

GUILDFORD BOROUGH COUNCIL

NOTE IN RELATION TO HRA ADDENDUM (JANUARY 2019) AND RESPONSE TO REPRESENTATIONS OF OPC AND WAG

Introduction

1. AECOM, on behalf of the Council, have produced a Habitats Regulation Assessment Addendum (January 2019). The HRA Addendum (January 2019) addresses three specific issues:
 - 1) The reasonableness and legality of allowing for an improvement in background/baseline nitrogen deposition rates and NO_x concentrations in air quality modelling, in light of the CJEU ruling in *Coöperatie Mobilisation*¹, otherwise known as the ‘Dutch Nitrogen’ cases;
 - 2) The Implications of proposals to expand visitor numbers to RHS Wisley for roadside air quality on the A3 past Oakham and Wisley Commons; and,
 - 3) The implications of the CJEU ruling in *Holohan and Others v An Bord Pleanála*².
2. The HRA Addendum speaks for itself and need not be summarised.

Response to representations of Ockham Parish Council and Wisley Action Group

3. Following the close of the hearing sessions in June/July 2018, Ockham Parish Council and Wisley Action Group (OPC/WAG) have made a number of written representations in relation to the Council’s Habitat Regulation Assessments. These representations consist of an email dated 6 September 2018, an undated letter sent under cover of email 21 December 2018 and, following request for clarification from GBC, a letter dated 16 January 2019. The relevant correspondence is included at Appendix A.
4. GBC consider that it has addressed each of the matters raised by OPC/WAG in these representations (as far as it understands the points raised). In particular:

¹ *Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg and Others* (C-293/17 & C-294/17)

² *Holohan and Others v An Bord Pleanála* (C-461/17)

- 1) The legal compliance of the HRA with the Habitats Directive and Regulations in light of the CJEU judgment in *People over Wind* has already been explained by GBC in its 'Note on Habitats Regulation Assessment (June 2018 Update) and impact of *People over Wind* (Case C-323/17) on the Local Plan'.³ That note addresses a number of the concerns raised by OPC/WAG in its latest representations;
- 2) As is explained in the HRA Addendum (January 2019), the appropriate assessment of the Local Plan has lawfully taken into account projected improvements in background air quality. OPC/WAG's apparent position that such projections could not be taken into account, as set out in their September email, was based on a misinterpretation of Advocate-General's Opinion⁴ in the *Coöperatie Mobilisation* case. In any event, the subsequent judgment of CJEU in that case has confirmed that such 'autonomous measures' can be taken into account so long as their benefits are not uncertain. It is noticeable that, whilst OPC/WAG's December letter mentions *Coöperatie Mobilisation*, it is no longer suggested that the appropriate assessment was wrong to take account of projected improvements in background air quality;
- 3) The effect of the anticipated growth in visitor traffic to RHS Wisley has been addressed in the HRA Addendum (January 2019)
- 4) As far as the Council is aware, the contention that Natural England *objected* to the RIS Junction 10 scheme "due to damage to the SPA" is inaccurate. The RIS junction 10 scheme will be subject to the Development Consent Order (DCO) process, with the application likely to be in Spring 2019. Highways England have undertaken pre-application statutory consultation. We have been informed by Natural England that they were consulted by Highways England in March 2018 and did not raise any objection to the proposed scheme. Natural England have also approved a HRA Screening Report in respect of the scheme. The implications of the RIS junction 10 scheme on the Thames Basin Heath SPA will be assessed as part of the DCO process. Consent could only be granted under that process if it were concluded that there would not be any adverse impacts on the integrity of the SPA or,

³ GBC-LPSS-21b

⁴ An Advocate-General's Opinion is exactly that: an opinion, and not a judgment of the Court of Justice of the European Union (CJEU). The AG's Opinion does not constitute case-law, let alone binding authority which domestic courts, or the examining Inspector, is required to apply.

alternatively, if it were concluded that there were imperative reasons of overriding public interest.

- 5) As explained in the HRA Addendum (January 2019), the appropriate assessment of the Local Plan has been lawfully undertaken having regard to the CJEU judgment in *Holohan*.

