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## Appeal Decision

Hearing Held on 23 November 2021

Site Visit made on 23 November 2021

**by S M Holden BSc (Hons) MSc CEng MICE CTPP FCIHT MRTPI**

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

**Decision date: 14/01/2022**

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**Appeal Ref: APP/L3815/W/20/3259646**

**Land at Flat Farm, Broad Road, Hambrook, West Sussex PO18 8FT**

- 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 Mr A Williams of Peter Nicholas Homes (Flat Farm) Ltd against Chichester District Council.
  - The application Ref 20/00412/OUT, is dated 12 February 2020.
  - The development proposed was originally described as: 'construction of 42 no. affordable residential dwellings for first time buyers'.
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### Decision

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

### Preliminary Matters

2. The address on the application form was given as 'Land off Broad Road'. However, the appeal form stated it to be 'Land at Flat Farm'. I have used this latter address as the parties agreed at the Hearing that it is more precise and consistent with other applications which have been submitted for the same site.
3. During the course of the application the description of development was amended. The appeal form gave it as: 'construction of 35 no affordable residential dwellings for rent'. However, the officer's report described the scheme as: "outline application for the construction of 35 no affordable residential dwellings for first time buyers and those looking to rent their first home (paragraph 71 entry-level exception site), with all matters reserved other than access." It was agreed at the Hearing that this is a precise description of the proposal and I have determined the appeal on that basis.
4. The application was in outline with only access to be determined at this stage. An indicative layout was also submitted which I have taken into account in my assessment of the proposal.
5. Before the Hearing opened the Council indicated that it would be publishing its Five-Year Housing Land Supply Statement around the same date. It was subsequently published on 25 November. The Hearing was therefore formally adjourned to give the appellant the opportunity to comment on the Statement by the agreed date of 10 December. Having studied the Council's document and the appellant's response, I am satisfied that it was not necessary to resume the Hearing. The parties were informed that I would determine the appeal on the basis of the written submissions.

6. A completed S106 agreement was submitted, as agreed, on 10 December. This made provision for the following matters. First, it would secure the affordable housing units in the form of 26 units for rent and 9 as Discount Market Sales (DMS) housing. It included a nominations agreement for the affordable rented properties and set out the criteria that prospective purchases of the DMS homes would be required to meet. Second, it provided for open space and landscape buffers to be created and maintained within the site. Third, it secured financial contributions towards mitigation measures a) to address recreational disturbance of the Chichester and Langton Harbour Special Protection Area (SPA) and b) A27 improvements.
7. The Council was satisfied that the provisions of the S106 agreement addressed its concerns in relation to the provision of open space, landscape buffers and mitigation measures in relation to recreational disturbance of protected Habitats sites. However, it remained concerned that there could be pressure to amend the terms of the agreement, if the DMS housing proved difficult to sell. I return to this issue later.
8. The appellant also submitted a Unilateral Undertaking (UU) to secure mitigation measures to provide nutrient neutrality and prevent any adverse effects on the Solent Special Area of Conservation (SAC) and SPAs. However, the Council was not fully satisfied that the UU would be enforceable. It was also necessary for me to consult Natural England (NE) on the proposed mitigation measures. I did so after the Hearing and gave the parties an opportunity to comment on its response. I address these matters later in my decision.

### **Main Issues**

9. The Council failed to determine the application within the statutory period. However, its appeal statement sets out three reasons why it would have refused the application. The planning obligations have partially addressed two of these reasons.
10. The main issues are therefore whether the proposal would:
  - a) constitute an 'entry level exception site', having regard to local and national planning policy for the delivery of affordable housing;
  - b) deliver a mixed and sustainable community having regard to the proximity of the DMS housing to the electricity pylons;
  - c) achieve nutrient neutrality throughout the lifetime of the development.

### **Reasons**

#### *Entry level exception site*

11. The appeal site is an open, undeveloped, flat field adjacent to, but beyond, the settlement boundary of the small village of Nutbourne East. A little further to the north is another small village, Hambrook, centred on the junction of Broad Road with Scant Road West and Priors Leaze Lane. It has its own settlement boundary. Although there is ribbon development along the eastern side of Broad Road between the two settlements and a caravan park immediately to the north of the appeal site, these areas and the appeal site are in the countryside for the purposes of planning policy.

