

Guildford Borough Council

NOTE ON HABITATS REGULATION ASSESSMENT (JUNE 2018 UPDATE) AND IMPACT OF PEOPLE OVER WIND (CASE C-323/17) ON THE LOCAL PLAN.

1. This note, which should be read together with the Habitats Regulation Assessment Update (June 2018) ('HRA')¹, addresses the following matters:
 - I. A brief explanation of the Court of Justice of European Union's (CJEU) judgment in *People over Wind* and the Planning Inspectorate's guidance in relation to plan-making in light of the judgment;
 - II. The legal compliance of the HRA. In particular the note:
 - 1) explains that every iteration of the HRA has complied with the approach to 'screening' required by the Court of Justice of European Union (CJEU) in *People over Wind*;
 - 2) notes the updates to the text of the HRA made in the latest version and explains why these amendments are matters of form rather than substance;
 - 3) explains why the criticisms advanced by Wisley Action Group of the HRA's assessment of Air Quality is misguided.
 - III. The (limited) amendments that need to be made to the Local Plan in light of *People over Wind*.

I. People Over Wind and People over Wind (case C-323/17)/ PINS Guidance

2. In *People over Wind* the CJEU confirmed that, when assessing the effect a plan or project will have on the conservation objectives of a Special Area of Conservation (SAC) for the purposes of Article 6(3) of the Habitats Directive², "*it is not appropriate, at the screening stage [ie considering whether the plan or project is 'likely to have a significant effect' on the SAC] to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site*" (para 40). The CJEU clarified that "*a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site*

¹ Habitats Regulations Assessment for Guildford Borough Proposed Submission Local Plan: Strategy and Sites 2018 Update (June 2018). This supersedes GBC-LPSS-CD-007f: Guildford Local Plan HRA update (May 2018)

² Council Directive 92/43/EEC

must be carried out not at the screening stage, but specifically at the stage of appropriate assessment” (para 36).³

3. This is directly contrary to the previously settled position established in domestic case-law (*R (Hart DC) v SSCLG* [2008] EWHC 1204 and *Champion v North Norfolk DC* [2015] UKSC 52 (para 42)).
4. In light of *People over Wind* the Planning Inspectorate issued Note 05/2018 (9 May 2018) in which they advised as follows with regards to the Local Plan examinations:

“8. For local plan examinations which are ongoing or for which examining Inspectors have not yet issued their recommendations by 12 April 2018 (the date of the CJEU judgment), the HRA report for the plan should be reviewed:

- *If the HRA report identifies that the plan is likely to have significant effects on European site(s) and their designated features and an appropriate assessment of the plan has been carried out then **no further action is required.***
- *If the HRA report includes information that concludes that there are no pathways for the policies/allocations in the plan to cause significant effects on European site(s) and their designated features then **no further action is required.***
- *If the HRA report includes information that identifies likely significant effects on European site(s) and their designated features but concludes that they can be mitigated through avoidance or reduction measures (and does not go on to the AA stage) then examining Inspectors should:*
 - o *Ask the... LPA to confirm the extent to which they consider their HRA report is legally compliant in light of the judgment and ask them to re-visit the screening assessment in doing so.*
 - o *If the revised screening assessment concludes that an AA is required this should be carried out.*
 - o *Consider whether the AA necessitates any main modifications (MM) to the plan. The extent to which MM are likely will decrease where adequate avoidance and reduction measures were already identified and secured. If the avoidance and reduction measures are adequate to exclude adverse effects on European site(s) integrity, the approach required is primarily a procedural one ensuring that the AA has been undertaken where required. (emphasis added)*

II. Legal Compliance of the HRA

5. The HRA is, and has always been, compliant with the proper approach to the screening as clarified by the CJEU in *People over Wind*. Specifically, it has only ever taken into

³ Morag Ellis QC provides a fuller discussion of the judgment at paragraphs 2.1 to 2.10 of her submissions (REP-17467233-001a Guildford College Group Appendix 1). We respectfully endorse those paragraphs of her submissions, save to note that the Habitats Regulations referred to ought to be the Conservation of Habitats and Species Regulations 2017 (which consolidated amendments to the early regulations).

account mitigation measures at the appropriate assessment stage. As the updated HRA explains:

“The Guildford Local Plan HRA (November 2017) did split the analysis presented into separate ‘likely significant effect’ (Chapters 4 and 5) and ‘appropriate assessment’ (all subsequent chapters) stages. Mitigation (notably the Thames Basin Heaths Avoidance Strategy) was not taken into account in decision-making until the appropriate assessment stage.”⁴

6. And that, because of this, in the updated HRA:

“No changes to the technical analysis are required in response to the People over Wind judgment because the analysis already presented in the report supports a conclusion of no adverse effects on integrity.”⁵

7. Amendments have been made to the wording of the HRA, but this is in order to clarify the process which had already been undertaken, and to ensure accurate use of language in light of the distinction drawn by the CJEU as to when mitigation can be taken into account. No changes of substance have been made and no further technical analysis has been necessary.