Conclusion

5. The Council is satisfied that the Habitats Regulation Assessments – being the Habitats Regulation Assessment (June 2018), the HRA Addendum (September 2019)⁵ and HRA Addendum (January 2019) - ensure that the legal obligations imposed by Habitats Directive⁶, and Habitats Regulations⁷ are satisfied. In particular, an appropriate assessment of the implications of the Local Plan on protected sites as is required by Article 6(3) and Regulation 63, has been lawfully undertaken.

Guildford Borough Council

6 February 2019

⁵ This Addendum address the impacts of the proposed main modifications

⁶ Council Directive 92/43/EEC

⁷ The Conservation of Habitats and Species Regulations 2017

Appendix A

Email dated 06th September 2018 and Attachments

From: Wisley Action Group [REDACTED]
Subject: recent Kolkott decision :Advocate General Kolkott July 25 2018 Joined cases-293/17 and C-294/17
Date: 6 September 2018 at 16:42:36 BST
To: Chris Banks [REDACTED]
Cc: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Dear Chris,
Please pass this on to the examiner Mr Bore.

A further recent European Court case has confirmed and refined the requirement for a detailed Appropriate Assessment and HRA for site A35 which has not been carried out by GBC. We suggest the examiner make contact with Natural England with whom we have recently met and confirmed the view about 'future mitigations' used by GBC which are no longer relevant. The Kolkott conclusion summary:

1. Latest Decision by Advocate General Kolkott July 25 2018 Joined cases-293/17 and C-294/17

V. Conclusion

169. I therefore propose that Court should rule as follows:

(1) The answer to Question 1 in Case C-294/17 is that legislation which exempts from the permit requirement projects and other operations causing nitrogen deposition which do not exceed a threshold value or a limit value, and are therefore permitted without individual approval, is compatible with Article 6(2) and (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora if, on the basis of objective information, there is no reasonable scientific doubt that there will be no significant effects in the protected site concerned as a result of that nitrogen deposition.

(2) The answer to Question 2 in Case C-294/17 is that Article 6(2) and (3) of Directive 92/43 permits an appropriate assessment for a programme in which a certain total amount of nitrogen deposition is assessed to be used as the basis for granting an individual authorisation for a project or other operation which causes nitrogen deposition in protected sites which fits within the room for deposition assessed in the context of the programme. However, that assessment must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the deposition. This requires that it is ensured, for each individual project and any land within protected sites on which protected habitats are located, that the total authorised nitrogen deposition does not, in the long term, jeopardise the conservation of the habitat types and species protected in the site or the potential to establish a good conservation status.

(3) The answer to Questions 5 to 7a in Case C-293/17 and Questions 3 to 5a in Case C-294/17 is that

- measures to reduce nitrogen deposition from other sources,
- restoration measures to improve nitrogen

sensitive

habitat types in the sites concerned, and

- the autonomous decrease in nitrogen emissions

can establish the compatibility of additional nitrogen deposition in protected sites with Article 6(3) of Directive 92/43 only if it is already definitively established at the date of the authorisation that the total load on the site from nitrogen deposition falls below the threshold for the integrity of the site being adversely affected. On the other hand, it is not sufficient, for the purposes of approval of additional nitrogen deposition, if deposition declines overall, but the land in question is still overloaded with nitrogen. Mere forecasts regarding the future effects of those measures and the expected decrease in nitrogen emissions may not be taken into account in the decision on the approval of additional nitrogen deposition.

Also the Examiner may recall the critical point raised in the hearing as follows:
GBC did not complete a detailed
Appropriate Assessment and HRA for site A35 and any assessment
was

based on outdated information

a. Did not address significant anticipated visitor traffic
growth to RHS
(50% over 5 years)

b.

Natural England Objected to the RIS J10 screen due to damage to the SPA. This is fundamental to the draft LP and the A35 site itself. This alone should have required an AA and HRA in the context of "People over Wind" case.

