



ELMBRIDGE BOROUGH COUNCIL

EXAMINATION OF THE ELMBRIDGE LOCAL PLAN

**MATTER 1: LEGAL COMPLIANCE AND PROCEDURAL
REQUIREMENTS (INCLUDING DUTY TO
COOPERATE)**

**PRE-HEARING STATEMENT ON BEHALF OF
ELMBRIDGE BOROUGH COUNCIL**

February 2024

Matter 1: Legal Compliance and Procedural Requirements (including Duty to Cooperate)

Issue 1: Have the relevant legal requirements been met in the preparation of the Plan and is the Plan legally compliant?

Questions:

- 1.1 Has the Plan been prepared in accordance with the Duty to Cooperate (DtC) imposed by S33A of the Planning and Compulsory Purchase Act 2004 (as amended)? This applies to the preparation of Local Plans so far as relating to a strategic matter. It is necessary for Local Planning Authorities to demonstrate how they have complied with the DtC at the Examination stage of their Local Plan.**

Council response

- 1.1.1 Yes, it is the Council's view that the Local Plan has been prepared in accordance with the duty to cooperate under S33A of the Planning and Compulsory Purchase Act 2004 (as amended). The Council's view is supported by the representation responses from neighbouring authorities which is set out in the Regulation 22 Consultation Statement [CD008]. The Council considers it has demonstrated that throughout the preparation of the Local Plan it has co-operated with neighbouring authorities and prescribed bodies through constructive and on-going engagement. The basis and results of this co-operation mean that the relevant cross boundary issues have been identified and considered within the submitted Local Plan. A summary of relevant legal principles in relation to DtC is included in Appendix 1 of this statement.
- 1.1.2 The Duty to Cooperate Statement of Compliance and Appendices June 2022 [CD015 and CD016], and the Duty to Cooperate Statement of Compliance Update August 2023 [CD014] provides evidence of the engagement that has taken place and an explanation of how this co-operation has influenced the Local Plan. The Council has also entered into several Statements of Common Ground (SoCG) with neighbouring authorities and prescribed bodies to confirm that the Council has met the duty.
- 1.1.3 To ensure this compliance is ongoing, the Council is committed to continuing to meet with other authorities and relevant bodies to discuss strategic cross boundary issues.

1.2 Has the Council maximised the effectiveness of the Plan by engaging constructively, actively and through an ongoing basis with the prescribed bodies on the relevant strategic matters identified and how has this been undertaken?

Council response

1.2.1 Yes, the Council has made every effort to obtain the necessary cooperation on strategic cross boundary matters through active and sustained engagement from the outset of Local Plan preparation. From early Local Plan preparation the Council produced a Duty to Cooperate Scoping Statement January 2015 [CD017] to assist the Council in meeting its duty to cooperate and ensure that the effectiveness of its planning policies was maximised.

1.2.2 The Council has actively engaged and consulted with the relevant neighbouring local authorities, prescribed bodies and formal partnerships (including those not subject to the Duty to Cooperate requirements) by way of joint evidence base working and early and on-going discussions on our evidence base, and meetings (in person and virtual). The Duty to Cooperate Statement of Compliance and Appendices June 2022 [CD015 and CD016], and the Duty to Cooperate Statement of Compliance Update August 2023 [CD014] sets out the engagement the Council undertook. This is supplemented by the following SoCG submitted to the Examination with:

- Epsom & Ewell Borough Council - Aug 2023 [CD018]
- Mole Valley District Council - July 2023 [CD019]
- Royal Borough of Kingston upon Thames - Aug 2023 [CD020]
- London Borough of Richmond upon Thames - July 2023 [CD021]
- Spelthorne Borough Council - July 2023 [CD022]
- Runnymede Borough Council - Aug 2023 [CD023]
- Woking Borough Council - Aug 2023 [CD024]
- Guildford Borough Council - July 2023 [CD025]
- Surrey County Council - Aug 2023 [CD026]
- Transport for London - July 2023 [CD027]
- Natural England - Sep 2023 [CD028]
- National Highways - July 2023 [CD029]
- Historic England - July 2023 [CD031]
- Surrey Heartlands Heath and Care Partnership Integrated Care System - Aug 2023 [CD032]

- 1.2.3 Elmbridge's Local Plan Duty to Co-operate Statement of Compliance and Appendices June 2022 [CD015 and CD016], the Duty to Cooperate Statement of Compliance Update August 2023 [CD014] and the SoCG [CD018 to CD032] set out the strategic matters that have been identified and considered through the preparation of the Local Plan.
- 1.2.4 In the Duty to Co-operate Statement of Compliance and Appendices June 2022 [CD015 and CD016] Section 4, 'Strategic Priorities & Matters: Geographies and Statutory Organisations & Prescribed Bodies' sets out each of the main strategic and/or cross boundary themes which were identified through the process and section 6 'Addressing the Strategic Priorities & Matters' details any specific outcome from the process.
- 1.3 Has the DtC under sections 22(5)(c) and 33A of the Planning and Compulsory Purchase Act 2004 (2004 Act) and Regulation 4 of the Town and Country Planning (Local Planning) (England) Regulations (2012) (2012 Regulations) been complied with, having regard to advice contained in the National Planning Policy Framework (NPPF) and the PPG?**

Council response

- 1.3.1 The Council considers the duty to cooperate has been discharged in a manner consistent with paragraphs 24-27 of the National Planning Policy Framework¹ and the Planning Practice Guidance (PPG). The Duty to Cooperate Statement of Compliance and Appendices [CD015 and CD016] demonstrates how the Local Plan is based on effective joint working on cross-boundary strategic matters, in accordance with the requirements of paragraph 27 of the NPPF and the PPG chapter on Maintaining Effective Cooperation.
- 1.3.2 The Council has provided all SoCG agreed (as set out in paragraph 1.2.2 above). The SoCG have been prepared consistently with the Framework (NPPF Paragraphs 24 to 27) and Planning Practice Guidance on Plan-making (paragraphs 011 and 015). The Council has had early engagement and on an ongoing basis with neighbouring boroughs and other stakeholders and prepared the SoCG's. The Duty to Cooperate Statement of Compliance and Appendices [CD015 and CD016] documents where cooperation has taken place and strategic

¹ [National Planning Policy Framework 2021](#)

cross boundary matters identified and considered in the SoCG's have been discussed throughout the preparation of the Local Plan.

1.4 Elmbridge Borough Council has set out within its Statement of Compliance and associated update (CD014 and CD015) and associated appendices (CD016) how it considers it has complied with the DtC. The Council have also submitted a number of Statements of Common Ground (SoCG) in support of this position. What has been the nature of the cooperation undertaken and on what issues has it focused?

