NEWMARKET HORSEMEN'S GROUP

FOREST HEATH SITE ALLOCATIONS LOCAL PLAN & SINGLE ISSUE REVIEW

RE: HABITATS REGULATIONS ASSESSMENT AND ADDENDUM

O P I N I O N

Introduction

1. We are instructed to advise the Newmarket Horsemen's Group (**"NHG**") in connection with Forest Heath DC's (**"the Council's**") emerging Site Allocations Local Plan ("**SALP**") and the associated Single Issue Review ("**SIR**").

2. In particular, we are asked to advise on the lawfulness of the Habitats Regulations Assessment which accompanied the April-June 2018 modification versions of the SALP and SIR ("**the HRA**"), and the addendum to that HRA dated June 2018 ("**the Addendum**") which was prepared to supplement the HRA in the light of the decision of the Court of Justice of the European Union in ***People Over Wind & Sweetman v Coillte Teoranta*** [2018] PTSR 1668.

3. For reasons explained below, however, and in the light of other CJEU habitats cases this year, we do not consider that the problem is resolved by the Addendum nor, having regard to the HRA and Addendum together, do we consider in any event that the overall process has been conducted in a legally correct manner and conclude that the process is not sound.

The HRA

4. The background to the HRA, the implications of the judgment of the CJEU in *People Over* Wind, and the production of the Addendum, are described in the NHG's legal submissions to the SALP/SIR examination dated 4 July 2018 at para 6.

5. The requirements for, and methodology of, the HRA can be found at §§1.7-1.23 (including previous HRA work at §§1.21-1.23) and Section 3 which is (as its title indicates) only dealing with screening methodology.

6. In summary, the HRA screened the SALP and SIR in respect of the following potential effects on the Breckland SAC (including Rex Graham Reserve SAC) and the Breckland SPA:

   (1) Direct loss or physical damage due to construction;

   (2) Disturbance and other urban edge effects from construction or occupation of buildings;

   (3) Disturbance from construction or operation of roads;

   (4) Recreation pressure;

   (5) Water quantity;

   (6) Water quality; and

   (7) Air quality.

7. With respect to those matters, the HRA concluded at Sections 5, 6 and §7.1 that likely significant effects could not be ruled out in respect of:

   (1) Disturbance and other urban edge effects from construction or occupation of buildings;

   (2) Disturbance from construction or operation of roads;

   (3) Water quantity;

   (4) Water quality; and

   (5) Air quality.

8. The HRA therefore undertook appropriate assessments ("**AA**") of each of those matters.

9. Section 7 headed "appropriate assessment" does not consider the methodology or requirements for AA which is surprising given the importance attached to this by the CJEU. It is also clear from the "project level HRA" in Table 7.1 that some of it at least was screened out as a result of mitigation measures including the provision of restored habitat: see e.g. the reference to Red Lodge at SA9(b) and SAR(9)(c).

10. As to the other matters, the HRA concluded that direct loss or damage to the Breckland SAC and SPA due to construction could be screened out on the basis that there were no pathways for significant effects to occur. That finding was not dependent on any mitigation.

11. The final matter, recreation pressure, was also screened out, on the basis of the mitigatory effects of a range of policies (listed in the Addendum at §3.16) which provide and enhance open space and rights of way networks ("**the Mitigation Policies**"). Section

6 noted in respect of suitable accessible natural greenspace (for which a study had been undertaken) applying an appropriate standard, a requirement for at least 39 ha of accessible greenspace over the plan period. §6.25 noted that the study

> "explores the opportunities for new greenspace and access routes that could be delivered to support the growth agenda, and outlines a recreation pressure mitigation strategy for each main settlement".

12. It appears clear that the requisite SANG has yet to be provided and there is only a policy to support its provision in connection with residential development. §6.18 notes the "*general commitment to provide new or enhanced open space alongside new development*" in adopted local plan policies.

13. A further lack of rigour in the AA, not corrected in the Addendum, is the reliance on earlier HRA assessments: see the HRA e.g. at §§3.30, 3.31 and Appendix 1.