Document attached.

c. Effect of 'People over Wind' whereby future mitigations were used to assume no significant future impact on SPA and so no detailed AA and HRA required for the site A35 "the court said: "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" - see also barrister's note attached. People over Wind means that if mitigation is being relied upon the project (or plan) MUST be subject to an AA i.e. the plan or project automatically fails the test of no Likely Significant Effects (screening test) if mitigation is involved. Our understanding is that GBC has not done this.

d. The assertion that avoidance and mitigation measures were not used to screen out impacts by concluding that there were no likely significant effect is incorrect. For example, the 2017 and 2018 HRAs both say in respect of A35 (former Wisley Airfield) (page 39): "This policy provides for bespoke SANG, thus if provided to an appropriate standard and in a timely manner will provide a suitable avoidance measure ensure this impact pathway does not result in likely significant effects upon the Thames Basin Heaths SPA, enabling this impact pathway to be screened out. ...

e. GBC Chapter 12 quote: "Examination of the air quality modelling in Appendix D shows that NOx concentrations and nitrogen deposition rates within 200m of the Thames Basin Heaths SPA are expected to be better at the end of the plan period than they are at the moment, due to expected improvements in vehicle emissions from the introduction on Euro6 standard vehicles and Government initiatives to improve background air quality."

Barristers opinion:

"The HRA therefore relies on improvements which are unrelated to the developments proposed to offset adverse impacts from those schemes. It does that to assert that there are no likely significant effects. *People Over Wind*

confirms that it is an incorrect approach even to mitigation measures on the same scheme.” In any event there are two fundamental problems with this approach 1. There will be a gap between the project being implemented and the less polluting vehicles coming into effect. Therefore effects will be manifest upon the site. 2. There is no certainty that these less polluting vehicles will replace the current vehicles and the HRA requires a high level of certainty.

So in the further light of Kolkott these matters cannot be ignored and as the AA and HRA have not been properly completed the site A35 remains unsustainable and should be withdrawn from the GBC draft Local Plan.

[REDACTED]

on behalf of Wisley Action Group

web [REDACTED]

facebook [REDACTED].

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Date: 02 March 2017
Our ref: -
Your ref: Option 9 and Option 14 Consultation



BY EMAIL ONLY

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Dear Sir/ Madam

M25 Junction 10/ A3 Wisely interchange Improvement Scheme

Thank you for meeting with us at our offices on 28th February 2017 to discuss the design options for the above road improvement scheme. We welcome the early opportunity to provide advice and we would encourage further dialogue as the scheme progresses. This is Natural England's formal response to the initial consultation stage of the project.

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

Natural England understands the need for improvement at Junction 10, based upon the large number of incidents, the high level of traffic congestion and predicted traffic flows. We are also aware of the issue of exceedance of air quality standards in the area and how this scheme may contribute towards meeting targets.

We are keen to work with Highways England to seek design and construction solutions which deliver scheme objectives whilst avoiding or minimising adverse impacts on biodiversity. In considering a preferred option we would encourage the selection of an option which not only seeks to avoid adverse impacts on biodiversity, but also one which has longest predicted 'life-span' to avoid the need for further modification.

Thames Basin Heaths Special Protection Area Ockham and Wisley Commons Site of Special Scientific Interest

Ockham and Wisley Commons was originally designated as a Site of Special Scientific Interest under the provisions of the National Parks and Access to the Countryside Act 1949 in 1975 and subsequently designated, with boundary amendments, under the provisions of the Wildlife and Countryside Act 1981 in 1986.

The SSSI has the following features of special scientific interest:

- Lowland heath;
- Lowland mire;
- Outstanding assemblages of invertebrates, associated with wetlands and heathland.

Natural England has assessed significant parts of the SSSI as being in a 'favourable condition', meaning that nature conservation objectives are being achieved. Other parts of the SSSI are in the process of habitat restoration and are close to meeting these objectives.

Ockham and Wisley Commons SSSI is a component part of the Thames Basin Heaths Special Protection Area (SPA). The site is included in the SPA because it provides supporting habitat for the Annex 1 bird species nightjar, Dartford warbler and woodlark. The site is also reported to support regular nesting hobby, which is also listed in Annex 1 of the EC Birds Directive. The boundary of the SPA differs from the boundary of the SSSI in that the SPA does not include those parts of the SSSI north of the M25.

