSPA bird population data.

[28.07] ***“... So there's two issues, one for the Thames Basin Heaths, where we do have an Avoidance Strategy, and one for the Wealden Heaths, where we don't have an Avoidance Strategy. So for the Avoidance Strategy sites, one of the questions is, “Well we're saying that the impact on the habitats is mitigated by the SANG”, but we're not necessarily demonstrating how, or explaining how, and it's been, you know and I think that's a fair point, that sometimes we've been saying, “Well there is the SANG, ipso facto, the Habitats Regulations have been discharged.”***

[28.40] ***But actually what the Government Guidance says is that SANG can be an appropriate mitigation but you still have to demonstrate through appropriate assessment what assessment you have done to make sure to ensure that you are satisfied that they won't have significant impact... the development won't have significant impacts on the ... on the SPA and or any other area and of habitats that are protected, and that's what we really ... that's the next step we need to do. My colleague Chris French is contacting Natural England because we are aware that they do do an annual survey of the bird numbers in the SPA but what we've been...***

[29.25] ***... what they've been reliant upon in the past is the Citation, and that was discussed at the Dunsfold O&S last week, so we're seeking to get a situation where we provide additional information in our appropriate assessments ...”***

50. That information should be available by now, and the Council must either submit it to the Appeal or concede that we do not have the requisite appropriate assessments for the Appeal scheme.

CONSERVATION OBJECTIVES

51. As the Head of Planning admitted to the Audit Committee in November (para 17 above), the authorities have been using the 1980s bird population data from the 1992 SPA Citation as a smokescreen to hide the lack of current bird population data and Conservation Objectives. However, the lack of Conservation

Objectives from Natural England does not necessarily need to be a show-stopper, provided that an open and honest approach to setting 'interim' targets can be agreed with Natural England. Dartford warbler numbers on the Thames Basin and Wealden Heaths could reasonably be expected to have surpassed the 2006 levels of 540 (TBH), 136 (WH1) and 139 (WH2). and to ensure future resilience to fires and bad winters our Management Plan Conservation Targets should be to maintain population levels well above the 743, 248 and 220 (resp.) previously achieved. A precautionary approach must be taken.

THE REQUIRED INFORMATION FOR AA DOES NOT YET EXIST

52. The minimum requirements for the content of an appropriate assessment are set out in legislation :
- In-combination impacts (Art.6(3))
 - Possible impacts on all the interest features of the habitats and species for which the Site was designated (Art.6(3))
 - Conservation Objectives in accordance with the Site's Art.6(1) Management Plan (Art.6(3))
 - Detailed "convincing" objective scientific evidence (C-127/02 *Waddenzee*), including detailed quantitative assessment of the extent to which any proposed mitigation measures are effective, with "**no lacunae**" (C-323/17 *POW/Sweetman*) – no gaps, no omissions
 - Bird population data and trends (Wild Birds Directive Art.4(1) and C-43/10 *Greece* para 115)
53. Clearly the requisite information and evidence is not available. If it were, then it would be placed before us. It should be noted that the Thames Basin Heaths [Joint Strategic Partnership Board](#) meeting papers record two previous attempts by Natural England to demonstrate the efficacy of their mitigation strategies :
54. At the [27th November 2015 JSPB meeting](#) ^[FN17] the Board agreed that an NE-commissioned Report on the effectiveness of SANGs by Footprint Ecology should not be published, as it contained "**a significant number of (unsupported) assumptions, assertions and sweeping conclusions**", lacked real evidence and even "**had the potential to undermine the strategy for the protection of the SPAs**" (see Item 6 in the [Minutes](#) ^[FN18] ::
55. The [21st September 2018 JSPB meeting](#) ^[FN19] was provided with a survey-based [PhD Thesis from Southampton University](#) ^[FN20] on the role of SANGs, which despite a number of factual inaccuracies in the background information still concluded that there was no evidence that SANGs are effective in attracting visitors away from the SPAs.
56. NE's Report within the [Agenda papers](#) ^[FN21] for the 19th November 2020 Meeting of the TBHSPA JSPB confirmed (at paragraph 7.5 on p29 of 62) that the SPA and SANG visitor count data and modelling necessary to understand cause and effect was not expected before 2022 at the soonest:

“Future analyses, to be carried out by the next meeting, will be a formal statistical analysis of people counter data to produce a trend over time per site. During the second stage, which will likely be started, but not completed, before the next meeting, trends will be contextualized in relation to the presence of nearby SANGs, for some of which people counter data are being kindly provided by the Local Planning Authorities: the aim will be to understand to what extent the trend in people visiting SANGs and SPA match. The result will be correlative, as cause and effect cannot be established with certainty using the data currently available. The third stage, which will likely not be completed before 2022, will include a statistical model to explain the number of visitors on the SPA in relation to number of visitors at SANGs, as well as distance between each SPA site and the nearest SANG(s), seasonality and other factors that will be identified according to the data available. The aim will be to understand the likely drivers of change, or lack there-of, in visitors on SPA, with the view of drawing recommendations on how to alter visitor numbers if necessary.”

57. From Natural England’s own words it is clear that further fundamental work needs to be done before a POW-compliant appropriate assessment of SANG and SAMM mitigation measures can be produced.

THE PROFORMA AA (SCREENING ASSESSMENT)

58. The Council’s [draft Appropriate Assessment Proforma for Hawthorns](#) ^[FN22] is not an appropriate assessment. It is clear that by assuming that a payment for untested mitigation removes the need for appropriate assessment, the Proforma is precisely the type of Screening Assessment which the ECJ condemned in the People Over Wind Ruling.
59. The Proforma does not provide any in-combination assessment for the WHSPA or the required bird numbers, Conservation Objectives and evidence of the extent to which the mitigation proposals are effective for the TBH and WH SPAs. It completely fails to consider the possible impacts on the WHSPA, of which it is well within the 15 km and 9 km visitor catchment areas established by independent WHSPA Visitor Surveys (to capture 95% and 70% of visitors, respectively).
60. **In law, the fact which determines this Appeal is that the Appellant, Waverley and/or Natural England have not even been able to provide the Inspector with any information to demonstrate the extent to which existing Strategic SANGs, local SANGs and On Site SANGs are effective. If they were able to provide genuine evidence of the extent to which the proposed faux-SANG mitigation measures are effective, then they would have already done so.**
61. The Habitats Directive is determinative ; in the absence of a complete AA, permission cannot be granted. Whilst it is true that proper implementation of the Regulations, Directive and [POW/Sweetman](#) would prevent almost all housing development in Waverley (pending necessary evidence), it might reasonably be assumed that a reduced quantum of development could be lawfully permitted through the Local Plan if NE cannot demonstrate that SANGs and other mitigation proposals are fully (100%) effective. Logically, if the past 15 years of NE and LPA survey data can provide certainty that the mitigation ‘Avoidance Strategy’ is 50% or 75% effective, then that proportion of the ‘accompanying’ new housing can be granted consent.

QUESTIONS

The questions which the Main Parties must answer are:

- (a) ~~Do you accept that "Competent Authorities must now the~~ Do you accept that the *People Over Wind & Sweetman* Ruling overturns the discredited *Hart* and *Smyth* judgements [\[FN16\]](#), confirming that the common practice of evading the production of a complete appropriate assessment containing a detailed assessment of the mitigation for Habitats developments, by instead merely assuming the efficacy of mitigation measures, cannot be lawfully used to grant consents ?
- (b) Do you accept that the Council's 'AA Proforma' [\[FN22\]](#) does not contain the necessary detailed assessment of the efficacy of Farnham Park SANG and NE's SAMM mitigation ?
- (c) Do you believe that you can provide all of the information and evidence necessary to produce a *POW/Sweetman*-compliant Appropriate Assessment, and if so, where can it be found ?
- (d) What are the recent and past bird population numbers and the Favourable Condition Conservation Objectives for the protected breeding birds on the TBHSPA and the WHSPAs ?
- (e) To what extent has the slow recovery of the Dartford warbler population on the WH1SPA since their 2009/10 harsh winters' crash in numbers been caused by increasing visitor numbers ?
- (f) To what extent does the provision of local SANGs encourage dog ownership among new and existing residents [\[FN20\]](#) ?
- (g) To what extent do SAMM 'hard measures', such as the reduction of car parking or car park charging displace visitors to other areas of SPAs, increasing the risk of a detrimental increase in disturbance of nests ?
- (h) What is the average time lag between the perceived main relevant cause and effect, i.e. between granting consent and relevant new residents becoming dog owners who frequent a SPA ?