SPEAKING NOTE

1. Introduction – I am Gregory Jones QC instructed by Farrer & Co on behalf of Mark and Rosemary Yallop and Andrew and Christina Brownsword who own homes in the vicinity which will be affected by the proposals.

2. As you know along with many local residents they are very concerned about this proposed development. They have engaged fully in this process and have instructed not only specialist lawyers in this field but also expert ecologists. We fully support the responses for refusal which have been set out in the officers report to committee and I do not intended to take up committee's valuable time on those points although happy to answer any question on those points and assist members if I can.

3. I wish to address the members on the ecology issues – this has been a subject of great concern to resident but also to the Council – our clients through their lawyers and ecologists have set out in their letters of April and November 2018, January 2020 and most recently 7 February 2020 why the applicants/appellants have failed to demonstrates that this development will not adversely affect the integrity of the SAC. All the cases I refer to this evening have been referenced in those written representations-there are no surprises!

4. Yet as matters stand, it is not a proposed reason for refusal – it involves a legal issue- and that is why I am addressing you this evening. Namely: is there sufficient evidence before the committee to demonstrated beyond all reasonable scientific doubt that this development will not adversely affect the integrity of an EU protected SAC site – the South Hams SAC

5. Why is this different? Why is it special? In respect of all the other planning matters you have ultimately it is a question of judgment and balance – furthermore members are entitled to accept things on the balance of probabilities, that means you could rely on evidence even if you're not sure it's actually correct.

6. That is **not** the case here when we deal with EU protected habitats – if the evidence does not meet the extremely high threshold then as a matter of law the Council must as a matter of law refuse planning permission – translated into the present circumstances this must be one of your reasons for refusal.

7. What that means is unlike the other reason for refusal which relate quite properly to matters of planning policy and judgment compliance with the requirement of the Habitats Directive as incorporated into English law by the Conservation of Habitats and Species Regulations 2017 set out legal requirements prohibiting the grant of development consent unless certain thresholds are met. Compliance must be demonstrated to a very high standard.

8. Why is this? It's because these sites are so very important. The Habitats Directive and regulations are recognized as one of the "main vehicles through which the [EU was] endeavouring to safeguard its principles of natural heritage"[1] Natura 2000[2] is a network of protected areas covering Europe's "most valuable and threatened species and habitats."[3] The Habitats Directive (HD) provides the essential legal matrix protecting Natura 2000 sites.

9. Article 6(3) HD provides that consent cannot be given where there is likely to be harm to the integrity of the SAC – what does that mean? It means beyond all reasonable scientific doubt – even 90% sure is not good enough! – it has to be higher. If that threshold is not reached you cannot by law grant consent.

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[1] Jonathan Faulks 'The EU Habitats Directive' *European Environment,* Spring 1994, 12-26.

[2] The sites in the Natura 2000 network are designated under the 'Nature Directives', i.e. the Birds and the Habitats Directives. In 1979, the Birds Directive (amended in 2009) established an EU-wide protection regime for all bird species naturally occurring in the EU including classification by Member States of Special Protection Areas (SPA) for 194. This approach was extended through the 1992 Habitats Directive, which also provided for the establishment of a representative system of legally protected areas throughout the EU. These areas are named Sites of Community Importance (SCI) and aim for the conservation of the 233 habitat types listed in Annex I of the Directive and the 900 plus species listed in Annex II.SCIs must also be designated as Special Areas of Conservation (SAC) as soon as possible and within six years at most. SPAs and SCIs/SACs together make up the Natura 2000 network.

[3] These figures which applied to the EU of 28 countries including the UK.

10. An Appropriate Assessment (AA) has to be carried out covering all the relevant possible environmental effects on the SAC. Sometimes called stage 2 AA.

11. I won't repeat all the points which have been made in our correspondence but highlight just a few as to why we are nowhere near that threshold in this case.

12. This proposal relies on newly created habitat. This is not mitigation or avoidance as the applicant's suggest but compensation which cannot be justified under article 6(3). They have also failed to address the issue of the time lag for the newly created habitat which is relied upon and the possibility it fails to take – it's vital to whether certainty has been achieved (I'll come to some recent rulings on this in a moment). Whilst they have relied on its being planted a year before destruction of the corresponding existing habitat, Aspect Ecology's evidence is that the newly established habitat would take many years before it developed so as to substitute effectively for the lost habitat. In the interim, there would be a loss which could have knock-on effects. Not only is this compensation inapplicable to article 6(3) they are plainly wrong to assert that there would be no residual impacts and no in-combination effects. There is inherent uncertainty in what is proposed.

