

**GUILDFORD LOCAL PLAN
EXAMINATION IN PUBLIC**

**SUBMISSION ON MATER 1.2
on behalf of GUILDFORD COLLEGE**

1. INTRODUCTION

1.1. Matter 1.2, under the heading “***Plan Preparation***” is:

“Has an appropriate Habitats Regulations Assessment (“HRA”) been undertaken and is the plan’s approach towards the Thames Basin Heaths Special Protection Area (“SPA”) sound?”

1.2. Guildford College “GC”) wish to bring to the Inspector’s attention the recent judgment Case C-323/17 People over Wind and Sweetman (Appx 1).

2. PEOPLE OVER WIND CASE

2.1. The Case came before the European Court following a Request for a Preliminary Ruling under Article 267 Transfer of Functions European Union from the High Court (Ireland).

2.2. The Request concerned the interpretation of Art.6(3) of Council Directive 92/42/EEC on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”). This Directive is transposed into English law by the Conservation of Habitats and Species Regulations 2010 (“the Regulations”).

2.3. Art.6 of the Directive provides:

“1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the

overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

2.4. The Regulations are in substantially the same terms (see Reg.61 at Appx 2).

2.5. The question posed was:

"Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive".

2.6. The factual circumstances were different from those of the Guildford Local Plan but the Court, in a very brief judgment, gave a ruling on the principle.

2.7. At paras 26 and 27 the Court said:

"26. the measures which the referring court describes as 'mitigating measures', and which [the developer] refers to as 'protective measures', should be understood as denoting measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned.

27 Thus, by its question, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether or not it is necessary to carry out subsequently an appropriate assessment of a project's implications for a site concerned, it is possible, at the screening stage, to take account of the measures intended to avoid or reduce the project's harmful effects on that site.

- 2.8. At para 29, the Court observed that Art.6(3) of the Habitats Directive refers to two stages – the first, requiring the Member State to carry out an AA when there is a likelihood that the plan will have a significant effect on the Site. The second stage, after assessment, allows such a plan only if it will not affect the integrity of the Site.
- 2.9. The Irish legislation specifically sets out a screening stage. The English Regulations do not, but the Court clearly interprets the Directive in that way. Reg.61(1) transposes Art.6(3). The Supreme Court observed in R (Champion) v North Norfolk DC [2015] WLR 3710 that there is no requirement for a formal and separate screening stage, but that this might happen simply and informally. Clearly, this observation and earlier cases must now be read subject to People over Wind.
- 2.10. The question in the Case was confined to the screening stage: para 31. The European Court's answer was that such measures could not be taken into account at the screening stage. It said:

"34 As regards the second condition, it is settled case-law that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (judgment of 26 May 2011, Commission v Belgium, C-538/09, EU:C:2011:349, paragraph 39 and the case-law cited). The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment of 21 July 2016, Orleans and Others, C-387/15

and C-388/15, EU:C:2016:583, paragraph 45 and the case-law cited).

35 As the applicants in the main proceedings and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

36 That conclusion is supported by the fact that 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.

37 Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive.

38 In that regard, 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 (judgment of 21 July 2016, Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraph 50 and the case-law cited).

39 It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment (see, to that effect, judgment of 8 November 2016, Lesoochránárske zoskupenie VLK, C-243/15, EU:C:2016:838, paragraph 49).

40 In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site."

3. THE PLANS AND ITS HRA

- 3.1. Policy P5: Thames Basin Heath SPA can be read as being consistent with People over Wind because it provides that permission will only be granted where it can be demonstrated that no adverse effects, alone or in combination, will be caused to the integrity of the SPA.
- 3.2. Supporting text para 4.35c concerns screening. The last sentence is not consistent with People over Wind, since it states that *“if residential developments provide or contribute to appropriate SANG and SAMM measures, they will not be required to undergo AA”* – i.e. because impacts would be precluded at screening stage.
- 3.3. The HRA adopts the same approach in several places. It is notable that the HRA refers to its being a *“screening”* in several places – see e.g. para 1.1.1, 2.3.3, 7.2.1. It is therefore not entirely clear whether or not the HRA entirely complies with People over Wind. Importantly in Table 7, the HRA assumes that *“all policies and site allocations ... will be in accordance with ... this [Policy] thus ensuring no likely significant effects result.”* Use of the word *“likely”* suggest Stage 1, Screening, rather than Stage 2. At Stage 1 mitigation/avoidance measures cannot now be taken into account, whereas they can at Stage 2. This approach may have informed conclusion on many such policies and allocations, e.g. Policy 2: Strategy and the Housing policies.

- 3.4. Conclusions on individual allocations vary, but some, at least, appear to rely on bespoke SANGS to “*screen out*” impacts; see A25, A35, possibly A22, A38, A46.
- 3.5. Some allocations refer to the need for a project-specific HRA, so are in compliance (see, e.g. paras 7.3.7 and 7.3.9) on Salt Box Road and Wisley respectively.
- 3.6. Section 8, dealing with Recreational Pressure, again relies on Policy P5: see para 8.2.5. This is potentially compliant, depending on how the Policy is applied and the error in supporting text has been noted above.

4. CONCLUSION

- 4.1. There is lack of clarity at least in the HRA as to whether or not it is a screening document or an AA. If it is an AA, then it must consider the impacts of the Plan alone and in combination with all other relevant Plans and Programmes, in Guildford and elsewhere. Impacts cannot be “*screened out*” on the basis of SANGS/SAMM.
- 4.2. The error in text could be amended so as to make Policy P5 capable of operating lawfully, and thus sound. Underlying “*screening*” assumptions in the base HRA need to be explored by the LPA and/or in the appropriate hearing session/s.

MORAG ELLIS QC