

NEWMARKET HORSEMEN'S GROUP
FOREST HEATH SITE ALLOCATIONS LOCAL PLAN & SINGLE ISSUE REVIEW
RE: HABITATS REGULATIONS ASSESSMENT

FURTHER OPINION

Introduction

1. I am instructed, to advise the Newmarket Horsemen's Group ("**NHG**"), further to the Joint Opinion dated 26 November 2018, to consider the latest consultation on the Forest Heath Plans intended to resolve the issues identified in that Opinion with respect to EU Habitats and appropriate assessment ("**AA**"). I use the same abbreviations as are used in the November Opinion.
2. The latest change is to propose further modifications ("**FMods**") to the SALP to allow for the use of SANGS purportedly to overcome difficulties with the soundness of the plans with regard to achieving a positive outcome in the AA. New HRAs have been produced for both the SALP and SIR.
3. The FMods and the latest HRAs are all dated April 2019 and were issued for consultation only on 9 May 2019¹ with an end date for consultation of 5pm on 21 June 2019.
4. In brief, I do not consider that the latest modifications overcome all the issues identified in November and in particular fail to meet the legal requirements for an AA. I do not consider that a lawful AA has been undertaken for reasons that should have been clear from the recent CJEU authorities, as explained in the November Opinion, which as a matter of law require there to be certainty even at the AA stage which is not achieved by the FMods: these continue to rely on measures which have yet to be taken. Indeed, on the approach taken, the plans cannot meet the rigorous certainty requirements for AA as I explain below.
5. There is a danger in approaching the position under these plans, and mitigation at the AA stage, on the basis that future provision of mitigation in plans is a common feature of plan making. However, as the departure from the approach to screening in High Court

¹ Even though the internal record of the HRA shows the final version was produced on 1.4.19 which was already later than the date originally indicated by the Council for a response.

and Court of Appeal decisions² as necessitated by recent authorities such as *People Over Wind* has demonstrated, what has been accepted to be common practice is not a reliable guide to what is now considered to be lawful in terms of Habitats law. This is particularly true in the case of meeting the high threshold of certainty required for a lawful AA.

Proposed further modifications and HRAs

6. The FMods adopt the means of using SANGS as a solution to recreational pressure which is, of itself, not surprising since the use of SANGS and SAMMS (management measures) is well-known. See e.g. *Ashdown Forest Economic Development LLP v Secretary of State* [2016] P.T.S.R. 78 and *Canterbury City Council and Crondall Parish Council v Secretary of State* [2019] EWHC 1211 (Admin) at [55]-[58] and [111]-[115]³.
7. However, in contrast to the *Crondall* case where the development proposed to link into an existing SANG, there is at present no SANG available which might provide sufficiently proximate means to resolve the issue of recreational pressure in the former Forest Heath.
8. This is clear:
 - (1) From the terms of the SALP FMods themselves; and
 - (2) From the latest SALP and SIR HRAs.
9. I will consider the SALP documents first then the SIR HRA.

SALP FMods and revised HRA

10. The FMods taken the form shown, e.g., in MM42 to the SALP:

“MM42 (SA4)

Add 10ha SANGS under Indicative Capacity:

Mixed use to include 1300 dwellings with a local centre, a minimum of 5ha employment land, **a 10ha SANGS**, schools, leisure facilities and public services.

Amend 1st paragraph after table to read:

97ha of land to the west of Mildenhall, as identified on the Policies Map, is allocated for mixed use development to accommodate residential, employment and other appropriate uses in connection with the Mildenhall Hub project, **including a 10ha SANGS**, strategic open space, allotments, public services, a local centre, and leisure facilities.

Insert new text at the end of B):

The developer is required to submit information that clearly demonstrates that the above

² E.g. *R (Hart DC) v SSCLG* [2008] 2 P. & C.R. 16 and *Smyth v Secretary of State* [2015] PTSR 1417.