Council response

- 1.4.1 The Council has a history of collaborative working and engaging with other local authorities and bodies both at an officer and Councillor level. Collaborative working which the Council is involved with includes various working groups and partnerships, some of which were set up prior to the duty and have been in operation for some time. Others have evolved through the preparation of the Local Plan as the Council and its partners have acknowledged that existing groups may not have been fully sufficient or suitable to meet duty to cooperate requirements for all strategic issues.
- 1.4.2 The working groups and partnerships that Elmbridge officers and / or Councillors' attend provide a vehicle to discuss strategic matters and duty to cooperate issues. During the preparation of the Local Plan, the Council has sought to utilise such mechanisms for cooperation in order to facilitate engagement and collaborative working on strategic issues.
- 1.4.3 Details of such groups including their purpose, key priorities and workstreams, membership / governance arrangements and frequency of meetings are listed below. This list is not exhaustive but includes those groups and partnerships which have had the most influence on our Local Plan preparation, including the evidence base, and those wider strategic plans and priorities that the Local Plan seeks to deliver. In some cases, the working groups and priorities have evolved over the course of preparing the Local Plan to reflect changes in the wider planning context in which it was prepared e.g., the COVID-19 pandemic and the climate change emergency.

1.4.4 In addition to the Regulation 19 representation period (June/ July 2022), the Council has also undertaken three Regulation 18 Consultations in which our duty to cooperate partners were formally engaged:

- Strategic Options Consultation (2016/17)
- Options Consultation (2019)
- Vision, objectives and direction for the development management policies consultation (2020)

1.4.5 In addition to more formal collaborative working arrangements, and consultations set out above, the Council has, as and when appropriate, undertaken more bespoke engagement with other local planning authorities including Surrey County Council (SCC); infrastructure partners and statutory consultees such as the Environment Agency (EA); National Highways (NH) and Natural England (NE). This includes discussions on the evidence base as it has emerged to ensure they are satisfied with the approach being taken by the Council to identified Strategic Matters and how this has informed the Local Plan. Details of relevant activities are set out under each Strategic Matter within Section 6 of the Duty to Cooperate Statement of Compliance [CD015].

1.2.5 Strategic matters identified were:

- Strategic matter 1: housing (including affordable housing),
- Strategic matter 2: Roma, Gypsies, Travellers & Travelling Showpeople and houseboat dwellers
- Strategic matter 3: employment, retail and other commercial developments
- Strategic matter 4: transport
- Strategic matter 5: flooding
- Strategic matter 6: minerals, waste and other utilities
- Strategic matter 7: health
- Strategic matter 8: education
- Strategic matter 9: green and blue infrastructure,
- Strategic matter 10: green belt and landscape,
- Strategic matter 11: natural environment including Thames Basin Heaths Special Protection Area (SPA)
- Strategic matter 12: climate change
- Strategic matter 13: historic environment
- Strategic Matter 14: Heathrow.

1.5 In relation to the Strategic Flood Risk Assessment (SFRA):

- **Does the work provided to date accord with the advice contained within paragraphs 159-160 of the Framework?**

Council response

- 1.5.1 Yes, the Local Plan and its evidence base set out in the Council's Strategic Flood Risk Assessment (SFRA) – Level 1 [INF009 and INF010] and associated Addendum [INF008] (February 2019 and January 2022), as well as the additional work in the forthcoming Level 2 SFRA, Sequential Test and Updated Level 1 SFRA accord with the advice contained within paragraphs 159-160 of the NPPF Paragraph 160 of the NPPF states that "*Strategic policies should be informed by a strategic flood risk assessment and should manage flood risk from all sources. They should consider cumulative impacts in, or affecting, local areas susceptible to flooding...*"
- 1.5.2 AECOM were commissioned in 2018 to produce a Level 1 SFRA to inform the preparation of the Local Plan, which was published in February 2019. The Level 1 SFRA provides an overview of the risk of flooding from all sources across Elmbridge Borough, now and in the future, taking account of the impacts of climate change, and assessing the cumulative impact that land use changes and development in the area will have on flood risk.
- 1.5.3 The Council subsequently produced an Addendum to this Level 1 SFRA, which was published in January 2022, following the release of updated climate change allowances data and flood mapping within the Thames Basin district for Elmbridge, along with changes to national policy and guidance on flood risk assessments published in 2021.
- 1.5.4 Since publication, the Level 1 SFRA [INF009 and INF010] and its Addendum [INF008] have been used to inform the development of policies, strategic planning decisions and development management decisions.
- 1.5.5 Following advice received from the EA in their Regulation 19 representation and a meeting held on 9 March 2023, the Council commissioned AECOM to produce a Level 2 SFRA in September 2023. The Council delayed the start of the Level 2 SFRA work until September 2023 to ensure it was able to capture the EA's 2022 updated Thames

modelling data that was eventually published in October 2023. The Level 2 SFRA reflects the latest national policy and guidance on flood risk (published in August 2022) and updated flood modelling data for the River Thames and Lower Wey released by the EA in October 2023 and October 2019 respectively.

1.5.6 The draft SFRA Level 2 was due to be provided to the Council as well as the EA and SCC for review in early January 2024. However, on 11 January 2024 AECOM received the Supplementary Model Report for the latest (October 2023) Lower Thames modelling data from the EA, which summarises the modelling updates that have been undertaken on the Lower Thames (Datchet to Teddington) and sets out the results. The Model Report states that the Thames Dominated outputs are overly conservative for the area around the Lower Mole and identifies that for the area between Island Barn and Hampton Court Way, flood risk is best represented by the Lower Thames Tributary Dominated model rather than the Thames Dominated model. As a result, AECOM have identified that the drafted Level 2 SFRA needs re-modelling and for the report to be amended to refer to a greater range of different model outputs for specific locations in Elmbridge with corresponding work required to update the proformas, mapping and site assessment database of the SFRA. This extra work will delay the project programme and the draft SFRA Level 2 is now expected to be ready in mid-February 2024.

1.5.7 The table below sets out the current work programme for the Level 2 SFRA:

| | |
|---|--------------------------------|
| Preparation of Draft Level 2 SFRA Report | w/c 29 Jan. – w/c 12 Feb. 2024 |
| Milestone: Issue Draft Report | w/c 12 Feb. 2024 |
| Review period – EBC, EA and SCC | w/c 12 Feb. – w/c 11 Mar. 2024 |
| Preparation of final Level 2 SFRA Report | w/c 11 Mar. – w/c 25 Mar. 2024 |
| Milestone: Issue Final Report and Mapping | w/c 25 Mar. 2024 |

1.5.9 Following a requirement from the EA in November 2023 the Council has also commissioned AECOM to prepare an update to the Level 1 SFRA in January 2024. The Level 1 SFRA Update will reflect the latest national policy and guidance on flood risk (published in August 2022) and the updated October 2023 flood modelling data and Model report provided January 2024. Work on this update is ongoing and a first draft of the report is expected in February/March 2024. The programme for this piece of work is set out in the table below:

| | |
|--|--------------------------------|
| Preparation of Draft Level 1 SFRA Report and Mapping | w/c 8 Jan. – w/c 19 Feb. 2024 |
| Milestone: Issue Draft Report and Mapping | w/c 26 Feb. 2024 |
| Review period – EBC, EA and SCC | w/c 26 Feb. – w/c 25 Mar. 2024 |
| Preparation of final Level 1 SFRA Report and Mapping | w/c 25 Mar. – w/c 15 Apr. 2024 |
| Milestone: Issue Final Report and Mapping | w/c 15 Apr. 2024 |

1.5.10 Again, following the EA’s advice the Council has prepared a draft Sequential Test, which sequentially and exception tests, where required, each proposed site allocation in the draft Elmbridge Local Plan in according with the approach detailed in national policy and guidance. This is not ready to submit as the extra work required to finalise the draft Level 2 SFRA also has implications for the Sequential Test and this will need to be revisited once the draft Level 2 SFRA is provided to the Council for review.

