FOREST HEATH LOCAL PLAN

SINGLE ISSUE REVIEW OF CORE STRATEGY POLICY CS7 AND SITE ALLOCATIONS LOCAL PLAN EXAMINATIONS

NOTE OF LEGAL SUBMISSIONS ON

HABITATS REGULATIONS ASSESSMENT

on behalf of

Forest Heath District Council

INTRODUCTION

1. This Note provides a written summary of the legal submissions on Habitats Regulations Assessment (HRA) made by Forest Heath District Council (FHDC) at the Single Issue Review (SIR) examination hearing on 25 June 2018. The Note also provides information on the future actions that FHDC expects to take in relation to HRA prior to any adoption of the SIR or the Site Allocations Local Plan (SALP).

2. The context is provided by the decision of the Court of Justice of the European Union (CJEU) in People Over Wind & Peter Sweetman v Coillte Teoranta (Case C-323/17) decided on 12 April 2018. The key ruling of the CJEU (the un-numbered paragraph at the end of the judgment) was:

> *"Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [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 measures intended to avoid or reduce the harmful effects of the plan or project on that site."*

3. The CJEU therefore held that a decision by a public authority that no appropriate assessment was required in relation to a project to lay a cable (connecting a wind

farm to the electricity grid) in the vicinity of a Special Area of Conservation (SAC) was flawed. The SAC included a habitat which hosted an Annex II species (a particular sub-species of the freshwater pearl mussel). It was the case that the construction processes involved in laying the cable could, if protective measures were not taken, result in pollutants (such as concrete) impacting on the mussels via the pathway of water courses between the construction site and the SAC. The public authority (effective a statutory undertaker with permitted development rights for works that did not require 'appropriate assessment') concluded that there was no need for an appropriate assessment in part because of distance and in part because of the protective measures that were built in to the design of the project. This conclusion was expressed in a screening report which stated that for these reasons there was no likely significant effect on the SAC.

4. The CJEU rejected this conclusion. It found that the fact that protective measures were put forward pre-supposed that in their absence there was likely to be a significant effect on the SAC and that the adequacy and efficacy of those measures needed to be assessed as part of an appropriate assessment. Otherwise there was a risk of circumvention of the protections given by the Habitats Directive (see paras 35 to 37 of the CJEU judgment).

5. The CJEU did not provide any guidance on how a plan or programme which did include 'embedded' protective or mitigatory measures as an integral component of the plan or programme was to be sub-divided for the purposes of initial screening so that the question of likely significant effects could be assessed without regard to those measures. However, it is implicit in the CJEU judgment that what would need to be assessed at that initial stage would be a notional plan or programme, ignoring any protective or mitigatory measures, rather than the actual plan or programme that the developer intended to undertake.

6. The CJEU decision represents a marked change of approach from that adopted by the UK domestic courts. That position was summarised by the Court of Appeal in Smyth v SSCLG [2015] EWCA Civ 174, per Sales LJ (at paras 75 and 76) as follows:

> *"75 …Since it is clear from the relevant case-law that preventative safeguarding measures are relevant matters to be taken into account under an 'appropriate assessment' under the second limb (see the discussion above), there is in my view a compelling logic to say that they are relevant*

and may properly be taken into account in an appropriate case under the first limb of Article 6(3) as well. In accordance with this logic, on a straightforward reading of para 108 in AG Kokott's Opinion in the Waddenzee case, set out above, she treats preventative safeguarding measures as relevant to both limbs of Article 6(3).

76 If the competent authority can be sure from the information available at the preliminary screening stage (including information about preventative safeguarding measures) that there will be no significant harmful effects on the relevant protected site, there would be no point in proceeding to carry out an 'appropriate assessment' to check the same thing. It would be disproportionate and unduly burdensome in such a case to require the national competent authority and the proposer of a project to undergo the delay, effort and expense of going through an entirely unnecessary additional stage…"

HRA ASSESSMENT

7. The HRA work that supported the SIR and the SALP (unsurprisingly) reflected the approach that had been endorsed by the UK domestic courts and so had taken into account preventative/mitigatory measures when determining whether potential adverse effects on the relevant European sites could be 'screened out' at the initial stage as having no likely significant effects on those sites. In the wake of the CJEU judgment, this work was then carefully reviewed in the HRA Addendum (June 2018).

8. The review process is explained at para 2.1. Three circumstances were distinguished:
    - Where the plan or its allocations would have a likely significant effect so that an 'appropriate assessment' has already been undertaken of those effects: no further action required;
    - Where there are no pathways for the plan or its allocations to cause any likely significant effects: no further action required;
    - Where reliance had been placed on avoidance or reduction measures to support a conclusion of no likely significant effects: action is required to amend the HRA in line with the CJEU judgment.