12. Policy 45 of the Chichester Local Plan: Key Policies 2014-2029, adopted in 2015 (CLP) restricts development outside settlement boundaries to those that require a countryside location and meet the essential, small scale and local need which cannot be met within or immediately adjacent to existing settlements.
13. Policy 2 of the CLP sets out the Council's development strategy and settlement hierarchy. Outside the sub-regional centre of Chichester, the policy identifies a series of Settlement Hubs and Service Villages which will be the focus for new development and facilities. Hambrook/Nutbourne is identified as one of these Service villages, notwithstanding the fact that each of them has a separately defined settlement boundary. However, the policy envisages only small scale housing developments consistent with indicative numbers set out in Policy 5, which is 25 for Chidham & Hambrook.
14. The proposal would exceed the need for affordable housing within the Parish and occupy a site beyond the existing settlement boundaries. It would therefore conflict with Policies 2 and 45 of the CLP. However, the scheme is seeking to be assessed on the basis that it would provide affordable housing in accordance with paragraph 72 of the National Planning Policy Framework (the Framework) and the specific criteria set out in the associated footnotes.
15. The Framework defines 'entry-level exception sites' as those which are suitable for first time buyers (or those looking to rent their first home) unless the need for such homes is already being met within the authority's area. As the CLP pre-dates the Framework's reference to 'entry-level exception sites', it is not a form of development which is specifically considered within the Council's adopted development plan. However, it is acknowledged that there is an on-going need for affordable housing in the District and the proposed dwellings, whether available for rent or purchase as Discounted Market Sales (DMS), could contribute to meeting that need.
16. It was common ground that the scheme would comply with the definition set out in paragraph 72 a) of the Framework through providing a mix of affordable rent and DMS housing. However, in order to comply with Paragraph 72 b) sites must be adjacent to existing settlements and proportionate in size to them. Footnote 35 states that such sites should not be larger than 1ha or exceed 5% of the size of the existing settlement. Whilst the site's location is acceptable, its size may not be as it exceeds the 1hectare limit. The determining factor is therefore its relationship with the size of the existing settlement.
17. The area within the settlement boundary of Nutbourne is 18ha. The development would therefore equate to an enlargement of 7.2%. This would exceed the 5% limit set out in the footnote to paragraph 72. However, the Framework does not define 'existing settlement'; that is a matter for the decision maker.
18. The Parish has 3 individual 'villages' within it; Chidham, Nutbourne and Hambrook. I appreciate that local residents will have an affiliation with the particular part of the parish in which they live. However, it is apparent from a visual inspection of the area that there is little physical separation between Nutbourne and Hambrook. The ribbon development on the eastern side of Broad Road and the footway alongside the road provide a continuity of built form and a pedestrian link between the two villages. The area of green space on the western side of Broad Road is a community asset which is not

exclusively available to residents of only one of the villages. There seems little doubt in my mind that the two effectively function as a single settlement. This is also consistent with the definition of Nutbourne/Hambrook as a service village set out in Policy 2 of the CLP.

19. The combined area occupied by Nutbourne and Hambrook is 35ha. On this basis the proposed development would equate to a 4.6% increase in the size of the settlement as a whole. This leads me to find that the proposal would be within the 5% limit set out in the Framework and would be proportionate in size to the existing settlement as a whole.
20. I therefore conclude that the proposal satisfies all the Framework's requirements to qualify as an entry-level exception site. This is a material consideration that outweighs the conflict with the development plan's locational policies.