1.5.11 Paragraph 159 of the NPPF states that *“Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere”*.

- 1.5.12 The Council's draft Sequential Test demonstrates how the sequential and exception tests have been applied to each site allocation proposed in the Local Plan. The Sequential and Exception Tests were applied in accordance with national policy set out in section 14 of the NPPF (paragraphs 159 – 165) and guidance set out in the Planning Practice Guidance on Flood Risk and Coastal Change. The Sequential Test considers the risk of flooding from all sources now and in the future, including taking account of the impact of climate change. The tests are informed by the Council's Level 1 and Level 2 SFRA, which identify and map the risk of flooding on each site from all sources.
- 1.5.13 The Sequential Test demonstrates that the majority of the site allocations proposed in the draft Local Plan are located in areas at low or relatively low risk of flooding from all sources now and in the future and are considered appropriate development under the Sequential Test. A relatively small number of proposed site allocations are located in areas at medium or relatively high risk of flooding. The Sequential Test demonstrates that it is not possible to relocate this to sites at lower risk of flooding as there are no suitable and reasonably available alternative sites in the Borough that can accommodate these developments. Where appropriate the exception test was applied and it was demonstrated that these sites satisfy both elements of the Exception Test, with no inappropriate development is proposed in areas at high risk of flooding.
- 1.5.14 Paragraph 160 of the NPPF also states that strategic policies and SFRAs should "... *take account of advice from the Environment Agency and other relevant flood risk management authorities, such as lead local flood authorities and internal drainage boards*"
- 1.5.15 The SFRA has been prepared in consultation with the EA and SCC. The EA are the risk management authority (RMA) with responsibility for taking the lead in the management of flood risk from the main rivers in the Borough and have made key flood risk mapping datasets available for the SFRA. SCC, as the Lead Local Flood Authority (LLFA), takes the lead in the management of flood risk from surface water, groundwater and ordinary watercourses.
- 1.5.16 In addition, in discharging its duty to cooperate the Council has consulted and engaged with all statutory consultees, including the EA and SCC. The Council identified the strategic matters for engagement, including flood risk, in its Duty to Cooperate Scoping Statement [CD017],

published in January 2015 and proposed a range of specific engagement activities in relation to the preparation of the SFRA and the Local Plan (see page 40 & 41).

1.5.17 The Council's Duty to Cooperate Statement of Compliance [CD015 and CD016], published in June 2022, details all DtC engagement activities undertaken up to the publication of the Regulation 19 draft Local Plan in June 2022, with the subsequent Duty to Cooperate Statement of Compliance Update [CD014], published in August 2023, going on to detail all activities undertaken between June 2022 and the submission of the Local Plan in August 2023. These documents demonstrate that the Council has consulted and engaged with the EA, SCC, as well as a range of other statutory consultees and prescribed bodies on the strategic issue of addressing flood risk and preparation of the SFRA.

1.5.18 Since the publication of the Council's Duty to Cooperate Statement of Compliance Update in August 2023, the Council has continued to engage with the EA on an ongoing basis. The table below provides links to the Council's Duty to Cooperate documents relating to the matter of flood risk and the SFRA in order of publication:

| DtC Document | Publication Date |
|--|---|
| <u>DtC Scoping Statement</u> (CD017) | Jan. 2015 (See page 40 – 41 in relation to flood risk) |
| <u>DtC Statement of Compliance</u> (CD015) and <u>Appendices</u> (CD016) | Jun. 2022 (See page 152 – 156 in relation to the SFRA) |
| <u>DtC Statement of Compliance Update</u> (CD014) | Aug. 2023 (See page 30 in relation to the SFRA) |

1.5.19 The EA were engaged throughout the process of preparing the 2019 Level 1 SFRA and its Addendum. The Council agreed a cost-recovery framework to ensure the EA were able to input effectively into the SFRA, including providing the required data and comments on the draft report.

The EA also attended a number of joint meetings with the Council and AECOM, during the preparation of the assessment. SCC and Thames Water were also engaged and asked to input on the draft methodology and draft report of the Level 1 SFRA. This is set out in detail on page 152 of the Council's Duty to Cooperate Statement of Compliance.

1.5.20 Following the EA's advice, the Council commissioned AECOM to prepare the Level 2 SFRA in September 2023. The EA were consulted on the scope of work of the project. The Council met with the EA on 26 January 2024 to discuss the progress on the draft report.

- **According to the letter of 10 November 2023 from the Council (COUDO002) the Council have been asked to update the SFRA Level 1 Assessment. What is the reason for this?**

Council response

1.5.25 The EA have advised the Council to update its Level 1 SFRA to reflect the changes to national policy and guidance that were introduced in August 2022, primarily relating to how site assessments of flood risk should consider flooding from all sources now and in the future; and so that the Level 1 SFRA is based on the latest flood modelling data, published by the EA in October 2023 and the Model Report received in January 2024.

- **Does the modelling work undertaken appropriately address all of the possible sites within the relevant flood zones? If not why not?**

Council response

1.5.26 Yes, the modelling work undertaken in the draft Level 2 SFRA thoroughly assesses all known reasonably available sites in the Borough located within Flood Zone 1 to 3. The modelling work and assessment of flood risk on each site is based on the latest available hydraulic modelling data for the Borough's rivers and takes flooding from all sources into account, as well as the impact of climate change in accordance with national policy and guidance.

- **Is there a SoCG with the Environment Agency? If not, this should be submitted with the hearing statement.**

Council response

1.5.27 The Council has prepared a preliminary SoCG with the EA, which both parties have signed. This has been submitted with the Council’s hearing statement. The Council will continue to engage with the EA and seek to agree a final SoCG.

1.6 In what way has the Council complied with the requirements of section 19(3) of the 2004 Act and Regulations 18 and 19 of the Town and Country Planning (Local Planning (England) Regulations 2012 with regard to conducting consultation in accordance with their statement of community involvement (SCI)?

