

**SOUTH EAST ENGLAND REGIONAL ASSEMBLY
REGIONAL PLANNING COMMITTEE**

Date: 20 November 2006

Subject: **Thames Basin Heaths - Peer Review**

Report of: Planning Manager

Recommendation:

That the Committee note the findings of the DCLG-led peer review of the evidence underpinning Natural England's draft Delivery Plan for the Thames Basin Heaths SPA that will inform discussions at the Examination in Public.

Purpose of Report:

To brief members on the findings of the peer review and the associated legal opinion.

Key Issues:

The peer review and legal opinion commissioned by DCLG, with support from the Assembly, identifies some areas where the evidence underpinning the approach advocated by Natural England and its draft Delivery Plan is weak. However, there is a lack of alternative and more compelling evidence on which to reject this approach.

The draft Delivery Plan appears to provide a framework for enabling residential development in proximity to the Thames Basin Heaths SPA that is compliant with the requirements of the Birds and Habitats Directive. Alternative approaches, when applied alone, would not enable compliance with the Directives.

The draft Delivery Plan therefore provides the best strategic means of enabling residential development to proceed while complying with legal requirements, through provision of accessible natural green space (SANGS) combined with on-site access and habitat management.

The earlier work undertaken by the Assembly to audit and assess the potential availability of SANGS will be valuable in assisting implementation of the draft Delivery Plan and mini-plans developed by local planning authorities.

I. Introduction

- I.1 Members will be aware that the Thames Basin Heaths Special Protection Area (SPA) is classified under the Birds Directive on account of the presence of important populations of three species listed in Annex I of the Directive: Dartford warbler, nightjar and woodlark. The SPA comprises land within 13 Sites of Special Scientific Interest (SSSIs) in Surrey, Berkshire and Hampshire.
- I.2 The EU Habitats Directive, transposed into UK law in the Habitats Regulations, provides a high degree of protection to sites designated as SPAs under the Birds Directive and Special Areas of Conservation (SACs) under the Habitats Directive. The Directive applies the precautionary approach to protected areas. Plans and projects can only be permitted where it has been demonstrated that there will be no adverse effect on the integrity of the site. English Nature (now Natural England) has advised that new residential development up to 5km from the Thames Basin Heaths SPA is likely to have a significant effect on the SPA due to increased recreational use and other urbanisation pressures.
- I.3 The Directive requires an assessment of the impact of such proposals to be made both alone and in-combination with that of other projects or plans. In the absence of evidence to the contrary, and on the advice of Natural England, local planning authorities must conclude that any plan or project that will lead to a net increase in residential development will have an adverse effect on the SPA. Unless avoidance measures can be taken, the plan or project can only be permitted, in the absence of alternative solutions, for reasons of overriding public interest and in conjunction with compensatory measures.
- I.4 English Nature (now Natural England) has developed a draft Delivery Plan which aims to enable new residential housing to be permitted in the area, while avoiding adverse effects on the SPA that could arise primarily through increased recreational use of the SPA. This is through the following mitigation measures delivered in parallel:
- Provision of suitable accessible natural green space (SANGS) to draw people away from the heathlands and so reduce recreational pressure;
 - On-site access management;
 - On-site habitat management.
- I.5 The Delivery Plan approach, through provision of mitigation measures in a strategic way, aims to remove the need for individual appropriate assessments for each plan or project. Developers would still be free to follow existing procedures required by the Directive.
- I.6 The Department for Communities and Local Government (DCLG) commissioned a review of the evidence underpinning the draft Delivery Plan. The Assembly contributed to this review financially and through membership of the project steering group. Its objectives were:
- To assist Government in informing the South East Plan Examination in Public's consideration of issues pertaining to the Thames Basin Heaths
 - To help ensure the delivery of housing in the area surrounding the Thames Basin Heaths in the immediate (0-5 years), medium (5-10 years) and longer (10-20 years) terms, by identifying practicable approaches to

delivery within the requirements of the Directive whilst also supporting heathland conservation, ground nesting bird interests, and the continued use of heathland areas for recreational purposes.

- 1.7 The review consisted of four main components:
 - i. A review of the ecological evidence underpinning the draft Delivery Plan.
 - ii. A review of the recreation evidence underpinning the draft Delivery Plan, including the derivation of the mitigation zones and greenspace standards.
 - iii. An examination of options for flexibility within the scope of the draft Delivery Plan.
 - iv. An exploration of other possible approaches that conform with the legal requirements of the Directives to protect the SPA and also the need to deliver housing supply.

- 1.8 As part of this work a legal opinion was also provided (by Bond Pearce LLB) on the approach promoted by the Delivery Plan and possible alternative approaches, and their conformity with the requirements of the birds and Habitats Directives. The report was finalised in October 2006 and is available from the Assembly's website¹.