8. The various criticisms raised by WAG⁶ and Guildford College⁷ of the HRA made on the basis of the *People over Wind* judgment are misguided for the following reasons:

1) **The HRA already includes an appropriate assessment** - Guildford College contend there is a *“lack of clarity at least in the HRA as to whether or not it is a screening document or an AA”⁸*. When the HRA is read as a whole there is no such lack of clarity. The HRA undertakes both a screening analysis of the likely significant effects of the plan on the SACs (chapters 4 and 5), before, where there are such effects, undertaking an appropriate assessment (chapters 7-10 & 12). It is acknowledged that some of the language originally used within the appropriate assessment chapters was suggestive of a screening exercise. This wording has been updated in the latest update to remove any doubt in this regard⁹.

⁴ HRA, para 1.14

⁵ *Ibid*, para 1.15

⁶ REP-17457825-002 Wisley Action Group - Guildford Local Plan HRA notes

⁷ REP-17467233-001a Guildford College Group Appendix 1, paras 3.1-4.2

⁸ *Ibid*, para 4.1

⁹ The updated HRA (June 2018) explains that *“the opportunity has been taken into account to adjust some of the wording used in the HRA, particularly replacing the phrase ‘screened out’ in the appropriate assessment*

2) **None of the site allocations were ‘screened out’ on the basis that proposed mitigation (particularly the provision of SANG) would mean there is no likely significant effects on the SAC** – both Guildford College¹⁰ and WAG¹¹ contend that the wording employed in Table 9 of the HRA in relation to assessment some of the site allocations – specifically A25, A26, A35, A38 and A46 – suggest that, contrary to *People over Wind*, site allocations had been ‘screened out’ taking account of mitigation proposed (particularly SANG). This is incorrect for the following reasons:

- i. None of the site allocations were ‘screened out’ on the basis that there would be no likely significant effects in light of mitigation proposed. Indeed, all of the residential site allocations – including all of the sites identified by Guildford College and WAG as being of concern – were ‘screened in’ and therefore all were subject to an appropriate assessment (See Table 9. Those allocations coloured in green were ‘screened out’; those in orange were ‘screened in’). The only site allocations that were screened out – A10, A21, A30 and A31 – were all non-residential allocations, each of which was screened out on the basis that there were no impact pathways present (i.e without considering mitigation);
- ii. The concerns raised in relation to A25, A26, A35, A38 and A46 – and specifically the concern that SANG provision had been taken into account at the screening stage - are misguided. Each of these site allocations were (and in all iterations of the HRA have been) subject to an appropriate assessment, specifically in relation to recreational pressures and the provision of SANG (See Chapters 8&9). It is acknowledged that some of the original wording in Table 9, if read in isolation and without regard to the later chapters, could be interpreted as though mitigation measures had been taken into account to ‘screen out’ sites from an appropriate assessment.¹²

chapters with a more precise reference to ‘no adverse effects on integrity’ as this is the wording used in the legislation regarding the outcome of appropriate assessment” (para 1.1.5)

¹⁰ Para 3.4

¹¹ Paras 2&3

¹² Specifically in relation to sites A25, A26, A35, A38 and A46

Therefore the opportunity has been taken in the latest draft of the HRA to clarify the wording.¹³

3) No reliance was placed on Policy P5 to ‘screen out’ the impact of other policies

– Guildford College raise the concern that Policy P5 – which provides protection in respect of the Thames Basin Heaths Special Protection Area - ‘may’ have been relied upon to ‘screen out’ other policies and/or site allocations from appropriate assessment.¹⁴ It has not. Table 7 of the HRA sets out the screening of the Local Plan’s policies for likely significant effects. None of the policies (nor any of the site allocations screened in Table 9) were screened out (ie coloured green) on the basis that development would have to be in compliance with Policy P5.¹⁵ Policy P5 itself was considered not to give rise to any likely significant effects, and therefore not subject to an appropriate assessment, because there were no impact pathways present.¹⁶ In the latest version of the HRA the wording in Table 7 which has given rise to confusion is deleted. Again this is not a change of substance.

