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## Appeal Decision

Hearing Held on 22 October 2019

Site visit made on 22 October 2019

**by Benjamin Webb BA(Hons) MA MA MSc PGDip(UD) MRTPI IHBC**

**an Inspector appointed by the Secretary of State**

**Decision date: 11 December 2019**

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**Appeal Ref: APP/A1720/W/19/3225866**

**Land adjacent to 125 Greenaway Lane, Warsash, Fareham SO31 9HT**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
  - The appeal is made by Bargate Homes Ltd against Fareham Borough Council.
  - The application Ref P/18/0482/OA, is dated 4 May 2018.
  - The development proposed is described as an outline application with all matters reserved (except for access) for the construction of up to 100 residential dwellings, access from Greenaway Lane, landscaping, open space and associated works.
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### Decision

1. The appeal is dismissed, and planning permission is refused.

### Procedural Matters

2. The planning application was made in outline with permission sought for access, with matters of layout, appearance, landscaping and scale reserved for future consideration. Insofar as details of the layout, appearance, scale and landscaping of the development have been shown on the submitted plans, I have treated these as indicative.
3. The appeal has been made against the Council's non-determination of the planning application. The Council has however indicated that it would have refused the planning application on grounds of its impact on the integrity of European sites. This is a concern also shared by interested parties. I have taken these concerns into account in defining the main issues below.
4. I provided the appellant with 10 working days after the date of the Hearing to submit 2 finalised Unilateral Undertakings (UUs). The first of these UUs (hereafter 'UU1') covers the off-setting of land, and the second (hereafter 'UU2') addresses a range of other obligations set out in 5 Schedules.
5. The Hearing was closed in writing after the event in order to allow scope for potential consultation with Natural England (NE).

### Main Issues

6. The main issues are:
  - the effect of the development on European sites with regard to (a) nutrients, (b) recreational disturbance and (c) air pollution; and

- the effect of the development on the delivery of development on adjoining sites.

## Reasons

### *Background*

7. The potential for the development to have likely significant effects on the integrity of European sites, both alone, and in combination with other plans or projects, principally arises due to increase in population. This is because associated leisure activities, generation of waste water, and vehicle movements, would result in increased generation of nutrients, recreational disturbance, and air pollution. Some pollution would also be generated during construction.
8. With regard to nutrients and recreational disturbance, the sites potentially affected would be the Solent and Southampton Water Special Protection Area (SPA), Solent Maritime Special Area of Conservation (the SAC), and the Solent and Southampton Water Ramsar site (hereafter the 'Solent sites').
9. With regard to air pollution, the sites potentially affected would be the Portsmouth Harbour SPA, the Portsmouth Harbour Ramsar and the Chichester and Langstone Harbour SPA (hereafter the 'Portsmouth and Chichester sites'), and the SAC.
10. Though the Council produced an Appropriate Assessment (AA) during its assessment of the planning application, this was overtaken by subsequent advice issued by NE in relation to the impacts of nutrients and air quality on the integrity of European sites. A more recent Report to Inform Habitats Regulations Assessment Stage 1 and Stage 2 (the HRA), has been produced by the appellant. This is supported by an air quality assessment (AQA). I have taken these sources into account in my reasoning below.

### *(a) Nutrients*

11. Waste water from the development would be discharged via treatment works into the sea. This water would be enriched by nutrients, and in particular nitrogen, which would, in combination with other developments, contribute towards harmful eutrophication. This has been identified by NE as having an adverse effect on the condition of coastal, estuarine and maritime European sites in the Solent area, which include the Solent sites. The designation of the Solent sites specifically relates to the range of natural features and the species of bird life that they support. Where available, the conservation objectives of these sites generally seek to maintain or restore their integrity, including that of their qualifying features. Increased eutrophication would clearly be at odds with these objectives.
12. NE's Advice on Achieving Nutrient Neutrality for New Development in the Solent Region June 2019 (the Advice Note), sets out measures and a methodology for avoiding and mitigating against likely significant effects on European sites in the Solent. Interested parties have challenged the legality of this advice, including within a submitted legal opinion.
13. Various uncertainties are acknowledged within the Advice Note, and assumptions and generalisations have clearly been made in the modelling it contains. This includes matters relating to future population and buffering.