1.6.1 Throughout preparation of the Local Plan, detailed reports have been produced for each consultation setting out the way in which the Council has complied with section 19 (3) of the Planning and Compulsory Purchase Act 2004 and Regulation 18 and 19 of the Town and Country Planning (Local Planning (England) Regulations 2012 with regard to conducting consultation in accordance with the [SCI 2021](#) [CD007]. The table below lists the consultation documents produced and the consultation statements in date order. These include the details and evidence of how the consultations were carried out.

| Date | Local Plan Preparation | Consultation Documents | Consultation statements |
|------------------------------|--|---------------------------------------|---|
| December 2016- February 2017 | Regulation 18: Strategic Options Consultation | <u>Consultation Document (CON007)</u> | <u>Summary of Consultation Responses (CON004)</u> |
| August - September 2019 | Regulation 18: Options Consultation | <u>Consultation Document (CON006)</u> | <u>Options Consultation Statement 2019 (CON003)</u> |
| January - March 2020 | Regulation 18: Creating our vision, objectives and the direction for | <u>Consultation Document (CON005)</u> | <u>Consultation Statement (CON002)</u> |

Matter 1: Legal and procedural compliance
Statement by Elmbridge Borough Council
February 2023

| Date | Local Plan Preparation | Consultation Documents | Consultation statements |
|-----------------|--|---|--------------------------------|
| | development management policies 2020. | | |
| June -July 2022 | Regulation 19: Draft Elmbridge Local Plan 2037 | <p><u>Representations Strategy- May 2022-</u> This set out how the local authority would advise residents and key stakeholders about the representations they can make for the Regulation 19: Pre-submission Draft of the Elmbridge Local Plan representations stage.</p> <p><u>Consultation Statement- Regulation 19 – June 22 (CON001)-</u> This provided an overview of how the Council has consulted and engaged with communities and stakeholders in the preparation of the Elmbridge Local Plan and how the Regulation 18 responses have impacted the direction of the Local Plan, which is in compliance with Stage 3, bullet point 3 in appendix 2 of the SCI.</p> <p><u>Draft Elmbridge Local Plan 2037 (CD001)</u></p> <p><u>Regulation 22 Consultation Statement- August 2023 (CD008) -</u> This reports the publication arrangements and representations received for the draft Elmbridge Local Plan.</p> | |

Issue 2: Are the likely environmental, social and economic effects of the Plan adequately and appropriately assessed by the Habitats Regulations Assessment (HRA) and the Sustainability Appraisal (SA)?

Questions:

2.1 Is the Sustainability Appraisal (SA) adequate in terms of:

- **its assessment of the likely effects of the Plan's policies and allocations,**

Council response

- 2.1.1 Evaluating the likely environmental, social and economic effects of the draft Elmbridge Local Plan's policies and allocations is reported at section B3 of the SA Report 2022 (para 3.89-3.117) [CD002]. Table 15 in the SA report shows the appraisal results for each policy. The full and detailed assessment for each policy is located at Appendices 2, 3 and 4 of the SA Report 2022 including the justification and reasoning.
- 2.1.2 Section B3 of the SA report 2022 also presents the overall impacts of the Local Plan and shows the Local Plan's impacts on the 16 social, economic, and environmental sustainability objectives. In compliance with the SEA Directive, secondary, indirect, cumulative, synergistic and permanent effects are also discussed.
- 2.1.3 Sustainability consultants Levett-Therivel were commissioned to undertake a peer review the Sustainability Appraisal for the Local Plan, to determine whether it complies with legal requirements and whether its findings have been fully taken into account in the decision-making process. The peer review report at Appendix 1 of the SA report 2022 contains a table and point 6 discusses the likely significant effects on the environment. It is considered that the Council has meet the legal requirements in its assessment of the likely effects of the Local Plan's policies and allocations.
- 2.1.4 A summary of relevant legal principles in relation to the SA included in Appendix 1 of this statement.

- **the consideration of reasonable alternatives, and**

Council response

- 2.1.4 Developing the Local Plan Options including reasonable alternatives is discussed at section B2 of the SA report 2022 (Para. 3.20-3.88) [CD002]. This section provides a detailed explanation of the alternatives considered, and the problems/issues related to each alternative. It highlights the iterative process that has taken place focusing on the spatial strategy particularly in relation to meeting the borough's housing needs.
- 2.1.5 As well as setting out the context in terms of the level of housing need required and possible locations for housing, section B2 of the SA report explains the how the evidence base, national policy changes and consultation feedback have influenced the progression of the reasonable alternatives.
- 2.1.6 Table 1 in Appendix 1 of the SA report 2022 [CD002] shows how the SA has informed the plan-making process, particularly in terms of identifying and documenting the impacts of different spatial alternatives and of the Local Plan policies as they emerged.
- **Giving clear reasons for the preferred approach, explaining why the preferred strategy and policies were selected? (This issue relates to the legal compliance of the SA and HRA only and questions concerning the detail of the SA, outcomes and how it has informed the selection of the spatial strategy will be considered under matter 2).**

Council response

- 2.1.7 In accordance with paragraph 32 of the NPPF, Local Plan policies have been informed throughout their preparation by an SA. The reasons for the preferred approach are set out in Section B2- paragraphs 3.20-3.75 of the SA report 2022 [CD002] which explains how the options evolved. The Spatial Strategy of the Local Plan (Option 4a) was approved by Council in June 2022.
- 2.1.8 The reasons for selecting this option are due to its expected positive impacts on the community's health, accessibility to services, use of PDL, land quality, biodiversity and landscape protection and enhancements. It was considered that these positives compensated for the expected major negative impact from not meeting the borough's housing needs in full. Ultimately, the Local Plan seeks to balance the social, economic,

and environmental expected impacts to ensure the Council’s corporate vision for the borough can be met.

2.1.9 Point 8 (in the peer review table at appendix 1 of the SA Report [CD002] written by sustainability consultants Levett-Therivel) highlights how the SA has complied with Article 5 (h) of the SEA directive, which requires an outline of the reason for selecting the alternative. It states that paragraphs 3.17-3.69 (now 3.20-3.75) of the SA Report provides a detailed explanation of the alternatives considered, and the problems/issues related to each alternative.

2.2 Has the SA been undertaken as an iterative process to inform the Local Plan preparation, with reference to the flowchart contained within the Planning Practice Guidance?

Council response

2.2.1 The SA has been undertaken as an iterative process to inform the Local Plan Preparation. The SA report 2022 [CD002] has been structured to correspond with the stages set out in the PPG flowchart.

2.2.2 The table below highlights the SA documents that have been produced throughout the Local Plan preparation stages.

| Sustainability Appraisal process stage | Local Plan Preparation stage | SA Documents produced |
|---|--|---|
| Stage A: Setting the context and objectives, establishing the baseline and deciding the scope | Evidence gathering and engagement | 2016 <u>Sustainability Appraisal Scoping Report</u> 2020 <u>Scoping Report (Review of 2016 Scoping Report)</u> |
| Stage B: Developing and refining alternatives and assessing effects | Consult on Local Plan in preparation (regulation 18 of the Town and Country Planning (Local Planning) (England) Regulation 2012) | 2016- Regulation 18 Strategic Options Consultation (<u>Initial Assessment of spatial Strategy Options</u>) and <u>Appendix 5</u> |

| Sustainability Appraisal process stage | Local Plan Preparation stage | SA Documents produced |
|--|---|---|
| | | <p>2019- Regulation 18 Options Consultation <u>Sustainability Appraisal</u></p> <p>2020- Regulation 18 Creating our vision, objectives and the direction for development management policies <u>Sustainability Appraisal.</u></p> |
| Stage C: Prepare the sustainability appraisal report | Prepare the publication version of the Local Plan. | <p><u>CD002- Draft Elmbridge Local Plan Sustainability Appraisal – June 2022</u></p> <p><u>CD003- Sustainability Appraisal non-technical summary June 2022</u></p> |
| Stage D: Seek representations on the sustainability appraisal report from the consultation bodies and the public | <p>Seek representations on the publication Local Plan (regulation 19) from consultation bodies and the public.</p> <p>Submit draft Local plan and supporting documents for independent examination.</p> | <p>17 June – 29 July 2022</p> <p><u>Regulation 19 representation stage consultation homepage.</u></p> <p>10 August 2023</p> <p><u>Local Plan Examination webpage</u></p> |

2.3 The HRA and Suitable Alternative Natural Greenspace (SANG) Options Assessment (ENV010) advises that there is enough SANG capacity for the first 10 years of the Plan however an additional 7.5ha of land provision will be required for years 11-15. Reference

is made to the possibility of two feasibility options – the extension of Esher Common SANG and the Effingham Common SANG (within Guildford Borough Council).