From the information provided Natural England has concluded that all of the scheme design options proposed at this stage would:

- have an adverse effect on the integrity of the Thames Basin Heaths SPA;
- may damage or destroy the interest features for which Ockham and Wisley Commons Site of Special Scientific Interest has been notified;
- would result in direct loss of registered common land.

In considering potential impacts arising from the scheme Natural England has taken the following aspects into account:

Direct Habitat Loss

Any direct loss of habitat which either constitutes one of the special interest features or has the potential for restoration to one of those habitats, or which provides a functional role in maintaining the populations of species or assemblages of species of special interest should be avoided. Where direct loss is unavoidable, either temporary or permanent, there will be a requirement to provide compensatory or mitigation measures.

Where compensatory measures are required in the event that the scheme will result in loss of integrity of the SPA, any proposed measures must be above and beyond existing habitat restoration and maintenance requirements. To have greatest potential benefit compensatory measures in the form of habitat creation should be of sufficient scale to have the potential for utilisation by ground-nesting birds. Where habitat creation is required in order to compensate for loss of integrity of an SPA case law requires that this is in place prior to completion of the project. In such cases where direct loss of habitat is deemed unavoidable Natural England normally require that an agreed, detailed Site Mitigation Plan is drawn up at an early stage of project development. This would help to inform important matters such as the appropriate scale of compensatory habitat provision. We would encourage detailed discussion with us on the appropriate scale of habitat provision as larger areas of compensation may be required if this is likely to be of lower quality than that being lost. In considering the provision of compensatory habitat in relation to loss of integrity of the SPA this can be located on or adjacent to any component part of the wider SPA, but greatest benefit for local bird populations is likely to be achieved by delivery of compensatory land close to the area being lost.

It should also be noted that any land put forward to provide compensatory habitat for loss of the SPA would then become part of the SPA and would therefore be designated as such under the Conservation of Habitats and Species Regulations 2010. This will have significant wider implications, including a requirement to inform the European Commission. It is important that Natural England is kept fully informed during the consideration of compensatory habitat provision and that we are able to provide input to the decision process.

Not all of the land within the SSSI (and SPA) boundary supports habitats and species of special nature conservation interest. There may be some scope, albeit very limited, to seek to avoid or reduce potential impacts by designing the scheme so as to affect areas of 'site fabric' rather than features of higher nature conservation interest. Natural England can provide further detail on this aspect if required. In relation to the SSSI, Natural England can provide advice on options for on-site mitigation which may be appropriate once details of the preferred scheme are firmed up.

Indirect Impacts

In addition to direct habitat loss an important consideration is the potential adverse effects of moving roads closer to areas of open heathland utilised by ground-nesting birds, and the effects of habitat fragmentation. There is evidence that nightjar in particular may be displaced by intrusive noise.

Parts of the site provide valuable functions for the maintenance of the features of special conservation interest. These include dense, screening blocks of mature trees which may reduce levels of disturbance on ground-nesting birds on areas of adjacent heathland. Where present along the sides of the A3, blocks of mature trees may also provide the important function of reducing pollution levels. Aerial pollution, particularly raised nutrient deposition, is of concern at this site because of its potential to render habitat conditions unsuitable for ground-nesting birds. Any loss or reduction of these important functions should be taken into consideration. Where significant loss of existing screening trees is unavoidable consideration should be given to replacement planting, but not where this may result in the loss of extent of existing open heathland. There may be opportunities through the design of the scheme to provide 'new' good quality habitat for heathland birds, such as by planting dense blocks of gorse potentially suitable for Dartford warbler, linnet, whitethroat and stonechat.

Water Quality and Water Supply

A significant part of the special nature conservation interest of Ockham and Wisley Commons SSSI is critically dependent upon high quality groundwater and surface water supply. Water flowing from Boldermere under the A3 feeds a mire system and open water features on Wisley Common. These support rare species including the Nationally Scarce plant bog hair-grass *Deschampsia setacea* at its only known location in Surrey. Protection of water quality and supply is also important for the maintenance of suitable habitat conditions for specialised dragonflies and damselflies.