Further assumptions are required in the practical application of this modelling. In this context it is necessary to recognise the impossibility of forecasting future effects with absolute certainty given the variables involved, and that some reasonable assumption and generalisation is thus an inevitable feature. This explains and underlines the necessity of taking a precautionary approach at all stages of AA. As is further established within the international case law and opinion drawn to my attention, including that listed at the end of this Decision which was presented at the Hearing, the requirement within AA is to reach a conclusion beyond all reasonable scientific doubt at the time of the decision. Taking into account the fact that NE is the Secretary of State's scientific advisor on these matters, and attaching significant weight to this fact, I have little reason to question the claim within the Advice Note that the methodology it outlines is based on the best available evidence. As such I consider it appropriate to use the Advice Note for the purposes of AA.

14. Applying this methodology, the appellant has proposed off-setting the additional nitrogen that would be generated by the development, by taking agricultural land out of production. This has involved assigning categories of agricultural use specified within the Advice to both the appeal site and off-set land. NE has indicated its acceptance of the appellant's calculations. It has not however confirmed the accuracy of the agricultural uses assigned. Nor has it indicated that off-setting measures have been satisfactorily secured.
15. At the time of my site visit, active agricultural use of the site appeared to be limited to a relatively small part of a large greenhouse, much of the rest of which did not appear to have seen recent use. Other parts of the site were covered by rough grass, scrub, extensive areas of densely overgrown materials of indeterminate type, piles of building waste, rubble and rubbish, hardstanding, derelict buildings, and a storage unit. My visit might have occupied a moment in time, however the condition of most parts of the site appeared to be well established. At present therefore, active agricultural use of the site accounts for only a small fraction of its overall area, and this is also likely to reflect the situation in the recent past.
16. The Advice Note makes some allowance for disuse insofar as evidence of use over a 10-year period, and likely fallback, can be taken into account. The purpose of this is clearly in order to establish the existence of a credible long-term pattern of agricultural activity. In this regard a statutory declaration (SD) has been provided which testifies to past use of the site for growing strawberries, vegetables and Christmas trees. Over exactly what period, and over exactly what proportion of the site these activities took place, is however unclear. The SD furthermore provides no chronology or explanation for other activities which have evidently taken place on the site, including the deposition of waste materials. Even if aerial photographs, some of which are more than 10 years old, can be taken to indicate areas in which fruit and vegetables were grown in the past, these areas only account for parts of the site. This evidence does not therefore form a sound basis upon which to classify the whole site area as falling within a particular category of agricultural use.
17. Whilst the SD indicates resumption of active horticultural use in the event that the site was not developed, reference is again made only to specific parts of the site, or to activities which have occurred within specific parts of it in the past. Even within these areas, no firm evidence of a likely return to active use has been provided. As the SD further indicates that previous strawberry

growing was unsuccessful, and given that the condition of the site suggests that considerable investment would be required to enable its cultivation, there are reasonable grounds for doubt. The Council's draft allocation of the site for housing compounds this. For these reasons a resumption of active horticultural use across the site is, in my view, unlikely.