- **What is the status of both of these options? Are these conclusions now superseded by the SANG Options Assessment, September 2023 (ENV011) which refers to the identification of Land at Field Common, Hershams?**

Council response

- 2.3.1 Yes, the updated SANG Options Assessment, September 2023 [ENV011], supersedes the SANG Options Assessment 2022 [ENV010]. The extension of Esher Common and the Effingham Common SANGs are no longer feasible options for increasing the Borough's SANG capacity and are not being pursued by the Council.
- 2.3.2 As set out in the SANG Options Assessment September 2023 [ENV011], the Council has identified land at Field Common Farm, Hershams for acquisition and use as an additional SANG in the Borough. This is the most feasible option for increasing the Borough's SANG capacity over the Plan period of the Local Plan and beyond. This updated position is also referred to in the Council's HRA Assessment of Proposed Main Modifications, dated August 2023 [CD011].
- 2.3.3 The Council's SoCG with Natural England (NE) [CD028] demonstrates that the NE agree that the identified land at Field Common Farm meets NE's guidance on providing SANG and agree that the site is able to provide sufficient SANG capacity to help mitigate the quantum of development proposed in the draft Local Plan and beyond.
- 2.3.4 That said, the SANG capacity calculations presented in the Council's updated Thames Basin Heath (TBH) Avoidance and Mitigation Strategy, September 2023 [ENV009], supersedes those in the TBH Avoidance and Mitigation Strategy, 2022 [ENV008], which is the source of the SANG capacity figures referred to in the Council's HRA [CD004] and superseded SANG Options Assessment, 2022 [ENV010].
- 2.3.5 The TBH Avoidance and Mitigation Strategy September 2023 [ENV009] demonstrates that there will not be a shortfall in SANG capacity over the Plan period of the Local Plan and that the quantum of development proposed can be mitigated by the Borough's existing SANG capacity.

However, after fully mitigating the Local Plan, there would be a marginal (3.4 Ha) SANG capacity remaining in the Borough (TBH Avoidance and Mitigation Strategy, September 2023 - para. 4.26 – 4.27, page 18 – [ENV009]). The Council is therefore continuing with the acquisition of additional SANG at land at Field Common Farm, Hershaw to ensure there is sufficient SANG capacity to mitigate future development coming forward beyond the Local Plan period and to ensure the Council can mitigate development coming forward outside of the Local Plan site allocations.

2.3.6 The summary table below sets out the Council’s SANG documents referred to in the discussion above:

| SANG Document | Publication Date |
|--|-------------------------|
| TBH Avoidance and Mitigation Strategy (ENV008) | May 2022 |
| TBH Avoidance and Mitigation Strategy (ENV009) – supersedes ENV008 | Sep. 2023 |
| SANG Options Assessment (ENV010) | May 2022 |
| SANG Options Assessment (ENV011) – supersedes ENV0010 | Sep. 2023 |

- **How does the Council intend to address this shortfall?**

Council response

2.3.7 As discussed above, the Thames Basin Heath (TBH) Avoidance and Mitigation Strategy (September 2023) [ENV009] demonstrates that there will not be a shortfall in SANG capacity over the Plan period of the draft Local Plan and that the quantum of development proposed can be mitigated by the Borough’s existing SANG capacity.

2.3.8 The reason for this change to the Council’s SANG capacity is due to corrections following review in the SANG monitoring database that informed the SANG capacity calculations detailed in the TBH Avoidance

and Mitigation Strategy, 2022 [ENV008] and by extensions the HRA [CD004] and SANG Options Assessment, 2022 [ENV010]. The monitoring data was worked through and updated to support the preparation of the updated TBH Avoidance and Mitigation Strategy [ENV009] and SANG Options Assessment (September 2023) [ENV011].

2.3.10 Reviewing and updating the monitoring data and rerunning the SANG mitigation requirement calculations for the draft Local Plan showed that the Council has sufficient capacity to mitigate the proposed development in the Local Plan in full over the Plan period.

- **Overall, does the Plan provide for an acceptable approach to the provision of SANG for the Plan Period?**

Council response

2.3.11 As detailed above, the Council's Thames Basin Heath (TBH) Avoidance and Mitigation Strategy (September 2023) [ENV009] demonstrates the Council has sufficient SANG capacity to mitigate the impact of the quantum of development in the Local Plan over the Plan period in full. In addition, the SANG Options Assessment (September 2023) [ENV011] sets out that the Council has identified Land at Field Common Farm, Hersham for acquisition as an additional SANG site to ensure the Council has sufficient capacity to mitigate development coming forward outside the Local Plan allocations and beyond the Local Plan period.

2.3.12 Considering the above, the Council considers that the Local Plan is compliant with the requirements of the Conservation of Habitats and Species Regulations 2017 and European Directive 2009/147/EC, which requires Local Planning Authorities to ensure that any proposed development scheme or Development Plan will not adversely affect the integrity of the TBH Special Protection Area (SPA).

2.3.13 The Council's SoCG with NE [CD028] sets out that the identification of Land at Field Common Farm in part addressed the NE's objection to the Local Plan raised during the Regulation 19 representation period to the identified shortfall in SANG capacity. However, NE would seek that the Land at Field Common Farm site is identified on the Council's Policies Map, which was not addressed at the time of submission. As demonstrated above, there is no longer an identified shortfall in SANG capacity and the quantum of development proposed in the Local Plan can be mitigated in full. In addition, the Council agrees that the site

should be added to the Policies Map if the Inspector is minded to support the modification.

2.3.14 Since submission of the updated TBH Avoidance and Mitigation Strategy [ENV009] and SANG Options Assessment [ENV011] the Council has continued to pursue the acquisition of Land at Field Common Farm for use as a SANG site. As a Part II item, the details of the purchase will be discussed and agreed, by Cabinet on 7 February 2024. The Council will provide an update on the outcome of this meeting to the Inspector.

2.3.15 Alongside the Council's work to ensure there is a sufficient level of SANG provision to mitigate the Local Plan, Policy ENV5 – Thames Basin Heath Special Protection Area of the Local Plan details the proposed policy approach to mitigation of impacts on the TBH SPA and provision of SANG in the Borough. This sets out that development proposals that are likely to have a significant effect on the TBH SPA will be subject to an assessment to determine if and what level of mitigation and avoidance measures would be required to protect the continued integrity of the TBH SPA, which is dependent to the distance of the proposed development from the SPA.

