

WAVERLEY BOROUGH COUNCIL

SPECIAL EXECUTIVE

31 OCTOBER 2018

Title:

**SWEETMAN JUDGEMENT AND THE REQUIREMENT FOR A SUPPLEMENTARY
NOTE ON THE THAMES BASIN HEATHS AND HINDHEAD AVOIDANCE STRATEGIES**
[Portfolio Holder: Cllr Storey]
[Wards Affected: Western, Southern and Central Areas]

Summary and purpose:

This report outlines the necessary minor changes to be made to the Avoidance Strategies relating to the Wealden Heaths Phase 2 and Thames Basin Heaths SPA in light of the Sweetman, judgment which re-clarified the process of Habitats Regulations Assessment.

How this report relates to the Council's Corporate Priorities:

Updating the Avoidance Strategies will ensure legal compliance of planning decisions in relation to a recent European Court of Justice judgement. This outcome relates to the corporate priority of place and prosperity.

Equality and Diversity Implications:

There are no implications for equality and diversity. This issue relates to the protection of important habitats and species.

Financial Implications:

There are no direct financial implications arising from this report.

Legal Implications:

The amendments to the Avoidance Strategies as set out in this Report are compliant with the requirements of recent European case law on the Habitats Directive (principally the Sweetman cases) and related Habitats Regulations (Conservation of Habitats and Species Regulations 2017).

1. Background

- 1.1 The Hindhead Avoidance Strategy was adopted by the Council in 19 July 2011. Thames Basin Heaths SPA Avoidance Strategy Review 2016 was adopted by the Council on 19th July 2016. The documents' purpose is to provide guidance to developers when making planning applications for new housing which may have an effect on the conservation interests of the SPAs. The Strategies set out the Council's approach in seeking to avoid the effect of a net increase in population within either the Hindhead Concept Area or within 5km of the Thames Basin Heaths

SPA, and how it proposes to discharge its legal obligations under the Conservation of Habitats and Species Regulations 2017 (the 'Habitats Regulations').

- 1.2 Following a recent judgment, termed 'Sweetman' ([C-323/17 Sweetman Habitats Ruling re AA and Screening](#)), the process of undertaking a Habitats Regulation Assessment has changed. Previously, the Council was able to consider the Avoidance Strategies, and the associated avoidance measures of providing SANG and/or SAMM, when determining whether a development would have a likely significant effect on the SPA. This consideration meant that applications could be screened out at the first stage of a Habitats Regulations Assessment, without having to progress to an Appropriate Assessment.
- 1.3 The Sweetman judgment has changed this situation and the Council is now no longer able to consider pre-determined or in-built avoidance measures such as SANG and SAMM at the screening stage, and developments are required to be subject to an Appropriate Assessment at which time the avoidance measures can be taken into account. As a result, the outcome is unlikely to change, but there is an extra stage in the process of determination.
- 1.4 As a consequence of this, Officers have reviewed the wording of the Avoidance Strategies and, on the advice of Counsel, written a supplementary note to update each Strategy.

2. Supplementary text to be appended to the Thames Basin Heaths Avoidance Strategy 2016

- 2.1 The following paragraphs of the [Thames Basin Heaths Avoidance Strategy](#) are therefore amended as below:

Para 2.4 Bullet point 2:

- 'Development can provide, or make a contribution to, measures to ensure that they have no likely significant effect on the SPA. In doing so, residential development will not have to undergo an Appropriate Assessment (AA). ~~The option remains for developers to undertake a Habitats Regulations screening assessment and, where necessary, a full AA to demonstrate that a proposal will not adversely affect the integrity of the SPA.~~

Para 7.4. Contributions made in line with the Strategy are deemed to **avoid and** mitigate the effect on the SPA and, **however**, development proposals will **still** ~~therefore not~~ be required to undertake an Appropriate Assessment'.

[struck through text is to be deleted, text in bold is to be added]

3. Supplementary text to be appended to the Hindhead Avoidance Strategy 2011

3.1 Paragraph 5.6 of the [Hindhead Avoidance Strategy](#) to be amended as follows:

‘In terms of addressing the significant impact on the SPA, there are two options open to developers for meeting avoidance requirements:

- Buy into provision of avoidance measures assembled by the local authority (the Avoidance Strategy)
- Provide avoidance measures, including alternative sites and/or walking routes, themselves that the Local Authority, in consultation with Natural England, considers are sufficient to avoid development having a significant effect on the SPA.

In either case, there is a requirement for an Appropriate Assessment at the planning application stage’.

[struck through text is to be deleted, text in bold is to be added]

4. A note on other recent European judgements and opinions

The *Grace and Sweetman v An Bord Pleanala* ([C-164/17](#)) found that where mitigation measures are designed to compensate for a development’s negative effects, approval can only be granted if the planning authority is satisfied that there are ‘imperative reasons of overriding public interest’, as specified in the Regulations. The issue of compensation arises when the Appropriate Assessment for a plan or project concludes that there would be an impact on the integrity of the site. This situation will arise infrequently in Waverley due to the nature of the planning applications we receive as in the vast majority of planning applications that the Council deals with, impact on the integrity of the site is not predicted as the avoidance measures, employed by the Council’s Avoidance Strategies, are determined to be sufficient to rule out harm at the appropriate assessment stage. However, Members should be aware that this judgment must be borne in mind should the integrity of any Special Protection Area or Special Area of Conservation be at risk of impact. In those cases, an argument for imperative reasons of overriding public interest must be made before planning permission can be granted. No changes to the Council’s approach is required by this judgement.

Environment Overview & Scrutiny Comments

With the exception of the Chairman, the Committee was content that the approach to carrying out Appropriate Assessments as set out in the Supplementary Note reflected Counsel advice following the Sweetman judgement.

The Chairman had continuing concerns about the approach of the local authorities in the Thames Basin Heaths Joint Strategic Partnership, who had no evidence that the mitigation worked in the context of paragraph 36 of the Sweetman ruling.

Recommendation

That the Executive recommends to Council to agree the changes proposed in paragraphs 2 and 3 of this report to ensure compliance with the Sweetman judgment.

Background Papers

There are no background papers (as defined by Section 100D(5) of the Local Government Act 1972) relating to this report.

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