18. Classification of the whole site area as being in horticultural use cannot therefore be accepted. Even if the evidence for past and likely future use was more convincing, the failure to exactly define the proportion of the site applicable to the assigned use would provide an incorrect measure of the existing levels of agriculturally-derived nitrogen it generates. Indeed, the Advice Note makes clear that areas of a site which are not in an agricultural use and have not been for 10 years, should be excluded from the calculation. Thus, whereas some effort appears to have been made to include only previously cultivated parts of the land at Stubbington for the purposes of off-setting, a similar approach has not been undertaken with regard to the appeal site.
19. In view of my findings above, none of the 3 mitigation options outlined in UU1 can be considered satisfactory, as all are underpinned by classification of the whole site area as in some form of agricultural use. Furthermore, whilst I accept that differing options have been provided in order to allow for the most precautionary assignment to be made, this cannot logically include an irrelevant classification such as 'lowland grazing'.
20. With regard to the off-setting land at Stubbington, the main parties are in agreement that the field of which it forms part has been used for growing cereals in the past. Allowing for normal crop rotation, I see no particular reason to doubt this. Though the land has not been used in this way for the past 2 years, this is explained by its lack of a tenant in the context of proposals for development. Once tenanted, it is reasonable to consider that the land could return to its previous use. Exactly when this might occur, is however uncertain. Furthermore, UU1 allows for future development of the off-set land. Whether or not an AA would be required in the event that a planning application was submitted, such a provision is clearly at odds with the requirement to secure the land as mitigation in perpetuity. I thus have reasonable grounds to doubt both the classification of the off-set land, and whether it would be appropriately secured. Even if I was to have reached a different view, this would not have altered the fact that none of the mitigation options outlined in UU1 are acceptable.
21. I am satisfied that a planning obligation would be necessary to secure mitigation directly relating to the development, and that the Advice Note provides a framework for such mitigation to be both fair and reasonable in scale and kind. For the reasons outlined above however, UU1 would neither deliver nor secure the required mitigation. As such, UU1 would not pass the tests set out paragraph 56 of the National Planning Policy Framework (the Framework) and Regulation 122 of the Community Infrastructure Levy Regulation 2010 (as amended) (hereafter 'the relevant tests'), and therefore cannot be taken into account.
22. The Council has proposed a Grampian condition for use in these circumstances. This would require the appellant to demonstrate mitigation at a later stage in the development process. The suggested approach has been informed by the

Council's work on an Interim Nitrate Solution. This strategy is however at a draft/options stage, with further work necessary, no clear timetable for its completion or adoption, and no clear endorsement by NE. Whilst the condition does not therefore specifically state how mitigation would be achieved, the strategy itself offers little certainty.

23. Whether or not it is stated in the condition, the likelihood that any mitigation would also need to be secured by a planning obligation or other agreement, additionally runs contrary to advice in the Planning Practice Guidance. This indicates that the use of a negatively worded condition to require an applicant to enter into a planning obligation or other agreement is unlikely to be appropriate except in exceptional circumstances. I acknowledge that the need to mitigate against the adverse effect of nutrients has provided a challenge to the delivery of housing in the Council area. However, in the context of a general need to comply with the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations), there is nothing uniquely exceptional in this. Exceptional circumstances which might justify use of such a condition do not therefore exist.
24. Avoidance measures would otherwise be secured by standard condition, following the recommendations of NE. These include application of the optional Building Regulations standard relating to water consumption, helping to reduce the amount of waste water that would be generated by the development; implementation of a best practice sustainable urban drainage system, reducing the potential for discharge from the site; and agreement of a construction environment management plan (CEMP), helping to further reduce potential for pollution during construction. I agree that these measures are necessary, and, subject to modification of the proposed CEMP condition to ensure that it aligned with and secured the measures identified in the HRA, they would be effective.
25. Alternative solutions which would have lesser impact on the integrity of the Solent sites clearly exist. This is because at any given site the provision of appropriately evidenced, scaled, and secured mitigation in line with the Advice Note could potentially address likely significant effects. As such, and given the failure of the appeal scheme in this regard, allowing the appeal would be contrary to the Habitats Regulations. It would also be contrary to advice in paragraph 175(a) of the Framework, which indicates that planning permission should be refused if significant harm to biodiversity cannot be avoided, mitigated, or as a last resort, compensated for.
26. In view of my reasons above, I conclude that the development would have a likely adverse effect on the integrity of the Solent sites due to the additional generation of nutrients and the lack of appropriate and appropriately secured mitigation. The development would therefore be contrary to Policy CS4 of the Fareham Local Development Framework Core Strategy Adopted August 2011 (the CS), which seeks to protect habitats important to the biodiversity of the Borough; and Policy DSP13 of the Fareham Local Plan Part 2: Development Sites and Policies June 2015 (the Local Plan), which requires that sites of nature conservation value are protected; and Policy DSP40 of the Local Plan, insofar as the development would have unacceptable environmental implications.