2.3.16 The Council submitted a set of proposed main modifications [CD009] with the Local Plan for Examination. These proposed main modifications were prepared in response to the representations received to the Regulation 19 representation period. Main Modification (Ref. M4.5) details a proposed additional criterion to be added to policy ENV5 that seeks to strengthen the policy in response to NE's Regulation 19 representation, which they suggested the draft policy be strengthened by adding that:

- Proposals for new SANGs should be agreed with NE and adhere to the NE SANG Guidelines;
- Proposals in SPA Zone C resulting in a net gain of more than 50 units will be assessed on a case by case basis in consultation with NE; and
- Proposals for uses other than C3 can impact the TBH SPA and may also require mitigation and that the potential need for mitigation will be considered on a case-by-case basis in consultation with NE.

2.3.17 The proposed modifications will strengthen the draft policy and ensure that it is compliant with the requirements of the Conservation of Habitats and Species Regulations 2017 and European Directive 2009/147/EC.

2.3.18 A summary of relevant legal principles in relation to Habitats are included in Appendix 1 of this statement.

2.4 The HRA concludes that the Plan will not result in adverse effects on the Thames Basin Heaths SPA regarding atmospheric pollutants. With regards to the air quality modelling work which has been undertaken, ENV003 Air Quality Assessment refers to the assessment of 3 different growth scenarios – 2037 Baseline, 2037 Urban Growth Strategy (Elmbridge Local Plan) and 2037 Urban Growth Strategy with mitigation (Elmbridge Local Plan with a range of transport measures incorporated). Where in the evidence does it set out what is included for the urban growth scenarios and what are the transport measures referred to in the last scenario?

Council response

2.4.1 The 3 different scenarios in the Air Quality Assessment [ENV003] are scenario 1 the 'do nothing' scenario which sets a baseline for the borough from which scenarios 2 and 3 are compared. Scenario 2 the urban growth strategy includes those sites which are listed in Appendix 1 of the Air Quality Assessment but modelled without any transport mitigation. The final scenario, Scenario 3 includes an assessment of all the sites set out again in Appendix 1, plus transport mitigation. The transport mitigation includes highway mitigation and five junctions and the details of this are set out in section 7 of the Transport Assessment [INF001]. Section 7 of the Transport Assessment also sets out the possibility of future mitigation also including public transport and active travel measures.

Issue 3: *Whether the Council has complied with the other relevant procedural and legal requirements*

Questions:

3.1 Chapter 4 of the Plan sets out a number of policies which have been identified to address climate change (CC1, CC2, CC3, CC4 and CC5). In what way will these policies ensure that the development and use of land in the Borough contributes to the mitigation of, and adaptation to, climate change?

Council response

- 3.1.1 Section 19(1A) of the Planning and Compulsory Purchase Act 2004, as amended by the Planning Act 2008, sets out the legal duty to ensure that, *“taken as whole, plan policy contributes to the mitigation of, and adaptation to, climate change”*.
- 3.1.2 Policy CC1 – Energy efficiency, renewable and low carbon energy ensures development contributes to the mitigation of the impacts of climate change by requiring development to reduce operational carbon emissions (emissions produced by the use of energy) in line with building regulations through improved energy efficiency, the use of renewable energy technologies and decentralised energy as a minimum. Policy CC1 then goes on to encourage development to go beyond building regulation standards and deliver carbon neutral/zero carbon development.
- 3.1.3 The reduction of carbon emissions produced through the use of energy partially addresses the mitigation of carbon dioxide emissions associated with development. Policy CC2 – Minimising waste and promoting a circular economy seeks to address the mitigation of embodied and non-operational carbon dioxide produced throughout the entire lifecycle of a development from sourcing and transportation of materials to construction and demolition. Policy CC2 requires development to adopt a circular economy approach to reduce embodied and non-operational carbon emissions associated with construction materials and processes and ensure development is designed to be flexible and adaptable to minimise waste.
- 3.1.4 Policy CC4 – Sustainable transport seeks to address the reduction of carbon emissions associated with travel in the Borough. Policy CC4

requires development to contribute to the provision of a sustainable transport network and promote the use of active and sustainable transport methods, including walking and cycling.

3.1.5 Together Policy CC1, CC2 and CC4 seek to address the reduction of the full spectrum of carbon emissions produced by and associated with development to ensure development and the use of land in the Borough contributes to the mitigation of climate change.

3.1.6 Policy CC3 – Sustainable design standards requires development to adopt sustainable design and construction standards, including BREEAM and Home Quality Mark 4. These industry recognised standards will also support the mitigation of carbon emissions along with Policy CC1 and CC2 but also seeks to ensure development is designed to be adapted to a changing climate, including reducing the risk of internal overheating improving water efficiency.

3.1.7 Finally, Policy CC5 – Managing flood risk seeks to ensure development is designed to respond to the risk and flooding, including adapting to the increased risk of flooding as a result of climate change.

3.1.8 Combined, Policy CC1 – CC5 will ensure development in the Borough contributes to the mitigation of climate change impacts through the reduction/elimination of the full spectrum of carbon emissions associated with development. The policies will also ensure development contributes to adaptation to climate change by requiring development to be designed for adaptation to the key impacts of a changing climate, including increasing temperatures and the resulting increased risk of overheating, as well as rising sea level and greater frequency of extreme weather events and the resulting increased risk of flooding.

3.2 In what ways does the Plan seek to ensure that due regard is had to the aims expressed in s149 of the Equality Act 2010 in relation to those who share a ‘protected characteristic’?

Council response

3.2.1 The Council has carried out an [Equalities Impact Assessment](#) [CD005] on the Local Plan [CD001]. The assessment looks at whether the Local Plan policies would have a positive, negative or no impact on those that share a protected characteristic. The reason and justification for the score is included in the assessment. It is concluded that a full impact

assessment is not required as there is no negative impact reported from the initial assessment. The conclusions for groups who share a protected characteristic are set out below:

| Protected Characteristic | Impact of the Local Plan |
|---|--|
| Age | Positive, see policy SS3, ENV3, ENV8, ENV9, HOU3, HOU4, HOU6, ECO1, ECO2, ECO3, INF2, INF3 and INF4. |
| Gender reassignment | No impact. |
| Marriage and civil partnership | No impact. |
| Pregnancy and maternity | Positive, see policy INF2 and INF3 |
| Disability | Positive, see policy SS3, ENV9, HOU5, HOU6, EC03 and INF3. |
| Race | Positive, see policy HOU7. |
| Religion, belief or lack of religion/belief | Positive, see policy INF2. |
| Gender | Positive, see policy SS2 and ENV9. |
| Sexual orientation | No impact. |

3.2.2 Consequently, the Council has had due regard to the aims of S149 of the Equality Act.

3.3 Is the Plan clear in identify strategic and non-strategic policies? Does the Plan need to be more explicit in this regard? (Noting COUD002 sets out the Council’s initial views in relation to this matter).

Council response

3.3.1 The Council considers that with the proposed minor modification (MM3.1) as set out in the Schedule of Proposed Minor Modifications [CD013] the Local Plan clearly identifies the Strategic Polices and the

non-strategic policies. The Council considers policies SS1, SS2 and SS3 to be the strategic policies, the remaining policies in the Local Plan are non-strategic.