2. Findings of the Peer Review

2.1 Overall

- 2.1.1 The draft Delivery Plan and the mini-plans developed by some local authorities provide a Birds and Habitats Directive compliant mechanism for the consideration of residential development applications around the Thames Basin Heaths SPA.
- 2.1.2 The draft Delivery Plan does not have a robust evidence base. However the evidence that does exist triggers concern about threats to the SPA. It is not an evidence base that would allow the precautionary principle to be dismissed.
- 2.1.3 The development of a more robust evidence base would, dependent on the specific studies, allow better prediction of impacts (and hence the scale of need for avoidance or mitigation measures) or a more flexible approach to be taken to specific types or location of residential development.
- 2.1.4 Until such evidence is produced, the draft Delivery Plan (and the mini-plans that derive from it) represents the available way forward. It is still open to developers and others to put forward alternative approaches but they will need to be supported by evidence and be capable of passing the stringent tests required by the Birds and Habitats Directives.

2.2 Ecological evidence

- 2.2.1 The statistical robustness of the relationships between measures of access pressure and bird populations in the recent studies cited in the draft Delivery

¹ http://www.southeast-ra.gov.uk/our_work/planning/sust_nat_res/tbh.html

Plan are only weak. Although weak, they are sufficient to trigger concern and mean that through the application of the precautionary principle, the possibility of adverse impact on the SPA from recreational pressure cannot be dismissed.

- 2.2.2 Only one study provides an indication of the scale of the relationship between a bird population and an increase in recreational access, and this indicated that a very large increase in visitors was needed to produce a significant reduction in population (of woodlark). It is not known if this would also apply to nightjar and Dartford warbler. This emphasises both the need to take a precautionary approach and the importance of further studies to build the evidence base.
 - 2.2.3 There is not the weight of evidence of no significant effect from other studies (some provide contrary results, some supportive) to be able to dismiss the need to take a precautionary approach to the application of the evidence that indicates a negative impact of existing recreational access (or indirect measures of it such as proximity to housing) on Annex I birds.
- 2.3 Recreation
- 2.3.1 Further research is required, specific to the SPA, in order to provide a more secure evidence base from which to derive the zones that are set out in the draft Delivery Plan. The zones have been derived from the limited data available. The derivation of Zones A and C is considered by the peer review to be reasonable and not overly restrictive. However, the peer review considered that the boundary for Zone B may be too far from the SPA, depending on how a threshold for the proportion of visitors travelling by foot and by car is applied. Further work is considered necessary to strengthen the evidence base for the outer edge of Zone B.
 - 2.3.2 It is concluded that it is reasonable to use generic mitigation zones based on straight-line distances to 'flag' English Nature's concern with the LPA. However, in considering the potential effects of individual developments on the SPA, then the actual travel distance from the development site to the SPA should be considered.
 - 2.3.3 There is a lack of robust data from which to derive new standards for greenspace provision around the Thames Basin Heaths SPA. This paucity of the evidence severely inhibits any strong analysis or proposed alternatives. Similarly, it is not possible to test robustly the proposed 16 hectare and 8 hectare standards in the draft Delivery Plan.
 - 2.3.4 The effectiveness of alternative open space in drawing new residents or existing visitors away from protected sites appears untested. Testing the effectiveness of SANGS will be an important issue for the draft Delivery Plan pilot phase.
 - 2.3.5 SANGS do have theoretical support, with evidence showing that visitors to open space are not strongly faithful to any one area. The location of SANGS is critical, with distance clearly being a key influence in peoples' choice of open space to visit. The peer review concludes that the minimum area of land/SANGS required as mitigation may be too high in some circumstances but that further evidence would be required to substantiate a revision.

2.4 Combination of actions and measures

2.4.1 The review did not find a 'radically different' standalone alternative to the draft Delivery Plan and its local implementation through mini-plans. This is because each alternative, considered alone, either fails some element of the Directives or, lacking a robust evidence base, fails the precautionary principle.

2.4.2 There are a number of measures that, if used in combination with the draft Delivery Plan, a mini-plan or the existing Habitats Regulations decision making steps in a case specific decision, would provide a package that is in compliance with the Birds and Habitats Directives and would aid the delivery of housing supply alongside the protection of the SPA.

2.4.3 The peer review identifies a combination of actions and measures that should be taken in the **short term**:

- i. Start to address visitor management over the coming bird breeding season, recognising that this is the start of a medium term process.
- ii. Apply the options for flexibility in case specific circumstances, where it is possible to support it with an evidence base.
- iii. Implement the mini-plan procedures where they have been agreed and encourage other LPAs to consider using this approach.
- iv. Target the Thames Basin Heaths SPA for green infrastructure funds.
- v. Develop and initiate a programme of studies to increase the evidence base on visitors, effectiveness of SANGS, defining a carrying capacity and the bird response to incremental increases in visitor pressure such that it delivers results in the medium term.

2.4.4 The 'options for flexibility' approach (ii above) requires the specific planning application to be supported by additional evidence to justify the case-specific circumstance. It also requires the application to be assessed by the LPA in the step-wise manner required by the Habitats Regulations. The result is that 'flexibility' places additional burdens on the developer, LPA and Natural England compared to an application with SANGS in accordance the draft Delivery Plan or a mini-plan.