*(b) Recreational Disturbance*

27. Future occupants of the development would be likely to access areas included within the Solent sites for leisure purposes. The reasons for designation and conservation objectives of these sites are noted above. Disturbance of bird life resulting from recreational activities in combination with that generated by other developments, would be at odds with these objectives.
28. The Solent Recreation Mitigation Strategy 2017 (the SRMS), which has been adopted by a number of Councils in the area, sets out an approach to mitigate and avoid the recreational disturbance of European sites around the Solent. It specifies contributions based on bedroom numbers per dwelling, which are used to fund a range of site access management and monitoring measures. In this context, NE has indicated that it raises no objection in relation to recreational disturbance subject to contributions being secured in line with the SRMS.
29. Interested parties have nonetheless challenged the legality of the SRMS on grounds that the measures it specifies are too general, and that their effectiveness is uncertain. As set out, and cross-referenced within the SRMS however, the measures outlined are supported by detailed research, which NE has identified as the best available evidence. As such I see no reason to question the legitimacy of the SRMS.
30. Interested parties further question whether a contribution in relation to the SRMS would be correctly made and secure. In this regard I am satisfied that Schedule 3 of UU2 would require payment of mitigation in full prior to occupation of any residential unit, and that the Council's use of the contribution would be further secured on payment using the payment form attached at Appendix C of UU2.
31. For the reasons outlined above the contribution passes the relevant tests. I thus conclude that the development would not adversely affect the integrity of the Solent sites as a result of recreational disturbance. The development would therefore comply with Policy DSP15 of the Local Plan, which supports the application of the SRMS.

*(c) Air Pollution*

32. Natural England's Approach to Advising Competent Authorities on the Assessment of Road Traffic Emissions under the Habitats Regulations June 2018 (the Guide), indicates that where qualifying features of a European site are sensitive to pollutants, road traffic within 200 metres may have a significant effect on its integrity. The development would lead to an increase in vehicle movements within 200 metres of the SAC and the Portsmouth and Chichester sites. In common with the SAC, the Portsmouth and Chichester sites are designated for the range of natural features and species of bird life that they support. Where conservation objectives exist for these sites, they again generally seek to maintain or restore integrity, including that of qualifying features. Increased deposition of pollutants at harmful levels would clearly be contrary to these objectives.
33. Informed by the Guide, the appellant has produced an AQA which concludes that the deposition of pollutants within the affected sites resulting from the development, both alone, and in-combination with other plans or projects,

would be negligible. Thus, a significant effect on their integrity can be ruled out. NE has confirmed that it concurs with the conclusions of the AQA, though offers no endorsement of the traffic modelling upon which it is based.

34. In this regard the Council has provided a critique of the appellant's AQA, raising concern over the adequacy of its coverage of in-combination effects. Additional queries have also been raised by interested parties, who again draw attention to caveats and assumptions. No alternative assessment has however been provided. In this context, I am satisfied that the best available evidence has been employed to inform the AQA, and that the appellant has satisfactorily addressed the concerns raised, both within the Rebuttal submitted at the Hearing, and during the course of the Hearing itself. This included through confirmation of the methodology used to calculate in-combination effects in relation to specifically identified development sites, and with regard to background activity. As such, and based on the evidence set before me, I see no reason to reach a different conclusion.
35. In view of my reasons above I conclude that development would not have a likely significant effect on the integrity of the SAC or Portsmouth and Chichester sites due to air pollution. In this regard the development would not conflict with Policy DSP40 of the Local Plan, insofar as unacceptable environmental implications would not therefore arise.