3.4 The key diagram at page 26 of the Plan identifies 3 broad locations for development – Whiteley Village, Brooklands College and Lower Green as set out at policy SS3.

- **Are these the broad locations for development as envisaged by paragraph 23 of the Framework?**
- **Does the key diagram sufficiently illustrate the broad distribution of development across the Plan area?**
- **There does not appear to be any corresponding allocations in relation to these 3 broad locations for development. Is this correct? Does this present a justified and effective approach?**

Council response

- 3.4.1 The three locations identified in Policy SS3 in the Local Plan, namely Whiteley Village, Brooklands College and Lower Green have been identified as they are considered unique areas that are important within the context of Elmbridge, for what they currently provide in terms of education, social and community use or housing, or have potential in the future to enhance the future provision of these.
- 3.4.2 Although these three locations have been broadly identified, these are not as envisaged by paragraph 23 of the NPPF. Whiteley Village and Brooklands College have been highlighted due to their contribution to older persons affordable accommodation and the only provision in the Borough for higher and further education. Lower Green is an area which has been identified as relatively deprived compared to the rest of the Borough. There is significant public sector ownership, and the opportunity has arisen through partnership working to improve this area through positive placemaking.
- 3.4.3 However, having reviewed the wording of policy SS3 in light of the Inspector's question, the Council propose a main modification of the policy to remove these sites from the policy text, and add into this to the supporting text providing the further information on the context of the Borough.

3.5 Do the proposed changes to the policies map correctly illustrate geographically the application of the policies within the Plan?

Council response

3.5.1 The Policies Map correctly illustrates geographically the relevant policies of the Local Plan as submitted, in accordance with paragraph 23 of the NPPF.

3.5.2 Following the Examination, if it is considered that any modifications to policies in the Local Plan are required that would require updates to the Policies Map, these changes would be made and consulted on. The interactive version of the map will be updated regularly and will enable the Council to ensure that the most up-to-date data is easily available to applicants and the public.

3.6 Paragraph 1.2 of the Plan advises that once adopted, the Local Plan will replace the 2011 Core Strategy and 2015 Development Management Plan and a cross reference is made to appendix A1. However, appendix A1 of the submitted Plan only refers to the Core Strategy policies and makes no reference to the Development Management Plan. The Council have provided an update to this in the form of appendix 4 attached to COUD002 and are requested to confirm this will be addressed as a modification to the Plan.

Council response

3.6.1 The Council can confirm that the amendment to Appendix A1 to include both the Core Strategy and Development Management Plan policies as set out in the council letter [COUD002] will be addressed through a modification.

3.7 Is the Plan compliant with the Council’s Local Development Scheme in relation to its form, scope and timing? What is the role of purpose of the SPD on the TBHSPA referred to within the LDS?

Council response

3.7.1 Yes, the Council considers the Local Plan is compliant with the Council’s Local Development Scheme (LDS). The Council’s latest LDS was published in July 2023 [CD006]. The LDS includes the following in relation to the form and scope of the Local Plan:

“3.2 The new Elmbridge Local Plan will set out the spatial strategy for the Borough for a 15-year plan period to deliver our vision for how the places and communities will grow. This will include how we want to develop and support our key employment areas, ensure our town and local centres remain vibrant retail, leisure and community hubs, provide housing, particularly affordable housing, and continue to protect and enhance our historic and natural environment.

3.3 It will include borough-wide strategic and detailed development management policies to deliver sustainable growth. In particular, the Plan will establish a new housing target for the Borough and allocate sites, as well as designate key areas such as Strategic Employment Land and Local Green Space.”

3.7.2 The Council is satisfied that the form and scope of the Local Plan is as set out in the LDS. In terms timing the Local Plan achieved each stage of the progression of the Local Plan against the key milestones, with three Regulation 18 consultations taking place in 2016/17, 2019 and 2020, the Regulation 19 in June/ July 2022 and the Regulation 22 submission in August 2023.

3.7.3 The TBHSPA SPD referred to in the LDS is included to produce an SPD that brings together important information and guidance on the TBHSPA into one document, including details on SANG and SAMM. Many other authorities within Surrey have an SPD that brings together this information and sets out further details on the implementation of policies relating to the mitigation of the TBHSPA.

Appendix 1: Summary of Relevant Legal Principles

ELMBRIDGE LOCAL PLAN EXAMINATION

STAGE 1: LEGAL COMPLIANCE AND DUTY TO CO-OPERATE

SUMMARY OF RELEVANT LEGAL PRINCIPLES

1. This note is supplied to assist the Inspector examine the Matters, Issues and Questions under Stage 1, by drawing together the legal principles identified in the case law relevant to those MIQs.

Duty to Co-operate

2. By s.33A(1) and (2) Planning and Compulsory Purchase Act 2004, the Council was under a duty to engage constructively, actively and on an on-going basis with prescribed bodies¹ in the preparation of the Local Plan but only insofar as it concerned a “strategic matter”.
3. By s.33A(4), a “strategic matter” is that which concerns the development or land use and which: (i) would have a significant impact on at least two planning authority areas, (ii) is a county matter or (iii), has or would have a significant impact on a county matter.
4. By s.33A(6), the engagement required by s.33A(2) includes “considering” the adoption of joint planning approaches.
5. Dove J recently reviewed the case law on s.33A in *Sevenoaks DC v SSHCLG* [2020] EWHC 3054 (Admin). He found that:

¹ Those are: neighbouring local planning authorities, the County Council, the Environment Agency, Historic England, Natural England, the Mayor of London, the Civil Aviation Authority, the Homes and Communities Agency, relevant Integrated Care Boards, NHS England, the Office of Rail and Road, Transport for London, each Integrated Transport Authority, each Highway Authority, the Marine Management Organisation, each local enterprise partnership, each local nature partnership, see reg.4 Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767).

- a. Discharging the duty to co-operate is not contingent on securing a particular outcome.²
- b. The following are matters for the “evaluative planning judgment of the [Council]”, and to which a “substantial margin of appreciation or discretion should be afforded” to the Council:
 - i. whether development or use of land would have a significant impact on two planning areas;
 - ii. deciding what ought to be done to maximise effectiveness and what measures of constructive engagement should be taken; and
 - iii. considering the adoption of joint planning approaches under s.33A(2) and (6).³
- c. The task of the Inspector is whether in all the circumstances it is “*reasonable to conclude*” the duty at s.33A has been met, see s.20(7)(b)(ii).⁴

Sustainability Appraisal

6. By s.19(5) Planning and Compulsory Purchase Act 2004, the Council was obliged to carry out a sustainability appraisal of the proposals in the Local Plan and prepare a report of its findings.
7. By reg.12 Environment Assessment of Plans and Programmes Regulations (SI 2004/1663), the Council was under an allied duty to prepare an environmental report, identifying, describing and evaluating the significant effects of implementing the Local Plan and the reasonable alternatives, taking into account the objectives and geographical scope of the Local Plan.

² At [51].

³ At [35] quoting with approval the observations of Sales J on the substance of the duty in *Zurich Assurance Ltd v Winchester CC* [2014] EWHC 758 at [109]-[113].