Recreational Disturbance

One of the most significant factors determining the suitability of the site for ground-nesting birds, other than habitat management, is disturbance levels from people and dogs. Patterns of behaviour may be expected to change depending on the proximity of busy roads. The risk of displacing people into areas currently utilised by ground-nesting birds should be considered when scoping and designing the scheme.

Common Land

All options under consideration will involve loss of common land which is accessible to the public on foot and on horseback. This will require the provision of an equivalent area of accessible land which is likely to be of benefit to users of the common. This replacement land should be suitable for registration as common land to be available in perpetuity to the public. We suggest contacting our internal commons specialist [REDACTED] who will be able to provide further advice on compensation.

Ancient Woodland

Natural England advises that the proposals as presented have the potential to adversely affect woodland classified on the ancient Woodland Inventory. Natural England refers you to our Standing Advice on ancient woodland <https://www.gov.uk/ancient-woodland-and-veteran-trees-protection-surveys-licences>.

Natural England is keen to engage proactively with Highways England to seek the best outcomes for the environment. Should Highways England wish to discuss the detail of measures to mitigate the effects described above with Natural England, we recommend that they seek advice through our [Discretionary Advice Service](#). This service can also be used to provide advice on licensing issues or to review and advise on survey or scoping reports.

For clarification of any points in this letter, please contact [REDACTED]

Alternatively you can contact [REDACTED]

Yours sincerely

[REDACTED]

[REDACTED]



Guildford Local Plan (Barristers Note)

Wisley Action Group note on the May 2018 Habitats Regulations Assessment

1. A new *Habitats Regulations Assessment for Guildford Borough Proposed Submission Local Plan: Strategy and Sites 2018 Update* was published on 30 May. The 'Explanation of changes' note produced with it says:

"The submitted HRA was compliant with the approach as now clarified because avoidance and mitigation measures have been taken into account in the appropriate assessment stage and not used to "screen out" impacts. However, an opportunity was taken to tighten up the wording in the document to make sure this is absolutely clear and to make other minor updates to the wording, resulting in the HRA May 2018."

2. The assertion that avoidance and mitigation measures were not used to screen out impacts by concluding that there were no likely significant effect is incorrect. For example, the 2017 and 2018 HRAs both say in respect of A35 (former Wisley Airfield) (page 39):

"This policy provides for bespoke SANG, thus if provided to an appropriate standard and in a timely manner will provide a suitable avoidance measure ensure this impact pathway does not result in likely significant effects upon the Thames Basin Heaths SPA, enabling this impact pathway to be screened out. ...

Provided Natural England and Guildford Council are content with the SANG provided and that the SANG and management of the SANG can be secured in perpetuity, there is no reason to conclude that suitable avoidance cannot be provided to ensure that no likely significant effects arise as a result of increased recreational pressure."

3. Similar conclusions are expressed for A38, A46.
4. The Air Quality part of the assessment relies on improvements in emissions factors and background air quality to offset (and indeed reverse) increases in emissions due to the Local Plan proposals (para 10.4.3 to 10.4.6). Chapter 12 repeats this approach:

"12.4.2 Moreover, the conclusion no likely significant effects was based primarily on the following factors:

- The fact that, even allowing for growth 'in combination' in surrounding authorities and Guildford over the plan period, there is forecast to be a net improvement in NO_x concentrations and nitrogen deposition rates along all modelling links. Even at the most affected location this improvement is forecast to be retarded to only a small extent by the Guildford Local Plan and is considerably outweighed by the net improvement expected; and
- The fact that total 'in combination' NO_x concentrations by 2033, while in some cases still in excess of the Critical Level, are predicted to be well below the level at which effects on vascular plants (other than growth stimulation due to nitrogen deposition) are likely to arise."

5. Para 12.4.3 continues:

“Examination of the air quality modelling in Appendix D shows that NOx concentrations and nitrogen deposition rates within 200m of the Thames Basin Heaths SPA are expected to be better at the end of the plan period than they are at the moment, due to expected improvements in vehicle emissions from the introduction on Euro6 standard vehicles and Government initiatives to improve background air quality.”