14. In the ***Dutch Nitrogen*** cases, which concerned the authorisation schemes adopted by the Netherlands in respect of nitrogen deposition arising from agricultural activities, the CJEU concerned a scheme AA and the question arose as to whether such a high level AA could apply to individual projects, or be regarded as a single project, or whether a group authorisation could exempt individual schemes from case specific AA. This issue is not considered by the HRA or Addendum and the suitability of the earlier HRA is not specifically considered as to whether they are up to date or provide sufficient basis to be taken into account for each of the allocated sites in question. The CJEU held that high level, or a single AA for multiple projects, will only be effective and applicable if [109, 114] –

> "only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain"

15. At [110] in connection with scheme exemptions, but which is equally applicable to earlier HRA or AAs, the CJEU held:

> "110 As stated in paragraph 101 of the present judgment, it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive accompanying a programmatic approach such as that at issue in the main proceedings, and exemptions from authorisation such as those at issue in the main proceedings may be accepted only if the national court is satisfied that that assessment carried out in advance meets the requirements of that provision."

16. Moreover, to the extent that those earlier HRAs relied upon in the HRA (and by implication the Addendum) also incorporated mitigation it is probable that they also breached the requirements of art. 6(3) as now understood following ***Orleans*** and ***People***

Over Wind. However, this aspect has simply not been considered by the Council or its consultants. The Addendum does not meet the ***Dutch Nitrogen*** requirement for "*a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment'…*".

The Addendum

17. The Addendum recognised that, in the light of ***People Over Wind***, recreation pressure could not be screened out on such a basis. The Addendum thus undertook an AA of the likely significant effects of recreation pressure.

18. That exercise is found at §§3.6 – 3.12 of the Addendum. In summary, the Addendum proceeds on the basis that the Mitigation Policies can be taken into account at the AA stage, and that when those policies are taken into account, the residual (post-mitigation) recreation pressure arising from the SALP/SIR is negligible (para 3.10).

19. The critical finding on the mitigatory effects of the Mitigation Policies is at para 3.10:

> As reported in the HRAs for these development plans, mitigation has been put in place to avoid recreation pressure effects on European sites from the development plans for those districts. The HRA of the SALP assumed that the residual (post-mitigation) recreation pressure from development in neighbouring districts is negligible and need not be considered further in the HRA of Forest Heath's Local Plan documents. That conclusion continues to hold good because those mitigation measures are secured as part of the policies of adopted development plans but should be expressed as a finding as part of the information required for an Appropriate Assessment of Forest Heath's Local Plan documents. It was considered that economic and tourism development proposed by adopted Forest Heath Core Strategy policy CS 6 could have recreation effects which are insignificant alone but which could combine with those of the SIR and SALP to become significant. The HRA of the SALP therefore considers the recreation effects of its site allocations in combination with these otherwise insignificant effects.

20. The above analysis is based entirely on the screening-stage analysis in Chapter 6 of the HRA. The methodology (which is flawed for AA purposes as explained below) is set out at §§3.1-3.21 and Appendices 1-3. Chapter 3 describes the key features of the Mitigation Policies as follows (box 1):

> • Provide at least the level of open space set out in the SPD for Open Space, Sport and Recreation Facilities on all development sites.
>
> • Where there is already a sports pitch and formal provision available within the community that is easily accessible, take a flexible approach to increase the natural open space through the SPD provision.
>
> • In those settlements shown through the ANGSt study to be deficient in a 2-20 ha local green space, aim to create new open space of this size in association with new development. This should be located within 300 m of the new dwellings to ensure easy access for the new residents, and the design should, as much as is practicable, follow the (adapted) Natural England guidelines.

- Secure the provision of a large SANG area, at least 10 ha, such as a country park with adequate car parking facilities and natural areas which fulfil many of the requirements of the Natural England SANG design.

- New green space should be connected to the existing GI network through the retention of existing and creation of new features such as tree belts, hedges, grasslands, and river corridors.

- For development sites in settlements that are within 7.5 km of the heathland and forest components of Breckland SPA, improve and connect the wider green infrastructure network to provide access and walking routes of approximately 2.5 km in length.