9. The Air Quality chapter of the appropriate assessment within the HRA (Chapter 10) takes into account projected improvements in emissions and background air quality which has the effect of offsetting the (minimal) increases in emissions due to the Local Plan proposals. WAG¹⁷ contend that this is wrong in law for two reasons: i) they submit that, given mitigation measures as part of the same scheme cannot be taken into account at the screening stage (ie the ratio of *People over Wind*), nor should background improvements which are unrelated to the proposed plan; and ii) they also submit that CJEU case law has established that future improvements should not be taken into account at either the screening or appropriate assessment stages (*Orleans v Vlaams Gewest* (Case C-387/15) and *Briels v Minister van Infrastructuur en Milieu* (Case C-521/12)).

10. WAG’s contentions are misconceived for the following reasons:

¹³ In addition sites A25, A26, A35 and A46 have been added to the appropriate assessment chapter on recreational pressure (chapter 8). This in substance replicates the conclusions that were reached in respect of these sites in chapter 9 on the basis of SANG

¹⁴ REP-17467233-001a Guildford College Group Appendix 1, paras 3.1-3.3

¹⁵ Indeed the one example given by Guildford College, Policy S2 – the spatial strategy – was assessed as being likely to give rise to significant effects and therefore subject to an appropriate assessment.

¹⁶ See Table 7, Policy P5 (p24)

¹⁷ REP-17457825-002 Wisley Action Group - Guildford Local Plan HRA notes

- I. First, *People over Wind* said nothing about projected improvements in background conditions. In particular, it said nothing about their relevance of projected improvements in background conditions to either the screening stage (with which *People over Wind* was concerned) or the appropriate assessment (which it was not).
- II. Second, the HRA did not screen out impacts due to air quality. Instead issues of air quality were treated as a distinct pathway of impact and subject to a to a specific appropriate assessment (Chapter 10 of the HRA)
- III. Third, neither of the cases of *Orleans* nor *Briels* are of relevance. Contrary to WAG's statement these cases do not provide authority for the broad proposition that "*future improvements are not taken into account in either the likely significant effects [ie screening stage] or the no adverse effect on integrity tests [ie appropriate assessment]*"¹⁸. Instead both were cases in which new habitats were proposed as part of a plan/project. The CJEU held in both cases that the proposed new habitats were in truth compensatory, not conservation measures, and could not be taken into account as part of the appropriate assessment of the impact of the plan/project on the integrity of the existing SPA/SAC. These cases say nothing about whether the assessment of the effect of the plan/project on existing SPA/SACs (whether at the screening or appropriate assessment stage) can take into account projected improvements in background conditions.
- IV. Fourth, not to take into account projected improvements in air quality (so long as those projections are robust and reliable) would be to assess a counterfactual position.

11. In conclusion, the Council is satisfied that the HRA is, and has always been, legally compliant, including in relation to the judgement in *People over Wind*. The updated HRA merely removes any ambiguity which arises from the previous wording.

III. Amendments to the Local Plan in light of *People over Wind*

12. Neither the Guildford College nor WAG submissions suggest that any amendments are necessary to the text of the policies in the Local Plan. The only suggestion of inconsistency is by Guildford College in relation to the supporting text of Policy P5 at

¹⁸ *Ibid*, para 10

para 4.3.50c (their submission having noted that Policy P5 itself “*can be read as being consistent with People over Wind*”).

13. This was acknowledged by the Council in their letter of 30 May 2018¹⁹, where the following amendments were suggested:

Paragraph	Proposed draft modification
4.3.50c (supporting text)	4.3.50c 'Adverse effects on integrity' refers to the definition under the Habitats Regulations. In line with the Habitats Regulations, development proposals should be screened to establish whether they are likely to have significant effects on the SPA. All net new residential development up to five km from the SPA, and developments of over 50 net new residential units five to seven km from the SPA are considered likely to have a significant effect. Where significant effects are likely, proposals and must undergo Appropriate Assessment to identify measures that avoid, as a first step, and mitigate any adverse effects. However, if these residential developments provide or contribute to appropriate SANG and SAMP measures in accordance with the Thames Basin Heaths Special Protection Area Avoidance Strategy (the strategy), they will not be required to undergo Appropriate Assessment it is likely that it can be concluded that no adverse effects on the integrity of the SPA will occur as a result of increased recreational pressure
4.3.56 (supporting text)	Developments covered by prior approval and permitted development benefit from a blanket planning permission granted by central government and do not need to receive planning permission from the Local Planning Authority. These developments must be compliant with the Habitats Regulations as a matter of law and must adhere to the principles set out in policy P5. Where avoidance and/or mitigation measures are required, these should be provided in line with the approach set out in this policy and the Thames Basin Heaths Special Protection Area Avoidance Strategy (the strategy) . The Council will enter into an agreement with anyone undertaking such developments to provide avoidance and mitigation measures where appropriate.

2nd July 2018

¹⁹ GBC-LPSS-CD-007g