6. The HRA therefore relies on improvements which are unrelated to the developments proposed to offset adverse impacts from those schemes. It does that to assert that there are no likely significant effects. *People Over Wind* confirms that it is an incorrect approach even to mitigation measures on the same scheme.
7. Other future improvements are not taken into account in either the likely significant effects or the no adverse effect on integrity tests: *Orleans v Vlaams Gewest* (Case C-387/15) [2017] Env. L.R. 12 at para 56, 58; *Briels v Minister van Infrastructuur en Milieu* (C-521/12) [2014] P.T.S.R. 1120. In some circumstances they may be compensatory measures which are required if a plan or project is allowed to proceed notwithstanding a potential adverse effect on integrity. However background improvements which are expected to arise in any event will not be compensation or mitigation because their occurrence is unrelated to the plan or project.
8. The explanation given as to why air quality does not give rise to likely significant effects is therefore erroneous in law both in that screening test and in the appropriate assessment test of ‘no adverse effect on integrity’. The new HRA is therefore legally flawed for this further reason.

31st May 2018

Undated letter sent under cover of email 21 December 2018

The Programme Officer,
Guildford Local Plan

██
Mr. Chris Banks
c/o Banks Solutions
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Dear Mr Banks

It is appreciated that the Inspector, Mr Jonathan Bore BA MRTPI Dip UD found the Guildford Local Plan to be broadly sound, subject to modifications as yet unresolved, following the public hearings which took place between 5th June and 5th July 2018. A six week public consultation exercise into the Proposed Main Modifications ensued, extending from 11th September to 23rd October 2018. A further public hearing is planned for February 2019 regarding the ONS figures and another consultation is proposed after that.

It is a fact that this year has seen four significant judgments delivered by the Court of Justice of the European Union (CJEU), two of which have occurred following the close of the hearing sessions on 5th July 2018, and the culmination of the six week consultation period into the Proposed Main Modifications.

These two judgments from the CJEU both concern the Habitats Directive, namely *Holohan v An Bord Pleanala C-461/17* delivered on 7th November 2018 which extends further than earlier CJEU discussions relating to appropriate assessment, with what is known as the Dutch nitrogen case also delivered on the same day *Cooperatie Mobilisatie for the Environment and Vereniging Leefmilieu case C-293/17, C-294/17*.

It is the first case which is the most relevant when considering housing allocations in the Guildford Local Plan, although it is noted that neither of these two recent CJEU judgments have been examined in the context of the PINS Note 05/2018 issued on 9th May this year entitled “*Consideration of Avoidance and Reduction Measures in Habitats Regulations Assessment: People Over Wind. Peter Sweetman v Coillte Teoranta*”. PINS Note 05/18 also refers to a review date of 9th November 2018, but to my knowledge there have been no updated versions of the same Inspectors’ Guidance Note.

It is therefore not surprising that earlier representations made on behalf of the Wisley Action Group (WAG), OPC et al., along with the response from Guildford Borough Council in their paper entitled “*Note on Habitats Regulations Assessment (June 2018 Update) and Impact of People Over Wind (Case C-323/17) on the Local Plan*” have not taken into account these two latest judgments delivered by the CJEU, when considering legal compliance with the Habitats Regulations Assessment and issues of Appropriate Assessment.

The “*Holohan*” case is particularly relevant and in OPC/WAG’s view casts doubts over whether the Council through its latest Habitats Regulations Assessment Update (June 2018) is legally compliant with current CJEU case law, particularly in respect of Article 6(3) of the Habitats Directive. The “*Holohan*” case is significant in that the CJEU held:

1. *Article 6(3) of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora 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.*
2. *Article 6(3) of Directive 92/43 must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.*
3. *Article 6(3) of Directive 92/43 must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the “appropriate assessment” must include an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned.*
4. *Article 5(1) and (3) of, and Annex IV to, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, must be interpreted as meaning that the developer is obliged to supply information that expressly addresses the significant effects of its project on all species identified in the statement that is supplied pursuant to those provisions.*
5. *Article 5(3)(d) of Directive 2011/92 must be interpreted as meaning that the developer must supply information in relation to the environmental impact of both the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, taking into account at least the environmental effects, even if such an alternative was rejected at an early stage.*

The fifth finding of the CJEU, when considered in the context of the new wording introduced by the 2014 EIA Directive relating to alternatives, now requires developers to include “a description of the reasonable alternatives studied by the developer”.