³ In the second of the two cases, the *Crondall* case, Where the Court quashed the decision since it could not be sure the error would not have made a difference despite the role of SANGS and SAMMS.

measures would result in no adverse effects on the integrity of Breckland SPA. This information will include:

- details of the timetable for implementation of all measures;
- availability of measures at the time of occupation of the new dwellings – including any phasing plan if applicable;
- details of adoption and future management of measures (as required);
- a concept design for the SANGS.

Planning permission will not be granted unless this information is sufficient to allow the local planning authority (as competent authority) to conclude that the requirements of the Habitats Regulations 2017 (or any replacement regulations) are satisfied."

11. The reasons for MM42 include:

"The additional text is to ensure that there is sufficient information submitted by the applicant in relation to the delivery of the recreation pressure measures to demonstrate, with certainty, that the proposals will not adversely affect the integrity of Breckland SPA and to inform the project level Habitats Regulations Assessment."

12. The same/similar modifications are made in the cases of SA5, SA7 to SA10 and SA14 (MM 43 to MM48) with the same reasons given. MM48 SA14 also deletes from existing criterion B) the reference to "suitable alternative" since the requirement could not be met –

"Suitable alternative natural greenspace (SANGS) is an approach requiring particular design features. In this case it is unlikely that all the features of a SANGS could be provided although a large area of open space proportionate to the size of the development and the village location would be provided."

13. The April 2019 SALP HRA acknowledges the need for AA:

"4.1 The HRA screening of the SALP has determined that Appropriate Assessment is required, as likely significant effects from the plan's policies and site allocations cannot be ruled out. The reasoning for this is presented below.

Is the plan directly connected with or necessary to the management of any European sites?

4.2 No; the SALP is not connected with or necessary to the management of any European sites.

Is the plan of a type that could possibly have any (positive or negative) effect on a European site?

4.3 The SALP will result in new development (e.g. housing, employment and infrastructure), which will have associated impacts (e.g. changes to traffic distribution, types or distribution of recreation, water abstraction and discharge, light or noise). These impacts could affect those European sites identified in Table 4.1.

....

Is the plan likely to have a significant adverse effect on any European site alone?

4.12 Likely significant effects from the SALP cannot be ruled out at the screening stage: the SALP allocates development across the District, and the European sites listed above have been identified as being sensitive to the types of activities that result from development. An Appropriate Assessment is therefore required and this is set out in Chapter 5. Habitats

Regulations Assessment of the Forest Heath

Is the plan likely to have a significant adverse effect on any European site in combination with other plans or projects?

4.13 Likely significant effects from the SALP in combination with other plans and projects cannot be ruled out at the screening stage. An Appropriate Assessment is therefore required and this is set out in Chapter 5."

14. The relevant sites are identified for potential recreational pressure impacts in Table 5.5 and Fig. 5.2. The sites are listed at para. 5.84. The detailed consideration of the issue begins at para. 5.89

15. The HRA notes at paras. 5.92 to 5.97 the development plan policies that

"provide a general commitment to provide new or enhanced open space alongside new development and to manage and monitor recreation pressure".

16. The important point to note is the policies consider a commitment to provide new or enhanced space and does not identify any specific site or existing locations that could be utilised as SANGS without enhancement. For example, at para. 5.95:

"Policy DM12: Mitigation, Enhancement, Management and Monitoring of Biodiversity states that:

"All new development (excluding minor household applications) shown to contribute to recreational disturbance and visitor pressure within the Breckland SPA and SAC will be required to make appropriate contributions through S106 agreements towards management projects and/or monitoring of visitor pressure and urban effects on key biodiversity sites."

17. The HRA refers to the Accessible Natural Green Space Study ("ANGSS"). This again is dealing with potential, not actual, green spaces:

"5.98 In addition to these general policy commitments to provision and enhancement of open space and rights of way, the Council has carried out an Accessible Natural Greenspace Study (42) to provide evidence on appropriate accessible natural greenspace that will support the planned growth in the District. The study reviews accessible natural greenspace provision at the District's main settlements, explores the opportunities for new greenspace and access routes that could be delivered to support the planned growth, and outlines a recreation pressure mitigation strategy for each main settlement."