- A warden service should be established where development could lead to recreational pressure that could damage the interest features of the existing sensitive open spaces that are designated nationally and/or locally. These sites include Maidscross Hill SSSI and LNR, Red Lodge Heath SSSI and Aspal Close LNR.

- Where appropriate and proportionate to the scale and location of development, monitoring should be secured. Consultation with Natural England will be necessary to agree the level of monitoring.

21. The Addendum concluded (§3.15) that the information contained in Chapter 6 of the HRA was adequate to enable an AA to be carried out. It nowhere refers to or purports to apply the requirements of AA as repeated in numerous CJEU authorities, including the most recent. The Addendum is not an AA itself but purports to review whether the HRA itself is suitable to discharge that function.

22. At §3.16, the Addendum states that ***People Over Wind*** permits avoidance and reduction measures to be taken into account at the AA stage. As noted below, it does so in principle but it omits to consider whether the avoidance and reduction measures are ones which meet the legal requirements of the Directive for the conduct of an AA, still less an AA that is capable of showing no adverse effect on the integrity of the protected sites. The Addendum concludes that, as those measures are already identified and secured, the SALP/SIR would have no adverse effect on the Breckland SPA either alone or in combination with other plans and policies.

Established principles for AA and their application to the HRA

23. As repeated in many CJEU cases, including ***Sweetman v An Bord Pleanala*** (C-258/11) [2014] P.T.S.R. 1092, ***Orleans v Vlaams Gewest*** C-387/15 [2017] Env. L.R. 12, ***Commission v Poland (Białowieża Forest)*** C-441/17, 17.4.18, ***People Over Wind***, ***Grace & Sweetman*** (below), ***Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg*** C-293/17 and C-294/17 (the ***Dutch Nitrogen*** cases) 7.11.18 (below) and ***Holohan v An Bord Pleanála*** C-461/17 7.11.18, the principles of an AA require demonstration on the best scientific evidence available that

there will be no adverse effect on integrity "beyond all reasonable doubt". See e.g. ***People Over Wind*** at [36] and [38]:

> "36. … a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment."
>
> 38 … the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned"

24. The same principle appears in ***Orleans*** at [50] and [51]:

> "50 However, the Court's case-law emphasises the fact that the assessment carried out under art.6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (judgment of 14 January 2016 in *Grüne Liga Sachsen and Others*, C-399/14, EU:C:2016:10 , at [50] and the case-law cited).
>
> 51 In this connection, the appropriate assessment of the implications of the plan or project for the site concerned that must be carried out pursuant to art.6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field …"

25. Similarly in ***Commission v Poland***, where the CJEU reviewed the requirements under article 6 at [106]-[193]:

> "116 In order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive (see, inter alia, judgments of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 39, and of 21 July 2016, Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraph 47).
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> 117 Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities have become certain that the plan or project will not have lasting adverse effects on the integrity of the site concerned. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see to that effect, inter alia, judgments of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 40, and of 8 November 2016, *Lesoochranárske zoskupenie* VLK, C-243/15, EU:C:2016:838, paragraph 42)."

26. In ***Holohan*** the AG and CJEU explained the requirements in greater detail. At [32]-[40], the CJEU held that art. 6(3) may not be discharged simply by having regard to the protected site itself but also to other sites which may themselves affect the protected site:

> "35 In order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs

to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of sites of Community importance, in accordance with that directive (judgment of 17 April 2018, *Commission v Poland (Białowieża Forest),* C-441/17, EU:C:2018:255, paragraph 116 and the case-law cited).

36 Taking account of those conservation objectives, the Court must determine the extent of the obligation to carry out an appropriate assessment of the implications of a plan or project for a site in question.

37 Since, as stated in paragraphs 33 and 34 of the present judgment, all aspects which might affect those objectives must be identified and since the assessment carried out must contain complete, precise and definitive findings in that regard, it must be held that all the habitats and species for which the site is protected must be catalogued. A failure, in that assessment, to identify the entirety of the habitats and species for which the site has been listed would be to disregard the abovementioned requirements and, therefore, as observed, in essence, by the Advocate General in point 31 of her Opinion, would not be sufficient to dispel all reasonable scientific doubt as to the absence of adverse effects on the integrity of the protected site (see, to that effect, judgment of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraph 33).