⁴ *Ibid.*

8. The issue for the Inspector is whether the report is “so deficient that it could not be described as an environmental [report] as defined in the Regulations”, see: ***R(Blewett) v Derbyshire CC*** [2005] Env LR 29 at [41] as applied to the SEA regime by Lindblom LJ in ***R(Plan B Earth) v Secretary of State for Transport*** [2020] EWCA Civ 214 at [136]-[137]:

“... These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional “Wednesbury” standard of review—as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court.

137. None of the authorities relied on by Mr Fleming casts doubt on the well-established principle in domestic case law that it is not the court’s task to adjudicate on the content of an environmental statement under the EIA Directive or an environmental report under the SEA Directive, unless there is some patent defect in the assessment, which has not been put right in the making of the decision ...”

9. The requirement is to assess alternatives to meeting the stated objectives of the plan or programme, not to assess alternatives to the objectives themselves, see: ***R(Buckinghamshire CC) v Secretary of State for Transport*** [2013] EWHC 481 (Admin) *per* Ouseley J at [162]:

“...The Government concluded that alternative strategies for motorways or a new conventional or enhanced existing rail network were not capable of meeting the plan objectives set for high speed rail. It is obviously a contestable view as to whether those objectives should be met, or can be met to a large extent by means other than a new high speed rail network. These alternative strategies could not, however, have constituted reasonable alternatives to the plan for assessment in the SEA, since they are incapable by their very nature of meeting all the objectives for a new high speed rail network.”

10. The “identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority”; provided an authority “appl[ies] its mind to the question”, the conclusion will not be open to review by the Court except on narrow *Wednesbury* grounds, see: ***Ashdown Forest Economic Development LLP v Wealden DC*** [2016] PTSR 78 *per* Richards LJ at [42].

11. There is no requirement to assess obvious “non-starters”, that is to say alternatives which had no realistic prospect of meeting the plan’s objectives, see: *R(Chalfont St Peter Parish Council) v Chiltern DC* [2013] EWHC 1877 (Admin).

12. Moreover, as Sales J said in *Ashdown Forest* at first instance [2014] EWHC 406 (Admin) at [97], there is no requirement to embark on:

“... an artificial exercise of selecting as putative “reasonable alternatives”, for full strategic assessment alongside its preferred option, alternatives which could clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan and for good planning reasons, as not in reality being viable candidates for adoption.”

13. Sales J also observed at [90] that the necessary choices made by the planning authority in preparing its environmental report are:

“deeply enmeshed with issues of planning judgment, use of limited resources and the maintenance of a balance between the objective of putting a plan in place with reasonable speed (particularly a plan such as the Core Strategy, which has an important function to fulfil in helping to ensure that planning to meet social needs is balanced in a coherent strategic way against competing environmental interests) and the objective of gathering relevant evidence and giving careful and informed consideration to the issues to be determined.”

14. The identified reasonable alternatives should be assessed in an equal or comparative way to the preferred option. However, the test in assessing that question is “whether the approach taken by the plan-making authority is irrational or can be impugned on public law grounds” see: *Flaxby Park Ltd v Harrogate BC* [2020] EWHC 3204 (Admin) at [135].

Habitats

15. By reg.63(1) Conservation of Habitats and Species Regulations 2017 (SI 2017/1012), the Council is obliged to undertake an appropriate assessment of the Local Plan if it is likely to give rise to significant effects on a European site (either alone or in combination).

16. Having regard to the views of Natural England and in light of the conclusions of the appropriate assessment, the Council may only adopt the Local Plan having ascertained that it will not adversely affect the integrity of a European site.
17. The legal principles in relation to the obligation at reg.63 were recently summarised in *R(Wyatt) v Fareham BC* [2022] EWCA Civ 983 at [9]. Those relevant to this examination are as follows:

“(6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the "precautionary principle, and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered" (see the judgment of the CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA interveniënde)* (Case C-127/02)) [2005] 2 CMLR 31 ("Waddenzee"), at paragraph 58). The "precautionary principle" requires a high standard of investigation (see the judgment in *Waddenzee*, at paragraphs 44, 58, 59 and 61).

(7) The duty placed on the competent authority by article 6(3) and regulation 63 is to ascertain that there will be no adverse effects on the integrity of the protected site, but that conclusion does not need to be established to the standard of "absolute certainty". Rather, the competent authority must be "satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" (paragraphs 44, 58, 59, and 61 of the CJEU's judgment and paragraphs 107 and 108 of the Advocate General's opinion in *Waddenzee*, and the judgment in *Holohan*, at paragraphs 33 to 37). In *Waddenzee* (at paragraph 59), the CJEU emphasised the responsibility of the competent authority, having taken account of the conclusions of the appropriate assessment, to authorise the proposed development "only if [it] has made certain that it will not adversely affect the integrity of that site". That, it said, "is the case where no reasonable scientific doubt remains as to the absence of such effects". But as Advocate General Kokott explained in *Waddenzee* (in paragraphs 102 to 106 of her opinion), a requirement of "absolute certainty" would be "disproportionate". As she said (at paragraph 107), "the necessary certainty cannot be construed as meaning absolute certainty ...", the conclusion of an appropriate assessment is, "of necessity, subjective in nature", and "competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty". Similar observations appear in the judgment itself (in paragraphs 44, 58, 59 and 61). As the Supreme Court acknowledged in *Champion*, adopting the approach in *Waddenzee*, "while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority" (see the judgment of Lord Carnwath, at paragraph 41). This approach is, in essence, what the "precautionary principle" requires in the context of article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations.

(8) The requirement that there be "no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" does not mean that the "reasonable worst-case scenario" must always be assessed. In the European Commission guidance document entitled "Communication on the precautionary principle" (2000) it is stated in Annex III that "[when] the available data are inadequate or non-conclusive, a prudent and cautious approach to environmental protection, health or safety could be to opt for the worst-case hypothesis". That guidance, however, is not law (see *Heard v Broadland District Council* [2012] Env. L.R. 23, at paragraph 69, and *Prideaux*, at paragraph 112), nor is it in mandatory terms. What is required in law is a sufficient degree of certainty to ensure that there is "no reasonable doubt" on the relevant question. It may sometimes be useful to consider a "reasonable worst-case scenario" when assessing whether the necessary degree of certainty has been achieved. But whether there are grounds for "reasonable doubt" will always be a matter of judgment in the particular case.

(9) An appropriate assessment must be based on the "best scientific knowledge in the field" (see *Holohan*, at paragraph 33). Such knowledge must be both up-to-date and not merely an expert's bare assertion (see the judgment of Sales L.J. in *Smyth*, at paragraph 83). And the concept of "best scientific knowledge" is not a wholly free-standing requirement, separate from the precautionary principle itself. It is inherent in the precautionary principle, and in the concept of "no reasonable doubt".

(10) What is required of the competent authority, therefore, is a case-specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned. If an appropriate assessment is to comply with article 6(3) of the Habitats Directive it "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" (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (Case C-258/11) [2014] PTSR 1092, at paragraph 44, and its judgment in *People Over Wind and Sweetman v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668, at paragraph 38)."

ASHLEY BOWES

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6 February 2024.