18. The study provides a strategy but not a current solution in terms of existing green space (emphasis added):

"5.102 Discussion between the Council and Natural England has highlighted two SSSIs, Maids Cross Hill SSSI at Lakenheath and Red Lodge SSSI at Red Lodge, which are in close proximity to and act as the main areas of natural greenspace for these settlements. These SSSIs are already subject to increasing recreation pressure and the Accessible Natural Greenspace Study documents that the Council has agreed with Natural England the need for a wardening service at these two sites. This element of mitigation is not directly relevant to the HRA as the SSSIs in question are not part of European sites but demonstrates the potential role for measures other than SANG provision to mitigate recreation pressure.

5.103 The Accessible Natural Greenspace Study also notes that to avoid potential adverse

effects on populations of Breckland SPA designated species before they occur, monitoring of visitor levels and activities and of the effectiveness of mitigation measures such as Suitable Accessible Natural Greenspace (SANG) provision is likely to be required.

5.104 Drawing all of this information together, the Accessible Natural Greenspace Study proposes a recreation mitigation strategy, the key principles of which are set out in the Box 1. The document then further develops these via specific proposals for each settlement.

Box 1: FHDC Recreation Mitigation and Monitoring Strategy: Key Features

- 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 Maids Cross 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.

5.105 In commenting on a draft of the Accessible Natural Greenspace Study during Preferred Options consultation on the SIR and SALP, Natural England stated that the study “...has correctly identified the areas which are lacking natural greenspace” and accepted the need to “increase greenspace and green networks in a flexible way as suggested”, given the limited, undesignated space available at the District’s settlements. Where Natural England made suggestions to strengthen the mitigation offered by the study, such as inclusion of a large SANG area (at least 10 ha) and to focus on improvements to the wider green infrastructure network on development at settlement within 7.5 km distance of the heathland and forest areas of Breckland SPA, FHDC gave consideration to these and reflected them in latest (January 2017) version of the study.”

19. It follows from para. 5.104 and Box 1 that the mitigation strategy should include the provision of a SANG area of at least 10ha in an unspecified location with no indication of who will secure this, how it will be secured or within what timescale.
20. The HRA then turns to the SALP itself and the passages there confirm again that the SLAP is directing attention to future SANG provision not existing SANG provision:

“Policies within the Site Allocations Local Plan itself

5.106 In discussing the natural environment and biodiversity context, the SALP confirms that:

“the Council will continue to work with Natural England and developers to secure and implement mitigation measures to influence recreation in the region. These will be either onsite or offsite, proportionate to the type, scale, and location of development in the plan such that these measures contribute to the strategy set out in the natural greenspace study”.

5.107 Links are also provided in the SALP’s allocation policies to the general principles and various specific features of the mitigation and monitoring strategy set out in the Accessible Natural Greenspace Study. These are summarised in Table 5.6 for policies which allocate residential development to settlements falling within the 7.5 km and/or 1.5 km recreation pressure zones of influence for Breckland SPA.

5.108 There is also mitigation within the SALP to address site-specific pressure on farmland areas of Breckland SPA adjacent to the relevant allocated sites. This is also summarised in Table 5.6.”

21. Table 5.6 then sets out “Mitigation of recreation pressure by SALP policies allocating residential development within recreation pressure zones of influence of Breckland SPA”. The table then sets out the draft SALP policies including the FMods.
22. The final paragraphs of the assessment underline the lack of current provision and the lack of certainty clearly even though it is concluded that the proposals with the FMods are sufficient to conclude that there will be no adverse effect on integrity:

“5.110 Provision of Suitable Alternative Natural Greenspace (SANG) is widely accepted as an effective measure for diverting recreational visits away from European sites. The Council has also commissioned a study (results not available at the time of writing) to review evidence of the effectiveness of SANGS which will inform the detailed design, delivery and management of the SANGS and other access and recreation measures.