38 It must also be added that, since the assessment must clearly demonstrate why the protected habitat types and species are not affected, it may be sufficient to establish, as observed by the Advocate General in point 30 of her Opinion, that only certain protected habitat types and species are present in the part of the protected area that is affected by the project and that the other protected habitat types and species present on the site are not liable to be affected.

39 As regards other habitat types or species, which are present on the site, but for which that site has not been listed, and with respect to habitat types and species located outside that site, it must be recalled that the Habitats Directive, as follows from the wording of Article 6(3) of that directive, subjects '[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon' to the environmental protection mechanism of that provision. In that regard, as stated by the Advocate General in points 43 and 48 of her Opinion, the conservation objective pursued by the Habitats Directive, recalled in paragraph 35 of the present judgment, entails that typical habitats or species must be included in the appropriate assessment, if they are necessary to the conservation of the habitat types and species listed for the protected area.

40 In the light of the foregoing … Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site."

27. Additionally, at the CJEU made clear that general or broad conclusions are not sufficient for AA purposes:

"49 It follows, in particular from the Court's case-law in relation to Article 6(3) of the Habitats Directive, as summarised in paragraph 43 of the present judgment, that the assessment carried out under Article 6(3) of that Directive may not have lacunae and must <u>contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects</u> of the proposed works on the protected area concerned.

> 50 If there are no such conclusions capable of dispelling all reasonable doubt as to the adequacy of the information available, the assessment cannot be considered to be 'appropriate', within the meaning of Article 6(3) of the Habitats Directive.
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> 51 In circumstances such as those in the main proceedings, that requirement entails that the competent authority should be in a position to state to the requisite legal standard the reasons why it was able, prior to the granting of development consent, to achieve certainty, notwithstanding the opinion of its inspector asking that it obtain additional information, that there is no reasonable scientific doubt with respect to the environmental impact of the work envisaged on the site concerned."

28. It is seriously questionable whether the HRA and Addendum even taken together discharge the standard set by the requirements explained above. The absence of any consideration of the high legal standard, in contradistinction to the more detailed consideration of the screening requirements, is not anywhere resolved by consideration in the documents which neither shows understanding of those standards nor meets "the precise and definitive findings and conclusion capable of dispelling all reasonable scientific doubt".

29. The requirements are also explained in detail by Advocate General Kokott in her Opinion at [22]-[76] including the need for updated information and full discussion of issues, even those where no effect is considered likely.

30. We therefore consider it very doubtful that the documents taken together meet the general legal requirements for AA, including those that were subject to a purported AA in Section 7 of the HRA.

31. There are further, more serious failings as explained below.

32. The Addendum was undertaken by reference to the implications of ***People Over Wind***. Since the Addendum was prepared, however, three relevant CJEU decisions on the Habitats Directive have been handed down, already mentioned above. We have already dealt with ***Holohan*** and aspects of the ***Dutch Nitrogen*** cases.

33. The first is ***Grace & Sweetman v An Bord Pleanála*** [2018] Env LR 37. The case concerned a proposed wind farm on the Slieve Felim to Silvermines Mountains SPA, which was the habitat for a number of Hen Harriers. The AA for the scheme included the insertion of a "sensitive" management plan for some 137 HA of second rotation forest, so as to maintain open-canopied forest areas which the Harriers required for foraging.

34. One of the issues in the case was the extent to which mitigatory measures could be taken into account at the AA stage.

35. The CJEU restated, in clear terms, the proper approach (see also above):

> "51. It is only when it is sufficiently certain that a measure will make an effective contribution

> to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out ...
>
> 53. It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires 'dynamic' management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development."

36. Where such uncertainty was present, the proper approach was to regard the measures in question as compensatory and to consider them under Article 6(4) of the Habitats Directive, rather than within the Article 6(3) Appropriate Assessment.

