

WAVERLEY BOROUGH COUNCIL

EXECUTIVE

8 OCTOBER 2019

Agenda Item 5. Questions from Members

The following question has been received from Cllr Jerry Hyman:

“Does the Executive accept that the clarification of the April 2018 'POW' and 'Germany' Rulings of the ECJ provided within the 22nd July 2019 'National Planning Practice Guidance on Appropriate Assessment', in respect of the requirement that Authorities "must now assess the robustness of mitigation measures", confirms beyond equivocation that the use of Natural England's strategy of evading detailed assessment of SANG and SAMM measures through the TBHSPA JSPB Delivery Framework and WBC Avoidance Strategies is and always has been an unlawful strategy, such that the moratorium on granting consents to new housing within the visitor catchment zones of the Thames Basin and Wealden Heath SPAs (which was implemented temporarily from May last year) must now be reinstated with immediate effect, until such time as the requisite evidence and appropriate assessments can be produced? And if not, please state the justification in full.

Response by the Leader to Cllr Hyman:

The Habitat Regulations (Reg. 63) require that a local planning authority may not grant permission for “any plan or project which is likely to have a significant effect on any designated European Site (SPA) without first carrying out an “Appropriate Assessment” of the implications of that plan or project for the site in question to the extent that it is first satisfied to a standard of beyond reasonable scientific doubt, that the plan or project carried no adverse effect for that site.

It was the practice, at application stage, to consider whether proposed mitigation e.g. the securing of Suitable Alternative Natural Greenspace (SANG) by a s106 agreement, would avoid such adverse effect, to enable to “screen out” certain planning applications so that they need not be subject to full Appropriate Assessment, regarding any possible adverse effect and which would be referred to in the Report before Committee, at the stage of consideration of the planning application.

The existing Guidance has now been amended in July to clarify that the People over Wind / Sweetman (“POW”) judgement in April 2018 (European Court of Justice (ECJ)) meant that a planning authority cannot take into account any mitigation measures such as proposed SANG, when initially considering a planning application, in order to “screen it “out of the need for a full Appropriate Assessment . The POW judgement drew on existing rulings such as the Germany case, which has been referred to.

Thus as a result, mitigation measures intended to avoid any adverse effect of any “plan or project” can now only be considered as part of a full, end stage “Appropriate Assessment”. The amended Guidance in fact indicates, in terms, (para 006) that off-site SANGS (and by extension related Site Access Management and Monitoring (SAMM)) can be acceptable mitigation following the POW case, subject to an Appropriate Assessment of the plan or project in question, together with any such proposed mitigation.

When this Authority carries out any such Appropriate Assessment, consultation on any proposed plan or project’s likely effects, adverse or otherwise, will be undertaken with Natural England (the statutory “appropriate nature conservation body”) and other consultees considered appropriate, e.g. Surrey Wildlife, as part of that full Appropriate Assessment process, to ensure full legal compliance with the Regulations. Natural England has access to relevant ecological databases, with the assistance of the statutory adviser to it, the Joint Nature Conservation Committee.

The moratorium which has been referred to in the Question under reply was lifted, when this Council agreed a process for undertaking Appropriate Assessments with Natural England last year and in view of the position set out above the Executive confirms that the Council’s current practice accords with the amended Guidance and does not accept that the moratorium be re-imposed .

Please note that a Briefing on the updated Habitat Regulation process will shortly be given (on a date to be notified) to all Elected Members by external legal Counsel.