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MID SUSSEX DISTRICT PLAN EXAMINATION: PUBLIC HEARINGS ON 8/9 FEBRUARY 2017

Campaign to Protect Rural England, Sussex Branch CIO (CPRESx) submissions re principles of the application of constraints to potential site allocations

1 Introduction

- 1.1 The requirement in the NPPF that development plans be sustainable and that they be positively prepared with the aim of meeting the realistic aspirations of local people is to be welcomed in principle and honoured in action.
- 1.2 Positive, sustainable, planning involves planning for the conservation and enhancement of the environment and biodiversity every bit as much as it does for the building of houses, offices and industrial units. Nothing in the NPPF subordinates the environmental component of sustainability to other factors. The countryside plays a vital and irreplaceable economic role as a producer of resources from farm produce to energy, and as an economic generator of employment and tourist income (something of particular importance in Mid Sussex). Credit must also be given for the important role that our countryside plays in fostering human health and wellbeing, in mitigating climate change and in facilitating biodiversity. All these benefits need to be valued and positively planned for on a long term basis. They certainly should not be viewed, as they too often are, as hindrances to new housing.
- 1.3 Future generations are as entitled as past generations to celebrate our countryside, wildlife and biodiversity. That is especially so here in Mid Sussex, which is blessed with some of the most special and important landscapes and biodiversity anywhere in the country, as attested to by the extent to which it is protected by special conservation designations. Even in areas of housing stress – a problem that affects all of South East England – the NPPF recognises that positive planning is as much about saying “yes’ to environmental conservation and enhancement as it is about saying “yes” to new housing. At times, as NPPF para 14 acknowledges, sustainable development is incompatible with meeting housing needs in full. Nor is it a failure of sound planning when that occurs.
- 1.4 As CPRESx has consistently argued throughout the District Plan development process and these examination hearings, Mid Sussex is a largely rural district where a sustainable, positively prepared development plan that seeks opportunities to meet its development needs nevertheless involves planning for the reality that the district lacks the capacity to absorb the level of housing required to meet in full its own needs and the unmet needs of its neighbours.

2. The purpose of this submission

- 2.1 We understand that during the 8th and 9th February hearings the Inspector wishes to examine, by looking at examples, the basis by which MSDC has addressed the suitability for allocation/development of sites that have come forward for allocation or development having regard, inter alia, to those applicable provisions within the NPPF and elsewhere that promote the conservation and enhancement of the natural environment, and the adequacy of needed infrastructure, as core features of sustainability. It seems to us that this is properly a two part

exercise: firstly involving a consideration of the soundness of the evaluation methodology applied by MSDC in the exercise; and secondly, the reasonableness of the manner in which MSDC has applied that methodology in practice. That second part is of necessity only informative if the methodology itself is robust.

2.2 As to the first aspect, CPRESx's view is that, broadly speaking, MSDC's identification of principal relevant environmental and other factors for evaluation, and their evaluation methodology of those factors explained in the SHLAA, are justified by robust evidence, principally in the form of

- LUC's 2007 and 2014 Capacity Studies (EP48 and EP47);
- LUC's January 2015 Review of Landscape and Visual Aspects of Site Suitability (EP29);
- MSDC's Strategic Site Selection Paper, August 2016 (EP23).

2.3 The main, but significant, exception relates to their approach to the application of the Habitats Regulations where, as our previous representations to MSDC and submissions to this examination explain, there is no up to date robust evidence at all that justifies MSDC's laissez-faire evaluation of the application of these regulations to sites whose development might harm the two EU protected sites on Ashdown Forest.

2.4 As to the second aspect, whilst we consider that LUC's above referenced studies are sound as to what factors are relevant to MSDC's site assessment process they do little to assist MSDC in guiding it on how to apply them. Nor has MSDC always applied its methodology appropriately or consistently. MSDC has, in CPRESX's view, failed too often to give appropriate weight to environmental factors, misapplying environmental protection provisions within the NPPF and (occasionally) underlying statutory provisions on which the NPPF guidance is based. Environmental considerations have too often been viewed by MSDC just as impediments to development, not as positive values to be accorded value in their own right. However we question whether the soundness of a Plan can be challenged on the basis solely of the misapplication of a sound methodology.