37. In the ***Dutch Nitrogen*** cases, judgment given on 7 November 2018 (the same day as ***Holohan***), the CJEU again emphasised the importance of ensuring that, where measures are to be included in an AA on the basis of their mitigatory effects, the nature and effects of those measures are certain. The Court made it clear at §126 that:

> it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment'…

38. The Court's conclusion on this issue is expressed at §130:

> The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the <u>future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty</u>.

39. The use of the phrase "inter alia" makes clear that lack of implementation of procedures and a lack of scientific knowledge are not the only reasons why a measure may fall to be excluded from the AA. Rather, the defining characteristic of such excluded measures is the uncertainty of their mitigatory effects.

40. This is in line with earlier authorities. In ***Orleans*** at §52 the CJEU held in similar terms:

> "52 Moreover, it must be noted that, as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future (see, to that effect, judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330 , at [32])."

41. A similar passage appears at §52 of ***Grace & Sweetman***.

42. The AA contained in the Addendum concludes that the SALP/SIR would have no adverse effects on the Breckland SAC and SPA. That conclusion is contingent on the presence and operation of the various measures contained in the Mitigation Policies.

43. In the light of the CJEU decisions in the ***Grace & Sweetman*** and ***Dutch Nitrogen*** cases, reinforcing existing caselaw, it is apparent that an AA contingent on mitigation (such as that in the Addendum) is lawful if, and only if, the mitigatory measures guarantee beyond all reasonable doubt that no adverse effects will arise. It therefore does not follow, as the Addendum assumes, that by considering mitigation in the context of AA the issue which arose under ***People Over Wind*** is resolved. The absence of any consideration of the requirements of AA demonstrates that the Addendum focused on the screening problem and failed to consider the meeting of the strict requirements of AA.

44. The matter which was subject to the AA in the Addendum was recreational pressure: the increase in the number of visitors to the protected site (HRA para 4.25) brought about by residential development in the vicinity of the Breckland SAC/SPA pursuant to the policy support for such development which the SALP/SIR's site allocations would introduce. This is not an uncommon problem and has been dealt with elsewhere e.g. in the Thames Basin Heaths SPA, but in schemes devised prior to recent CJEU authorities and based on the approach in ***R (Hart DC) v SSCLG*** [2008] 2 P. & C.R. 16 - now no longer good law in the light of ***People Over Wind***.

45. The adverse impact of introducing policy support for such development is said to be mitigated by the operation of the Mitigation Policies. The Mitigation Policies do not, however, have any direct impact on recreation pressure. Rather, the mitigatory effects of the Mitigation Policies arise by imposing constraints on the terms of any planning permissions granted for residential development pursuant to the SALP/SIR allocations.

46. Following ***Grace & Sweetman*** and ***Dutch Nitrogen***, therefore, the relevant issue is whether it can be guaranteed beyond any reasonable doubt that residential development permitted pursuant to the policy support of a SALP/SIR allocation will be subject to the provisions of the Mitigation Policies.

47. In our opinion, no such certainty exists. Indeed, it is clear that the provision e.g. of SANGs required is both substantial and prospective.

48. The primary statutory provision governing the grant of planning permission is s. 70(2) of the Town and Country Planning Act 1990:

> "(2) In dealing with an application for planning permission … the authority shall have regard to—
>
> (a) the provisions of the development plan, so far as material to the application,

…

(c) any other material considerations."

49. S. 38(6) of the Planning and Compulsory Purchase Act 2004 provides:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

50. As a matter of law, it is well-established that the effects of those provisions is to give the terms of the development plan statutory priority: see for example ***City of Edinburgh Council v Secretary of State for Scotland*** [1997] 1 WLR 1447.