2.4.5 The combination of actions and measures that should be taken in the **medium to long term** are:

- i. Test the effectiveness of visitor management (including the twin track approach of restrictions and alternative recreation areas for those 'pushed off' the SPA) and develop a better evidence base on potential mitigation and compensatory actions.
- ii. Carry out a thorough evidence based review of the implementation of the draft Delivery Plan and agreed mini-plans after a period of two to three years.

2.4.6 The above testing and review processes are intended to ensure that future decisions on residential development proposals are determined in a manner that is based on positive predictions of impact, or lack of it, on the integrity of the SPA. This is in contrast to the current position of having to rely on the application of the precautionary principle.

2.5 Implications for residential property developers

- 2.5.1 The peer review considers the following options may be available to a developer considering a residential development application within 5km of the SPA that will be compliant with the Directives' requirements :
- i. Include an offer of SANGS (or funding for it) in their application, following the guidance provided in the draft Delivery Plan or a "mini-plan" where one has been agreed between the relevant LPA and Natural England.
 - ii. Make a detailed case that the development is of such a specific nature and location that, when applying the maximum flexibility indicated by Natural England and the case specific factors identified in this review, there is evidence to conclude with certainty that the development will have no impact on the SPA.
 - iii. Make a detailed case that their development proposal is of such a specific nature and location and that it has been assessed with sufficient scientific rigour that it can be predicted with confidence that the impact on the SPA results in no effect on the size of the Annex I bird population, their distribution or breeding productivity. They will need to include with their application sufficient information and evidence to enable a LPA to carry out an appropriate assessment. The rigour of the assessment would need to be sufficient to ensure that the precautionary principle would not need to be applied. It is currently not clear how such a rigorously assessed proposal would be treated when the in-combination test is applied.
 - iv. Delay their application, wait for the studies to be completed that will reduce the degree of scientific uncertainty over recreational impacts and wait for the revision to the draft Delivery Plan (or "mini-plan" where relevant). Then make their application in the knowledge that the precautionary principle will not need to be applied and that they will have the potential impact of their proposal assessed against an evidence based method to predict the significance of impact. It is currently not clear how such a rigorously assessed proposal would be treated in the future when the in-combination test is applied. It is assumed that the South East Plan and relevant LDFs would have undergone an appropriate assessment and a mechanism would have been developed to address in-combination effects.
- 2.5.2 Of these options, (i) is available now. This is both in principle through the draft Delivery Plan and, in some local authority areas with mini-plans, which are currently enabling the approval of residential development applications. Options (ii) and (iii) are available now through the case-by-case route. They will be onerous in terms of the provision of a case specific evidence base and likely to be slow in leading to a decision. These options do not appear very cost effective in comparison with option (i).
- 2.5.3 There is also the option open to a developer to put forward their application in a form and manner that they consider to be compliant with the Habitats Directive, with mitigation offered, and based on their judgement and any professional advisers that they use. They would then await the response from the LPA and Natural England with the intent, should their application be refused, of seeking to test the decision through appeal, and if appropriate, judicial review.

3. Legal Opinion

- 3.1 The legal opinion considers the options discussed in the peer review and a number of specific questions arising from this, and whether alternatives to

the approach advocated in the Delivery Plan would comply with the Habitats Directive. Its overall conclusion is that the approach advocated in the draft Delivery Plan is the best means of ensuring compliance with the Habitats Directive, and that alternative approaches discussed in the peer review on their own would not enable compliance.

- 3.2 It concludes that the principles underlying the draft Delivery Plan are consistent with the provisions of the Birds and Habitats Directives. While acknowledging that some of the evidence underpinning the Delivery Plan and Natural England's approach is weak, there is an absence of more compelling evidence to justify alternative approaches, for example with regard to SANGS standards and the proposed zones around the SPA. Competent authorities would therefore be acting lawfully and reasonably in applying the standards proposed in the draft Delivery Plan, and can determine planning applications and adopt land use plans on the basis of SANGS proposals.

4. Progress on delivery

- 4.1 A number of local planning authorities are pursuing the approach advocated in the draft Delivery Plan. Mini delivery plans have been developed by Woking Borough Council and Guildford Borough Council and have been agreed by Natural England. Natural England has advised the Assembly that Bracknell BC, Elmbridge BC and Waverley BC have made good progress on development of mini plans, and that Natural England is working closely with Surrey Heath BC, Runnymede BC and Rushmoor BC to identify potential SANGS that could be used to mitigate for housing in those boroughs.

5.0 Conclusion

- 5.1 The peer review and legal opinion conclude that the approach taken by Natural England and advocated in its draft Delivery Plan will enable compliance with the requirements of the Birds and Habitats Directives. Some of the evidence base is rather weak, but there is an absence of more robust evidence that would enable alternative approaches to be taken and be shown to be compliant with the Directives. This indicates that the approach advocated in the draft Delivery Plan should be pursued and efforts focused on making it work in practice.
- 5.2 The evidence base underpinning the draft Delivery Plan will be discussed at the forthcoming technical sessions preceding the full Examination in Public of the South East Plan. The Assembly, as co-sponsor of the peer review, will rely to its conclusions in these debates.

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