2.5 CPRESX's principal purpose in this submission is to identify the core principles that we believe should inform MSDC's deliberations as to how its methodology should be applied in its site allocation/development considerations in a manner consistent with the objectives of the NPPF. CPRESx does not, however, comment here on individual sites involved in that exercise as a full site by site analysis of its suitability or otherwise for allocation would be required, which CPRESx has not undertaken. Nor does CPRESx comment on individual site availability aspects.

3. **General Principles on Constraints**

3.1 CPRESx's view is that the LUC's above referenced studies provide the most important and robust general evidence available as to constraints affecting individual parts of the District, and that it is reasonable for MSDC to place reliance on them. The studies, read in conjunction with MSDC's latest submissions MSDC5a – MSDC7, identify clearly that sustainable locations for future development within the District are significantly constrained, and that this fact goes a long way to explain the failure by MSDC to meet its current housing target despite the application of NPPF para 14 to development applications considered since the NPPF came into effect. No new plan can change these facts, so the new housing target set in the new Plan must be a realistic one in the context of these constraints.

- 3.2 CPRESx considers that the recent SHLAA exercise is a key component of the level at which the housing target should be set. Whilst the NPPF para 47 does not require an LPA to identify at the outset sufficient locations to meet its full Plan period housing target, in a district which is known at the outset to have difficulty in identifying sites at a later stage of the Plan period because of widespread and significant developability constraints, it would be unrealistic to set a target that assumes that a significant future level windfall level of sustainable strategic sites (whatever the threshold) will become available at a later stage absent robust evidence that will happen. That is particularly so for Mid Sussex where MSDC admits in its own evidence that it will be struggling from the outset to avoid a shortfall in its proposed 800dpa target. CPRESx does not consider that requiring an early Plan review would be likely to result in the identification of sufficient additional sites to justify an uplift in the housing target, but would increase the risk of the Council falling into default. CPRESx therefore does not support the introduction of an early review requirement into the Plan.
- 3.3 There appears to be a view in some quarters that the higher the housing target is set in the new Plan, the more sustainable individual sites become to meet that target, thereby self-justifying the higher target. The environmental sustainability of a given site is not a variable that reduces by reference to an increase in the level of housing demand. So its suitability for development cannot and should not be influenced by the set housing target level. That is tantamount to putting the cart before the horse.
- 3.4 At least one developer has argued that all development proposals must be presumed to be sustainable and that a site must be allocated unless the adverse impacts of so doing significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole. But, by virtue of Limb 2 to the exceptions to NPPF para 14, that is not so in cases where NPPF policies restrict development, and in these cases there is a straightforward unweighted balancing exercise. *Forest of Dean District Council v DCLG and Gladman Developments Ltd* [2016] EWHC 421 (Admin) tells us that “it is appropriate to give the word “restricted” in Limb 2 of paragraph 14 a relatively wide meaning, to cover any situation where the NPPF indicates a policy that cuts across the underlying presumption in favour of development. The alternative is impractical”. That case, which concluded that the NPPF provision dealing with less than substantial harm to a designated heritage asset restricted development within the Limb 2 test, also makes it clear that the NPPF policies that restrict development are not confined to those specifically mentioned in footnote 9. Consideration of relevant potential site allocations need to be assessed on that straightforward weighting basis.
- 3.5 By virtue of NPPF para 119, the para 14 presumption in favour of sustainable development and test of sustainability has no application at all where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined. This is the case for developments affected by the 7km zone of influence around the two EU protected sites on Ashdown Forest. As we understand the rules, the Council is required by paras 102-104 of the Conservation of Habitats and Species Regulations 2010 (the “Habitats Regulations”) to reject any development proposal that would adversely and unavoidably affect the integrity of one of those sites, whatever other benefits it may bring. For this purpose
- (a) the cumulative potential for harm must be considered, taking account of all other actual and proposed developments within the zone of influence, and
 - (b) in the absence of robust evidence that harm will not occur or can be avoided, adverse

impacts on the sites must be presumed.