13. Furthermore, in this case as I have said the new habitat would be compensatory of or mitigating for impacts on the relevant species. If bat species lose access to foraging habitat which is destroyed in order to construct the development which it appears cannot be discounted in the present case, they may be disturbed thereby and if so any new habitat which is created would be compensating for or offsetting the disturbance rather than avoiding it.

14. As I mentioned just now, we are helped because most recently the EUCJ (NB its judgments are still binding in the UK during the current transition period) has rejected very similar proposals to what is proposed here as being

unlawful: In *Grace v An Bord Pleanala*)[4] the CJEU looked at on the extent to which mitigation can be taken into account at Stage 2 of the AA. It rejected the dynamic management of replanting the habitat which was proposed in that particular case as appropriate for passing AA and considered them to be compensation under art 6(4).[5] In *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu* [6]also the CJEU took the opportunity to reinforce the high levels of certainty required as the efficacy of mitigation before it could be taken into account at Stage 2 and made clear that:

> "126 Moreover, according to the Court's case-law, 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'…"

15. It rejected taking into account "future benefits" of future replanting schemes such as is proposed here where the procedures have yet to be carried out.

> "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."

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[4] C-164/17 *Grace v An Bord Pleanála* [2018] EUECJ C-164/17

[5] The CJEU concluded that [57]. … where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive."

[6] Case C-293/17, C-294/17

16. In addition, where as here, an off-site activity has an indirect effect on the SAC by affecting mobile species that would otherwise pass through the SAC, this may harm the integrity of the site even though the direct impacts occur outside the designated area. (Case C-142/16 *Commission v Germany*). In this case, impacts on Greater Horseshoe Bats which disturb them outside the SAC may affect the ecological integrity and functioning of the SAC which was designated to protect this very species. This has not been adequately assessed in the present case.

17. We are supported in this view because more recently in *Holohan v An Bord Pleanála*[7] the CJEU made clear beyond doubt in terms of the scope of the AA which may have to extend <u>beyond designated habitats and the species for which the habitat has been listed.</u>

> "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"

As we have noted previously no such assessment has been carried out in the present case.

18. The Applicants were correct that it is only article 12 of the Habitats Directive that is applicable, the relevant material does not establish that there would be no disturbance of the species for the purposes of the Directive, and the derogation tests would not be met here as alternative solutions have not been ruled out.

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[7] Case C-461/17 *Holohan v. An Bord Pleanála* ECLI:EU:C:2018:649

19. The English court decisions in *Hargreaves* and *Lee Valley* decisions referred to by Nicholas Pearson were, insofar as inconsistent with cases such as *Commission v Germany*, wrongly decided as the ore recent case of *Holohan v An Bord Pleanála.*[8]

20. The most recent e-mail from Natural England contains no additional reasoning on these or other points and merely reiterates the conclusions of the previous letter dated April 2018. It does not grapple with articles 12 and 16 of the Habitats Directive.

21. Whereas here the test in article 6(3) cannot be met the only way is if the developer demonstrated to the same level of certainty that the development is of overriding public importance (which this development plainly is not), that there are not alternative (plainly there are plenty of alternative sites for housing and that adequate compensation has bene provided with sufficient certainty (again this has not been done in this case). It is plain that an article 6(4) does not even get off the ground. But, in any event, you cannot rely on article 6(4) if you as here you have not carried out the assessment at 6(3) correctly.

22. Accordingly, it is clear that the proposed measures in the present case fail these tests. We respectfully request that the committee must add to its putative reasons refusal on based on the following:

> **It has not demonstrated beyond reasonable scientific doubt that the proposed development will not have an adverse effect on the integrity of a European Protected Site contrary to article 6(3) of the Habitats Directive and that it has not been demonstrated that the necessary conditions in article 6(4) have been met.**

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[8] The Rule 6 Parties whom I represented were of course successful on other grounds in the appeal concerning land at Churston Golf Club (appeal decision –APP/1165/A/13/2205208), such that they had no need or opportunity to challenge the inspector's findings on bat mitigation in the courts.

23. No doubt this reason can be further refined to add relevant development policies associated with habitats protection and we are happy to discuss this further with officers. We also will cooperate with the council in providing such assistance as we can in respect of this and the other reason for refusal.

24. Thank you for your time and careful consideration.

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10 February 2020