5.111 It is judged that the mitigation offered by policies to provide and enhance open space and rights of ways networks and the linkage of these to a coherent Recreation Mitigation and Monitoring Strategy set out in the Accessible Natural Greenspace study is sufficient to avoid adverse effects on integrity due to recreation pressure on any European site, including Breckland SPA.”

SIR HRA 2019

23. Whilst no further modifications are proposed for the SIR, there is a revised HRA for the SIR which notes its reliance on the SALP:

“5.6 As explained under each type of effect, the potential for some types of effect is most

appropriately assessed by reference to the total amount of housing development being proposed, as set out in the 'Provision' section of the SIR. Other types of effect are more appropriately assessed by reference to the amount of development proposed at broad locations (as set out in the 'Broad Distribution' section of the SIR) or by reference to the specific development sites being allocated (as set out in the HRA of the SALP document being prepared and consulted on in parallel with the SIR). In some cases, although the potential effect was most appropriately assessed at a detailed scale in the HRA of the SALP, it was necessary for the HRA of the SIR to rule out the possibility that adverse effects on integrity could not be avoided under any conceivable spatial distribution of the housing provision, leading to assessment of the effect at more than one scale."

24. Recreation pressure is dealt with in the SIR HRA at paras. 5.67 – 5.128. This section concludes:

"5.124 It was judged that the mitigation offered by adopted policies alone was insufficient to rule out adverse effects on integrity from the SIR, including in combination with the development provided for by the Forest Heath Core Strategy, in relation to recreation pressure on Breckland SPA. This was primarily because these policies do not implement the Recreation Mitigation and Monitoring Strategy set out in FHDC's Accessible Natural Greenspace Study.

5.125 However, it was noted that this strategy is in the process of being implemented via provisions in policies of the SALP being prepared in parallel with the SIR, for example requiring provision of alternative natural greenspace, dog-friendly access routes and connections to the wider green infrastructure network as well as also requiring applicants to submit detailed information in relation to the implementation of these measures. Consideration was therefore given to whether the policies set out in the emerging SALP, if adopted, could provide sufficient mitigation in this regard.

5.126 In relation to adverse effects on integrity from recreation pressure, the HRA of the SALP concluded as follows:

"It is judged that the mitigation offered by policies to provide and enhance open space and rights of ways networks and the linkage of these to a coherent Recreation Mitigation and Monitoring Strategy set out in the Accessible Natural Greenspace study is sufficient to avoid adverse effects on integrity due to recreation pressure on any European site, including Breckland SPA."

5.127 This conclusion demonstrates that it is feasible to implement the overall housing provision within the SIR without adverse effects on integrity in relation to recreation pressure either alone or in combination with the Core Strategy.

5.128 Adverse effects on integrity from the SIR in combination with other plans or projects can therefore be ruled out and reliance placed on assessment at a lower tier of plan making but carried out in parallel (HRA of the SALP) to ensure that site-specific allocations incorporate appropriate elements of FHDC's Recreation Mitigation and Monitoring Strategy to avoid adverse effects on integrity."

Conclusions from the FMods and the revised HRAs

25. It follows that it is clear from the terms of both the SALP FMods and HRA that there is at present no SANG available to offset recreation pressures but only a strategy to provide one. A further study has been commissioned *"to review evidence on the effectiveness of SANGS"* to inform future *"detailed design, delivery and management"*, it is not yet available. Although the FMods add the above provisions, the issue with the SANGS strategy, the fact that it is prospective only, that the SANGS are not yet in place, and that

no details or timescales for SANGS provision are provided, was already set out in the November Opinion at paras. 17-22, 56-59.