It is CPRE's view that the required cumulative assessment must take into account all development in all LPA areas that have been permitted or are proposed within the zone of influence since the potential for harm to both sites was first identified in about 2012. The zone of influence affects a considerable area of Mid Sussex. MSDC has not answered the broad-fronted challenge made by CPRESx to the robustness of its proposed policy whose effect is to allow unconstrained housing growth within the zone of influence around the two EU sites so long as sufficient SANGS are provided in the locality, a policy proposed with no robust or current supporting evidence and involving, we think, a significant mathematical over-estimation of the compensatory effect of a SANG.

- 3.6 Even where other insufficiently mitigatable environmental or other constraints exist in respect of a given site that individually may not involve policies that restrict development in NPPF policy terms, their cumulative effect may sufficiently outweigh the benefits of permitting development of the site as to justify not allocating the site or allowing it to be developed.

4. Areas of Outstanding Natural Beauty

- 4.1 CPRE Sussex's position is that NPPF paras 115 and 116 operate (in para 14 terms) to restrict development so that the presumption that development anywhere within the High Weald AONB would be sustainable is ousted. The effect of para 115 is to create a presumption that development for any such development should be refused having regard to the great weight that your Council is required by the CROW Act to conserving and enhancing its landscape and scenic beauty applying an unbalanced weighting exercise.

- 4.2 We accept that the position has to be considered in the context of any realistic mitigation and enhancement opportunities that the development may offer, but caution that so called "mitigation" that involves destruction of natural landforms and habitats, and their replacement with new artificially created or landscaped ones would not normally enhance the natural beauty of the High Weald. It is also vital to understand that harm to the natural beauty of the AONB is likely to involve much more than just harm to the visual appearance of the landscape. It is the overall landscape characteristics of the AONB land that have led to its protected designation and that have to be addressed in considering the potential effectiveness of any proposed mitigation, not merely visual impacts. In the case of the High Weald the differing protected landscape characteristics are identified within the High Weald Management Plan and in Natural England's High Weald National Character Area profile 122 – see <http://publications.naturalengland.org.uk/publication/4706903212949504?category=587130>.

- 4.3 In the case of a major development - and any site likely to be considered for allocation purposes would inevitably be a major development – the NPPF is even more restrictive as to the circumstances in which it would be proper to permit development (or by inference, allocation) with its twin "exceptional circumstances" and "public interest" tests (separate tests that sometimes seem to get elided). CPRE Sussex argues that the need to meet a given housing target does not by itself amount to an exceptional circumstance or justify on public interest grounds overriding environmental constraints that would otherwise justify refusal of planning permission. If the High Weald were an acceptable place to build just in order to boost the District's housing numbers, statutory AONB designation to protect it from development would be wholly meaningless, not just

for the High Weald but, given nation-wide housing pressures, for all or most of England's 34 AONBs. That is an illegitimate approach in terms of the CROW Act that sets out the Council's responsibilities vis a vis AONBs or NPPF paras 115-116. The "need for development" factor in para 116 is not to be read as allowing an authority struggling to meet its OAN to solve that problem within the AONB by ignoring their statutory responsibility to conserve and enhance the High Weald. If that had been the government's intention it would have been easy enough for them to say in para 116 that a housing shortage amounts to an exceptional circumstance. Para 116 does not say that (and quite rightly not!).

4.4 For Plan allocation purposes, in CPRESx's judgement, the Council would be entirely justified in not allocating any site within or affecting the setting of the High Weald AONB unless

- it had been advised by the High Weald AONB Unit that the proposal would have no material adverse effect on the High Weald or the fulfilment of the High Weald Management Plan; and
- Natural England had been consulted and raised no objection to the proposed allocation.

It would be perverse and inappropriate for MSDC to override any objections raised by the High Weald AONB Unit or Natural England as their primary advisers on compliance with their statutory function of conserving the High Weald.