9. The action taken in that third circumstance was *"In this case the screening assessment has been revised in line with the methodology required by the CJEU judgment, any required Appropriate Assessment has been carried out, and consideration has been given to whether the Appropriate Assessment necessitates any main modifications to the plan, in the light of the avoidance and reduction measures already identified and secured."*

10. Nothing in the CJEU judgment undermines the validity of the previous HRA work in the first two circumstances. If there are no pathways, the question of mitigatory measures does not arise. If an 'appropriate assessment' has already been undertaken, there is no need to revisit it. The CJEU judgment expressly recognises that mitigatory measures can be taken into account as part of an 'appropriate assessment' (para 36).

11. Section 3 of the HRA Addendum then applies the approach outlined in para 2.1 to the individual effects of the SIR and the SALP. It shows that recreational pressure is the only effect where the earlier work had relied on mitigatory measures at the initial 'screening' stage (see Table 3.1 for the SIR and Table 3.2 for the SALP). It is clear from those Tables that the SIR relies on the SALP to provide the detailed mechanisms to address the effects of the allocations which will deliver the SIR's strategic requirements. Paras 3.13 to 3.17 (inclusive) then set out how that issue has been re-assessed. Para 3.14 is explicit that *"In the absence of mitigation, the amended conclusion of the HRA Screening of the SALP in relation to recreation pressure is therefore that likely significant recreation pressure effects on the Breckland SPA cannot be ruled out."* Para 3.16 identifies the information that is available to inform an 'appropriate assessment' (including mitigatory measures). Para 3.16 provides a clear summary of the policy mechanisms for securing the delivery of those mitigatory measures in adopted development plans (both in Forest Heath and in the adjoining districts of Breckland and St Edmundsbury) and in the submission SALP. Para 3.17 then concludes:

    "These avoidance and reduction measures are sufficient to avoid and reduce recreation pressure such that there will be no adverse effect on the integrity of Breckland SPA, either alone or in combination with other plans and projects. As such, no further assessment is required and no additional main modifications are required to the SALP to meet the requirements of the Habitats Regulations.

12. That conclusion clearly addresses (and answers) the 'appropriate assessment' stage question in Article 6(3) of the Habitats Directive, namely whether the plan or programme will have adverse effects on the integrity of the SPA.

13. Section 4 of the HRA Addendum then sets out the overall conclusions and paras 4.5 and 4.7 address the 'appropriate assessment' stage question for both the SIR and the SALP.

CONCLUSIONS

14. The Council does not accept that any further information is required to be able to support the conclusion that the SIR and the SALP will not have any adverse effects on the integrity of any European site, either alone or in combination. That is the relevant question to ask at the 'appropriate assessment' stage. It has been asked, specifically in relation to recreational pressures in the wake of the CJEU judgment, and it has been answered.

15. It is correct that in answering the question reliance has been placed on the mitigatory measures that are secured by the policies referred to above but it is important to stress that there is absolutely no reason why such measures cannot be considered at the 'appropriate assessment' stage. Nothing in the CJEU judgment precludes that.

16. The fact that the HRA work comprises a series of reports (including the HRA Addendum) does not give rise to any breach of the Habitats Directive. When the reports are read together (as they are intended to be), it is quite clear that no reliance is now placed on the earlier finding that the effects of recreational pressures could be 'screened out' at the initial stage as having no likely significant effects by reason of mitigatory measures. Instead, those likely significant effects are recognised, and the HRA Addendum has therefore gone on to the 'appropriate assessment' stage and reached a proper conclusion in relation to it.

17. The HRA Addendum has been provided to Natural England (NE), the Government's statutory nature conservation advisor. NE has advised that *"we agree with the approach taken and the conclusions of the addendum"* (email from NE to FHDC of 19 June 2018 [16:03]).

18. It is right to record that at present the HRA Addendum has been considered by the Council at officer-level only and it has not been reported to Members. The Council, as 'competent authority' will need to make a formal decision on compliance with Article 6(3) of the Habitats Directive (and the parallel provision in Regulation 105 of the Conservation of Habitats & Species Regulations 2017) prior to 'giving effect to' the SIR and the SALP (i.e. prior to adoption). The Council currently expects to do this once the Examination Inspectors' reports on the SIR and the SALP are available (so that the decision can take into account the final form of all main modifications). It would also be possible for such a decision to take into account any guidance or good practice advice that might have been issued by then by the Government and/or NE on how best to assimilate the CJEU judgment into plan-making. The Council sees no need for an 'interim' decision to be made by Members at this stage.

19. However, if the Inspectors were to indicate that they would prefer such an 'interim' decision to be made, so they have information confirming whether the formal endorsement of the Council's Members has been given to the conclusions of the HRA Addendum before they complete their reports, that is a matter that the Council would be prepared to consider putting in train. The next available meeting of Full Council is on 26 September 2018

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