#### *Adjoining sites*

36. The appeal site, and sites to the east and south on which development has also been proposed, are located within the boundary of a large-scale draft allocation for housing. This is identified in Policy HA1 of the emerging Fareham Local Plan 2036 (the eLP), and a 'masterplan' contained in Appendix C of the same document. Whilst the Council considers that the eLP attracts very limited weight given the early stage of its production, it is nonetheless relevant in consideration of the relationship between the site and others being brought forward in the immediate area.
37. In this context, Policy DSP4 of the Local Plan seeks to address circumstances in which piecemeal development could delay or prevent the comprehensive development of a larger site. On this basis, and informed by Policy HA1 and the draft masterplan, the Council has sought to require road linkage of the development to the adjoining sites to the east and to the south; provision of an alternative means of vehicular access through the latter; and associated future downgrading of the access for which planning permission has been sought. This is outlined in Schedule 5 of UU2. The necessity for this is however disputed by the appellant, whilst the Council disputes the terms of implementation.
38. It is clear that an alternative vehicular access through the site to the south would serve only development within the appeal site itself. Furthermore, and notwithstanding concerns expressed by interested parties regarding the width, safety, and levels of use of Greenaway Lane, no necessity for an alternative access has been demonstrated on highways grounds. This is confirmed in comments from the Highways Authority. Road linkage of the development to the site to the east would similarly appear to serve no essential purpose, and indeed, none has been identified by the Council. As such, and in the absence of evidence to the contrary, I see no grounds to consider that a failure of the appeal scheme to make provision for the alternative access or linkage would prevent, or prejudice future development of either adjoining site.

Consequently, as no conflict with Policy DS4 of the Local Plan would therefore exist, Schedule 5 of UU2 is not necessary to make the development acceptable in planning terms. As such it does not pass the relevant tests and cannot be taken into account.

39. For the reasons outlined above, I conclude that the appeal scheme would not have an adverse effect on the delivery of development on adjoining sites. As such no conflict would arise with Policy DSP4 of the Local Plan, whose purpose is also outlined above; or Policy CS15 of the CS which amongst other things states that development must not prejudice development of a larger site.

### **Other Matters**

40. Two occupants of dwellings along Greenaway Lane who suffer from disability have raised concerns in relation to the effects of increased traffic on the safety of wheelchair users, both when traversing the lane, and accessing vehicles. With reference to the Public Sector Equality Duty contained in the Equality Act 2010 (the EA 2010), I have had due regard under Section 149 of the EA 2010 to the requirement to take steps to meet the needs of persons who share a protected characteristic. The EA 2010 defines disability as one such characteristic. The proposed development would provide a pavement along the short section of Greenaway Lane which would see use by vehicles entering and leaving the development, where none currently exists. Notwithstanding concern that this pavement would not be wide enough to allow 2 wheelchairs to pass, given that wheelchair users are currently obliged to use the road, this pavement would make adequate provision for their safety. With regard to access to vehicles, I note that the dwellings likely to be affected have large driveways. As such there appears to be no requirement for wheelchair users to access vehicles parked in the lane from within the lane itself. Indeed, even at present, accessing vehicles in this way would be unnecessarily dangerous. I consider therefore that were the appeal to be allowed, the needs of disabled residents would not be prejudiced in any way.
41. Interested parties have raised additional concerns related to the character and appearance of the area, wildlife, car use, local services and drainage.
42. With regard to the character and appearance of the area, I am satisfied that it would be possible to secure complementary development of the Greenaway Lane frontage within the scope of the reserved matters. Furthermore, highways works, and any additional traffic generated by the development, would affect only a very short section of the lane which lacks the more rural character seen towards the east. As such, I do not share these concerns.
43. In relation to wildlife, common lizards and an exceptional population of slow worms have been identified on the site. Satisfactory mitigation measures have however been specified, and these can be secured by condition.
44. Concerns that new residents would be reliant on cars appear to be unfounded given that the site is located within an established built-up area with good pedestrian links. Buses also run along adjacent Brook Lane, and a railway station is located a relatively short distance to the north.
45. I also have little reason to believe that the development would harm local services, given that a growth in the local population would be more likely to support and encourage the expansion of these services.