4.5 CPRESx also acknowledges the potential need for small-scale village boundary extensions into the High Weald to meet particular local development needs of village communities. CPRESx believes that it is essential that any such extensions should be planned extensions pursuant to adopted neighbourhood plan processes, and that such extensions are not normally appropriate locations to house overspill needs from elsewhere.

4.6 CPRESx also considers that the Council would be entirely justified in not allocating any site within or affecting the setting of the South Downs National Park unless the South Downs National Park Authority has advised that the allocation would cause no material harm to the setting of the South Downs National Park.

4.7 MSDC's controversial decision to approve Thakeham Homes's application to develop on an unallocated site within the High Weald AONB at Pease Pottage should not become a precedent that creates an open season for other strategic allocations or developments within the High Weald.

5. Areas within the Habitats Regulations Zone of Influence

5.1 In MSDC's oral response to our representations on this issue at the hearing on 13th January, their Counsel acknowledged that MSDC had not considered whether the Habitats Regulations would constitute a constraint on development within the Mid Sussex part of the zone of influence if the District's housing target was set at a level above 800 dpa. That is presumably because the Counsel has no evidence (it has adduced none) as to what the impact would be of a higher level of development within the zone of influence than is proposed in its current draft Plan, when read together with the East Grinstead and other relevant Neighbourhood Plans. In those circumstances, CPRESx says that the application of the precautionary principle would require MSDC not to allocate additional sites for development within the zone of influence unless and until robust evidence exists (and can be tested) that any such additional allocations would not adversely affect the EU Sites or can be avoided as the Habitats Regulations require.

5.2 We cross-reference here other comments on the application of the Habitats Regulations that we have made at paragraphs 2.3 and 3.5 of this submission.

5.3 We note that the Inspector has questioned whether MSDC has, or should have, considered alternatives to a 7km zone of influence. CPRESx will be making a submission on that issue at the appropriate time.

6. Other material environmental constraints

6.1 The significance or otherwise of most environmental constraints depends on individual site facts and circumstances. That is particularly true of landscape characteristics. We will not repeat our previous evidence to the effect that harm to individual landscape characteristics can carry sufficient weight (alone or in combination with other factors) to justify a conclusion that development of a given site should not be allowed. That is not only true where the site is judged to be in a valued landscape for the purpose of NPPF para 109.

6.2 CPRESx considers to be robust as evidence the LUC Review of Landscape and Visual Aspects of Site Suitability dated January 2015 (EP29) – which examines the methodology used to evaluate landscape suitability and sensitivity in the course of its SHLAA assessments. We draw its conclusions on page 16 to the Inspector’s attention.

6.3 There are numerous planning decisions that demonstrate that it can also be justifiable to reject as unsustainable a site that is outside a specially designated area and outside the para 109 valued landscape criterion on landscape character grounds. To cite two recent examples:

- an unsuccessful appeal against a refusal of permission for up to 200 homes in a district without a 5 year housing supply, where the Secretary of State decided that the harm to the character of the land and loss of best and most versatile agricultural land outweighed the benefit of reducing the district’s housing shortfall. (*Ref: APP/P1615/W/15/3005408 dated 21 December 2016: Forest of Dean DC*).
- an unsuccessful appeal against a refusal of permission for 300 homes on a large open-planned greenfield site outside Leighton Buzzard. The Inspector’s concluded that the scheme was unsustainable and that “the need for housing is not pressing enough to countenance the damage [to the landscape character] wreaked by this development”. (*Ref APP/JO405/W/16/3146817 dated 5 January 2017: Aylesbury Vale DC*).

6.4 In CPRESx’s experience, greenfield development proposals often raise not only landscape character issues, but also ones of the appropriateness or otherwise of extending an existing community boundary into the countryside and/or the retention of the separation of individual communities. Assessment of these often unmitigatable factors involves value judgments on the part of the Council as to the weight to be given to such considerations and their impact on the sustainability of the site involved.