It follows from the findings of the CJEU in the “*Holohan*” case that an HRA Report requires a plan to consider more than those significant effects on the European site and their designated features, which to date has been the basis of those Habitats Regulations Assessments carried out by the competent authority, Guildford Borough Council, and on which the various housing allocations in the emerging Guildford Local Plan have been assessed.

The “*Holohan*” case goes much further than what has hitherto been accepted in considering appropriate assessment in the light of Article 6(3) of the Habitats Directive, a matter evident from the contents of paragraphs 37 and 40 of the CJEU judgment:

*“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 above mentioned 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, that that effect, judgment of 26 April 2017, Commission v Germany, D-142/16, EU:C2017:301, paragraph 33).”*

*“40. In the light of the foregoing, the answer to the first three questions is that 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.”*

We should therefore be obliged if you could place this letter before the Inspector, requesting him to consider whether the latest iteration of the Habitats Regulations Assessment (June 2018) carried out by Guildford Borough Council is in compliance with the latest judgment of the CJEU, particularly the need to accord with the provisions of Article 6(3) of the Habitats Directive, and what reliance can now be placed on PINS Note 05/2018 and the advice contained therein with respect of Local Plan Examinations.

Yours sincerely,

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On behalf of OPC and WAG

Letter dated 16 January 2019

Ockham Parish Council
Wisley Action Group
Ockham Parish Rooms
Ockham Lane
Ockham GU23

16 January 2019

██████████
Senior Planning Policy Officer
Planning Services
Tel: 01483 44██████████
www.guildford.gov.uk
Guildford Borough Council
Millmead House
Guildford
GU2 4BB

Dear ██████████

Further to your email dated 11 January 2019 in which GBC requested further information relating to two matters: RHS visitor numbers and the issue of the HRA's non-compliance with the CJEU judgements. Please see our response below.

Recent European Court of Justice Rulings

We would have thought that OPC/WAG's original letter set out the reasons why the HRA carried out by the LPA, which pre-dates the four significant judgments delivered by the CJEU, was no longer considered sufficient, given that what is now required is a consideration of more than those significant effects on the European site and their designated features. A more thorough assessment is now required, as a reading of the five findings of the CJEU in the Holohan case reveals, all of which were set out in my earlier correspondence. May I respectfully suggest that the Officer concerned considers paragraphs 32 to 40 of the Holohan case, and in particular paragraph 37 and 40 thereof, in that the latest HRA would not have taken into account the significance of these four CJEU judgments which would not have been undertaken at the time of publication of the latest HRA was undertaken.

Paragraph 37 repeats in more detail the need for a thorough assessment and a certain conclusion:

"37. ... 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.”

The extent of the rigorous assessment required and the scope for the AA goes beyond designated habitats and the species for which the habitat has been listed:

*“40. ... 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.”*

Increase in growth of visitor number at RHS.

OPC/WAG’s reasons for saying that visitor numbers were set to rise substantially is based on the following information. We also attach the Transport Assessment prepared for RHS by Motion. We have highlighted in yellow references to the increase in vehicle numbers.

16/P/01080 – validated 25/05/2016 approved 30/09/2016 The transport assessment dated May 2016 under para 5.4 states that the 2014 visitor numbers were 1,028,655 and that the plan envisage an additional 400,000 visitors over the 10-year period.

We have also looked up the following websites:

Association of Large Visitor Attractions:

www.alva.org.uk and www.visitbritain.org have almost identical numbers for RHS

2014	1,023,715
2015	1,087,927
2016	1,110,050 (Visit Britain has 1,135,976)
2017	1,143,175

So we’re already have a 114,000 increase in visitors at end 2017 and the building has yet to be opened.

I trust that this further elucidation clarifies matters for GBC.

Yours Sincerely,

[REDACTED]

[REDACTED]

On behalf of
OPC and WAG