46. Lastly, whether or not water collects on parts of the Greenaway Lane during periods of rain, no evidence has been set before me which demonstrates that the development would cause flooding, or exacerbate any existing drainage issue.
47. In answer to requirements identified by the Council and County Council, Schedule 1 of UU2 sets out contributions towards off-site highways works, and local education, in compliance with Developers' Contributions Towards Children's Services Facilities 2019; Schedule 2 secures provision of 40% affordable housing, in compliance with Policy CS18 of the CS; and Schedule 4 details arrangements for the provision, management and transfer of open space, play facilities, pedestrian and cycle routes, in compliance with Policy CS21 of the CS, and the Planning Obligations Supplementary Planning Document for the Borough of Fareham (excluding Welborne) 2016. The Council is satisfied by Schedules 1, 2 and 4, and they are not otherwise subject of dispute. I am satisfied that all pass the relevant tests.
48. The Council accepts that it does not have a 5-year supply of deliverable housing sites, and so policies most important for determining the application are out-of-date. Under paragraph 11 of the Framework planning permission should therefore be granted unless any adverse impacts would significantly and demonstrably outweigh the benefits, or if specific policies within the Framework that protect areas or assets of particular importance provide clear reasons for refusal.
49. As outlined above, in the absence of appropriate mitigation for likely significant effects on the integrity of the Solent sites, paragraph 175(a) of the Framework provides a clear reason for refusal. Furthermore, given the consequent adverse effect on the integrity of these habitats sites, paragraph 177 of the Framework indicates that the presumption in favour of sustainable development does not apply. As such the 'tilted balance', and advice to grant planning permission found in paragraph 11 of the Framework also does not apply.
50. Given that the obligations outlined in Schedules 1 and 4 of UU2 would serve to either mitigate the effects of the development, or to cater for the specific demands it would generate, I accord them neutral weight. Schedule 2 of UU2 would however secure provision of up to 40 affordable dwellings, which would make a significant contribution towards meeting a demonstrable local need for affordable housing. This combined with the broader overall contribution to the local housing stock of up to 100 dwellings, and the investment that would be generated both during the construction process, and by future residents, would provide a substantial level of public benefit. This benefit would nonetheless be outweighed by the unacceptable harm that would be caused by the development to the integrity of the Solent sites. In this case material considerations do not therefore indicate that the appeal should be determined other than in accordance with the development plan.

## **Conclusion**

51. For the reasons set out above I conclude that the appeal should be dismissed, and that planning permission should be refused.

*Benjamin Webb*

INSPECTOR

## **APPEARANCES**

### **For the Appellant**

|                        |                     |
|------------------------|---------------------|
| Tom Alder              | Lester Aldridge LLP |
| Daniel Clampin         | WYG                 |
| Jeremy Gardiner        | WYG                 |
| Steve Jenkins          | i-Transport         |
| Trevor Moody           | WYG                 |
| David West CEnv MCIEEM | WYG                 |

### **For the Local Planning Authority**

|                      |                             |
|----------------------|-----------------------------|
| Andrew Burgess MRTPI | Adams Hendry Consulting Ltd |
| Jean Chambers MRTPI  | Fareham Borough Council     |
| Adam Collier MRTPI   | Adams Hendry Consulting Ltd |
| Hillary Hudson       | Fareham Borough Council     |

### **Interested Parties**

|                  |                         |
|------------------|-------------------------|
| Conor Fegan      | Francis Taylor Building |
| Rex Holford      | Local resident          |
| Hilary Megginson | Local resident          |
| Rob Megginson    | Local resident          |
| Peter Nugent     | Local resident          |
| Hazel Russel     | Local resident          |

### **Documents Presented at the Hearing**

- (1) Air Quality Rebuttal to Ricardo's Comments
- (2) Appeal Decision APP/X1735/W/18/3214079
- (3) Appeal Decision APP/A1720/W/18/3214358
- (4) Appeal Decision APP/A1720/W/19/3222404
- (5) Appellant's Closing Statement
- (6) Closing Submissions on Behalf of Save Warsash and the Western Wards
- (7) Email: confirmation from Lilybell Limited of agreement to plant off-set land with whips.
- (8) Judgment: European Commission v Republic of Poland, Case C-441/17.
- (9) Judgement: Holohan and Others v An Bord Pleanála, Case C-461/17.

- (10) Judgment: Joined cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA and Others v College van Gedeputeerde Staten van Limburg and Others
- (11) Judgement: People Over Wind v Coillte Teoranta (ECJ) [2018] PTSR
- (12) Nutrient Balancing Assessment: calculations Options A and B
- (13) Opinion of Advocate General Kokott in Joined cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA and Others v College van Gedeputeerde Staten van Limburg and Others

Richborough Estates