6.5 Where development of a site is identified as causing even slight harm to a designated heritage asset or its setting that cannot be sufficiently mitigated:

- s.66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires considerable weight to be given to the conservation of that asset (*Barnwell Manor Wind Energy Ltd v. East*

Northamptonshire District Council, English Heritage and The National Trust [2014] EWCA Civ 137 (Court of Appeal)), and

- per *Barnwell*, the balancing exercise required by NPPF para 14 becomes an unweighted one because NPPF paras 133 and 134 impose a restriction on development in these circumstances for the purpose of limb 2 of the exceptions to the presumption that development will be sustainable.

6.6 Unmitigatable harm to a designated heritage asset or its setting, and potentially to an undesignated one, amounts to a significant constraint to development that is of potential relevance to a number of sites that have been considered.

7 Infrastructure Constraints

7.1 Traffic constraints on development in and around East Grinstead. The last bullet of NPPF para 32 mandates that development should be prevented or refused on transport grounds where, after taking account of improvements made, the residual cumulative impacts are severe. In CPRE Sussex's view this provision constitutes a restriction on development to which the second limb of the exceptions to NPPF para 14 applies.

7.2 We note that in a recent planning appeal decision dated 12th January 2017 at Gibbshaven Farm Felbridge, near East Grinstead (Appeal Ref: APP/3830/W/16/3156544) the Inspector concluded that he should reject the appeal against MSDC's refusal of planning permission on exactly these grounds. Traffic impact is also a key factor in the outstanding appeal case at Hill Place Farm, East Grinstead.

7.3 There are no proposals of which we are aware designed to improve the long-acknowledged traffic congestion to a level that would enable the town's roads to absorb extra traffic from future development (nor, as many argue, from much of the development already permitted). Whether one accepts that the severity level required by NPPF para 32 has already been reached – and Tandridge Council and one Planning Inspector has accepted the traffic experts' evidence that it has reached that severity level – there can be no doubt that development of the level proposed for potential development sites in East Grinstead would generate that level of traffic severity, as there are no sufficient costed or funded alleviation/improvement proposals in the pipeline. Such development would therefore be unsustainable in NPPF terms. Policy EG11 in the East Grinstead Neighbourhood Plan also recognises this as a potential constraint to future development.

7.4 Absent any determination as to what works would be required to deliver a significantly improved traffic flow system – assuming that were achievable at all – and hence of the costs involved in carrying out those works, there can be no assurance that sufficient CIL or s106 contributions could be raised to fund the work.

7.5 CPRESx notes that the evidence submitted by Jubb Consulting Engineers on this issue is in line with our own.

7.6 Our overall conclusion on the traffic aspects is that, even setting aside for the moment other major environmental constraints, NPPF para 32 creates a very significant constraint precluding the allocation of any large-scale site in and around East Grinstead.

8. Conclusion

8.1 The heavy focus in the hearings to date on boosting housing numbers within the draft Plan has obscured the focus away from the equally important provisions within the NPPF intended to ensure

the conservation and enhancement of the environment and biodiversity as a key component of a sustainable plan. That environmental component adds value in its own right and is not subordinate to others. The NPPF provides guidance to planners as to how to address inevitable clashes between economic, social and environmental considerations. This submission flashes a spotlight on some of that guidance relevant to site allocations in which the environmental component of sustainability gets particular attention and indicates how CPRESx understands that guidance should be applied in assessing potential site allocations.

8.2 CPRESx has sought to demonstrate through this submission how the main environmental considerations should properly be evaluated and weighted for site appropriation purposes. CPRESX believes that the inevitable conclusion, when the NPPF principles for the balancing of factors that ensure sustainable development are applied correctly and consistently, is that a sound housing target would be one that constrains development below the District's OAN. Evidence of past deliverability, and the severe challenge of finding sustainable sites for development, indicate to us that even the Council's own 800dpa target is unlikely to be deliverable.

For the Campaign to Protect Rural England, Sussex Branch CIO

1 February 2017

Note: This submission was largely written before the agenda for next week's hearings was published. Whilst it does address issues raised in that agenda, it does not do so by reference to the agenda layout or numbering.