26. This approach, and the approach to the FMods therefore, has ignored or misunderstood the legal principles explained in the November Opinion at [43] to [60]. I note that no legal opinion or view has been produced by the Council to support the latest HRAs or FMods (or at least none has been disclosed) and the revised approach taken to mitigation.
27. It appears that the Council and or the authors of the HRA have approached the points made in the November Opinion as if they were directed only to mitigation being used to screen out AA. The requirements of certainty with regard to mitigation do not apply only at the screening stage but also to the AA and it is for that reason, that the SIR and SALP remain unsound on habitats grounds.
28. The FMods and both the SALP and SIR HRA do not therefore overcome the criticisms made of the legal approach and do not overcome their effect on the soundness of the plans.

Application of the authorities

29. As set out previously in November, and in many cases, including *Sweetman v An Bord Pleanála* [2014] P.T.S.R. 1092, *Orleans v Vlaams Gewest* [2017] Env. L.R. 12, *Commission v Poland (Białowieża Forest)* C-441/17, 17.4.18, *People Over Wind & Sweetman v Coillte Teoranta* [2018] PTSR 1668, *Grace & Sweetman* [2018] Env LR 37, *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, *Holohan v An Bord Pleanála* [2019] Env. L.R. 16, and *Canterbury CC and Crondall PC v Secretary of State* [2019] EWHC 1211 (Admin) at [65]-[71] and [76] 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”. It follows that the principle is not simply engaged at the screening stage but governs the approach to AA.
30. See e.g. *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 ...”

31. 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).

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, *Lesoochránárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 42).”

32. As Dove J recently pointed out in the **Canterbury** case at [70] –

“70 The need for a strict precautionary approach, and the high level of the threshold of establishing that there will not be significant effects on a European site, has been re-emphasised in subsequent CJEU cases. These cases have reiterated the need to establish that “no reasonable scientific doubt remains as to the absence of such effects”. In *Sweetman v An Bord Pleanála* (case C-258/11); [2014] PTSR 1092 Advocate General Sharpston explained that as a consequence of the very high threshold of establishing an absence of significant effects on European sites there was a correspondingly low threshold for triggering the need for an Appropriate Assessment...”

33. The same approach is required whether the relevant authority is approving a plan or project: see the reference to both in art. 6(3) of the Habitats Directive and regs. 61, 63 and 105 of the Habitats Regulations 2017. EU law makes no distinction between the requirements for AA applicable to plans and projects. In **Dutch Nitrogen** the CJEU noted at [87] that art. 6(3) -

“establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited).”

34. In **Holohan**, 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 contain complete, precise and definitive findings and conclusions capable of dispelling all

reasonable scientific doubt as to the effects 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.

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."

35. The issue of certainty is critical therefore to a lawful AA.
36. The CJEU has, however, formed a different approach to certainty to that of the UK Courts which was one of the reasons which led to the difference of approaches between **R (Hart DC) v SSCLG** [2008] 2 P. & C.R. 16 and **People Over Wind** (and other authorities). In **Hart DC** Sullivan J was prepared to hold that the use of mitigation was sufficiently certain to be taken into account at the HRA screening stage but this approach was not accepted by the CJEU. Whilst therefore, the CJEU approach to certainty and mitigation is not one which concerned the UK courts, nonetheless the significant difference requires that it be given proper consideration and effect at both screening and AA stages. I had thought this had been made clear in the November Opinion.
37. It would be a mistake to regard the issue of certainty and mitigation as relevant only to the screening stage. Uncertainty in mitigation measures is also fatal to meeting the requirements of AA stage, as we advised in November, and as is shown by a number of recent cases. In **Grace & Sweetman** the applicant proposed a 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.
38. One of the issues in the case was the extent to which mitigation measures could be taken into account at the AA stage.
39. The CJEU restated, in clear terms, the correct legal approach (noted also above) which it applied to the mitigation measures in the AA:

"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.”

40. Where such uncertainty was present, because the benefits arose from of the adoption of potential measures that had not been implemented at that time, 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) AA.

41. Here, as noted in the November Opinion, and as underlined forcefully by the SALP FMods and HRA, as explained above, the mitigation effects of SANGS are only potential since (as in *Grace & Sweetman*) “the measures have not yet been implemented”. Contrast the *Crandall* case where the proposal was to obtain access to an existing SANG.