51. It does not follow, however, that planning permission can only be granted where each and every policy in the development plan is complied with. The statutory obligation to have regard to the development plan applies to the development plan as a whole, and it is open to decision makers to conclude that a proposal complies with the development plan notwithstanding a conflict with individual policies contained within it. That principle was explained by Sullivan J (as he then was) in ***R v Rochdale MBC ex parte Milne (No 2)*** [2001] Env LR 22 as follows:

> "48 It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: "is this proposal in accordance with the plan?". The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. In *City of Edinburgh Council v. the Secretary of State for Scotland [1997] 1 W.L.R. 1447*, Lord Clyde (with whom the remainder of their Lordships agreed) said this as to the approach to be adopted under section 18A of the Town and Country Planning (Scotland) Act 1972 (to which section 54A is the English equivalent):
>
> > "In the practical application of section 18A, it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it."
>
> 49 In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be "in accordance with the plan". Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes etc., it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the

proposal was in accordance with the overall thrust of development plan policies."

52. That approach was recently endorsed by the Court of Appeal: see for example Lindblom LJ in ***BDW Trading v SSCLG*** [2017] PTSR 1337 at [21].

53. It is therefore open to a decision maker to find that a planning application for residential development on a SALP/SIR allocated site is in accordance with the development plan even if the application in question does not comply with the Mitigation Policies.

54. Similarly, even if a decision maker found that a breach of the Mitigation Policies rendered such an application in conflict with the development plan overall, it would nevertheless be open to the decision-maker to grant planning permission on the basis of other material considerations. In weighing the benefits of those material considerations against the harm arising from the breach of the development plan, the decision maker could lawfully take into account the fact that though the proposal conflicted with the development plan as a whole, aspects of the development plan (i.e. the SALP/SIR allocation) supported the proposal.

55. Further, within the site specific Table 7.1 of the HRA reliance is also placed on habitat recreation or provision which is specifically ruled out of falling within AA and art. 6(3) by the CJEU in the passages quoted above.

56. For those reasons, we have reached the clear view that the Mitigation Policies do not, as a matter of law, guarantee "beyond all reasonable doubt" as required by the CJEU that the harmful effects of the SALP/SIR site allocations will be removed. Put simply, the SALP/SIR exist in a legal framework which, by design, is uncertain and leaves open the possibility that the SALP/SIR policies will be followed, and the Mitigation Policies not followed, in any given case.

57. The uncertainty exists in any event without regard to s. 38(6) since as the CJEU has held on several occasions recently, they are future measures -

> "because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty".

58. This situation arises regardless of ***People Over Wind*** since ***Grace & Sweetman*** and the ***Dutch Nitrogen*** cases are dealing with the uncertainty of future measures following screening and in the AA context.

59. On that basis, the purported AA carried out in the Addendum is in our opinion unlawful. If the Council adopted the SALP as part of its development plan in reliance on the Addendum's AA of the recreation pressure, then in our view that adoption would itself

be unlawful. The combined HRA and Addendum also fails to comply with other key aspects of AA as explained above e.g. in terms of earlier HRAs, habitat creation and the general requirements for AA as now explained in ***Holohan***.

60. It follows that the advice note from Michael Bedford QC submitted on behalf of the Council is incorrect in its conclusions since:

    (1) it fails grapple with the requirements of AA generally, as do the HRA and Addendum;

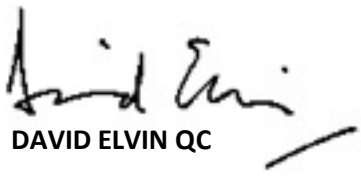
    (2) It does not (understandably) deal with more recent authority, but much of that authority reflects established lines of authority on AA and in some cases develops it (e.g. ***Dutch Nitrogen*** and ***Holohan***);

    (3) It focuses only on the issue of screening;

    (4) It incorrectly assumes that the issue of mitigation can be dealt with as part of an AA. It does not deal with how to proceed if the mitigation is uncertain and would therefore only be capable of being considered, if at all, as compensation under art. 6(4).

    To follow that advice, and to accept the HRA and Addendum as legally sound, would in our view not be appropriate. It would not comply with art. 6(3) and CJEU authorities and will lead to the plans being unlawful and thus unsound. If adopted in their current form, the plans would be open to challenge under s. 113 of the Planning and Compulsory Purchase Act 2004.

61. We have nothing more to add as presently instructed but would be pleased to advise further should it be necessary.



DAVID ELVIN QC

LUKE WILCOX

Landmark Chambers,

London EC4A 2HG

26 November 2018