42. In the *Dutch Nitrogen* cases, 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 must be certain:

“126 ... 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'...”

43. It is important to take full account of the Court’s conclusion on the issue at para. 130:

“The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the 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.”

44. However, in the case of the SALP the measures to identify and deliver the mitigation required in accordance with the HRA to overcome the impacts on the integrity of the EU sites “have not yet been carried out”. See further below. For this, if for no other reason, the HRA reaches conclusions that are wrong in law and therefore even with the FMods and the revised HRA the SALP must be unsound as a matter of law.

45. Moreover, as noted in the November Opinion, the use of the phrase “inter alia” makes it 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.

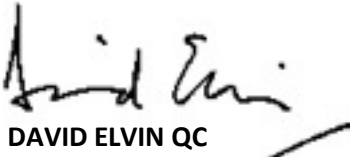
46. This is consistent with earlier authorities. In *Orleans* at §52 the CJEU held in similar terms:
- “52 Moreover, it must be noted that, as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type 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]).”
47. A similar passage appears at §52 of *Grace & Sweetman*.
48. The AA contained HRA, in support of the SIR and SALP, 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 as now proposed to be modified by the FMods.
49. 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 latest HRAs) is lawful if, and only if, the mitigatory measures guarantee beyond all reasonable doubt that no adverse effects will arise.
50. The adverse impact of introducing the policies for development and allocations is said to be mitigated by the operation of the FMODs to the SALP taken with the mitigating policies noted in the HRA⁴, although the SIR HRA now recognises that those policies are no longer sufficient. The policies as now proposed to be modified do not, however, have any direct impact on recreation pressure. Rather, the mitigatory effects arise by imposing constraints on the terms of any planning permissions granted for residential development pursuant to the SALP/SIR allocations – in particular the additions to the various allocations relating to SANGS.
51. 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 an allocation to generate the numbers required by the SIR will be subject to the measures that will be certain beyond reasonable scientific doubt.
52. No such certainty exists, any more than it did with regard to the criticisms made in November with respect to the AA Addendum. Indeed, it is clear that the provision of the SANG or SANGs required is wholly prospective and, further, is also dependent on a study that has not been completed or consulted upon.

⁴ Referred to in the November Opinion as “Mitigation Policies” – see paras. 13 and 14 above which refers to the passages in the SALP HRA 2019.

53. As noted above, in the case of the SALP the measures to identify and deliver the mitigation required in accordance with the HRA to overcome the impacts on the integrity of the EU sites “have not yet been carried out” (*Dutch Nitrogen* para. 130, above). The details of the measures and the timescales for their provision is not known or stated. For this, if for no other reason, the HRA reaches conclusions that are wrong in law and therefore even with the FMods and the revised HRA the SALP must be unsound as a matter of law. It is unfortunate that despite this issue being flagged up in detail in the November Opinion, it has not been addressed in the latest sequence of modifications and assessments.
54. The November Opinion also identified a separate basis for considering there to be uncertainty with respect to the development plan at paras. 48 to 58. The addition of the wording in the FMods to the allocation policies reduces that concern since development that does not comply with the additional text added to the various allocations will be less able to overcome the presumption in favour of the development plan. However, the concern remains given the ability to depart from the development plan, though in my view the main issue is the one identified above with regard to the wholly prospective nature of the mitigation proposed.

Overall conclusion

55. For the reasons set out above, the further AA carried out in the light of the FMods and the April 2019 HRAs for the SIR and SALP reaches a conclusion which is unlawful. If the Council adopts the plans as part of its development plan in reliance on the latest modifications and HRAs then in my view that adoption would itself be unlawful.
56. I have nothing more to add as presently instructed but would be pleased to advise further should it be necessary.



DAVID ELVIN QC

Landmark Chambers,
London EC4A 2HG
20 June 2019