*Delivery of a sustainable and mixed community*

21. The S106 agreement would secure the provision of a mix of property types; 26 would be for affordable rent; 9 would be for first time buyers as DMS housing. There was no dispute between the main parties that the houses, once built, would not sit empty. There is an identified need for affordable homes in the District. These would be available to prospective occupants who could demonstrate a local connection with the District. The Council is confident that suitable tenants for the 26 rental homes would be found through the nominations process set out in the S106 agreement. However, even though the S106 agreement sets out the process for selling the DMS homes at an appropriate discount, the Council is not persuaded that suitable buyers could be found.
22. The Council and the Parish Council were not convinced that potential purchasers of the DMS housing would be able to secure the necessary mortgages. This concern was based on experience of the development that has already taken place at Hambrook Place, adjacent to the appeal site. This development of 11 dwellings was originally proposed as a mix of social rented and DMS housing. However, as prospective purchasers of the 3 DMS were unable to secure mortgages, they are now occupied as social rented properties.
23. I was told that the reason for these difficulties related to the proximity of those dwellings to a line of pylons. This also passes through the northern part of the appeal site and within the proposed landscape buffer. If it proves to be difficult for potential purchasers of the DMS homes to obtain mortgages, the appellant could seek to re-negotiate the terms of the S106 agreement to permit those dwellings to be made available as rented properties. I understand that this is what occurred with the Hambrook Place development. This would lead to an over-concentration of single tenure housing which would be out of proportion with the size of the village.
24. Whilst I understand the Councils' concerns, there was substantive evidence before me which suggested that whilst not every bank or building society would choose to do so, there are lenders who are willing to offer mortgages on properties that are close to pylons, subject to a valuer's comments. The S106 agreement provides for the properties to be sold at 30% below the 'open market value'. As these figures have to be provided by a suitably qualified person it is reasonable to expect that the sale prices of the properties would be

appropriate for the area, would be attractive to potential first time home owners, and therefore should not make it excessively difficult for qualifying buyers to secure a mortgage.

25. There was also evidence from the National Grid's published advice: *Design guidelines for development near high voltage overhead lines* that development has been successfully delivered close to overhead lines through careful planning. There was no suggestion within this guidance that properties built near such overhead lines were only available to those in the rental market.
26. The manner in which the DMS housing would be marketed was discussed at the Hearing. From this I have no reason to believe that suitable efforts would not be made during the construction period to offer the homes for sale to those who are able to demonstrate a local connection with the District. The proposal would provide two 1-bedroom maisonettes, three 2-bedroom houses and four 3-bedroom homes. These would be accessible to first time purchasers with a local connection but without any income cap. Given the likely demand for such homes, and the likelihood that mortgages could be secured, I consider that the risk of not finding suitable purchasers is likely to be small.
27. I therefore conclude that the development as a whole would provide a mixed and inclusive community, in accordance with the Framework's aim of providing housing to meet diverse needs (paragraph 62) and in a manner that creates inclusive and accessible communities (paragraph 130 e) and f)).

#### *Nutrient neutrality*

28. New residential development generates wastewater. Even after treatment additional nitrogen from this scheme could be discharged into the Solent. There are designated conservation sites around the Solent including the Solent Maritime Special Area of Conservation (SAC), Chichester and Langstone Harbours Special Protection Area (SPA), Portsmouth Harbour SPA and the Solent and Southampton Water SPA. These areas are protected because they provide essential winter feeding and roosting for thousands of birds, such as waders, wildfowl and geese who spend the winter here before returning to the Arctic to breed.
29. Discharge of additional nitrogen into these connected protected areas would be likely to result in significant harmful effects to the habitats and to the species that depend up them. Consequently, mitigation is required to achieve nutrient neutrality for the site. To be effective this will need to be secured for the lifetime of the development, namely 80-125 years.
30. The appellant has secured an option to purchase an area of land which it is proposed would to be taken out of agricultural production, replaced by trees and managed as woodland over the long term. The area of land amounted to 0.37ha. However, when Natural England (NE) was consulted about the proposed mitigation measures it raised an objection, stating that an area of at least 0.42ha would be required to avoid an adverse effect on the integrity of the protected sites.
31. The appellant's executed UU only provided 0.37ha and would therefore not be sufficient to provide adequate mitigation. However, I also have other concerns about the drafting of the UU before me. The approach of preventing commencement of development until a further deed controlling the use of the



mitigation land is secured could be feasible; but it would be an unusual arrangement. In particular, the specific wording of the UU only requires the mitigation deed to be 'entered into' or 'completed'. In order to be enforceable, the Nitrate Mitigation Deed would need to be validly executed as a deed and provided to the Council so that it can be registered as a local land charge. Without these steps being guaranteed, the deed would not be enforceable and subsequent landowners would not be bound by its terms.

32. On receiving NE's response to the consultation, the appellant's advisors offered to prepare a supplementary UU for the additional land that would be needed to comply with NE's requirements. However, this would not only increase the complexity of the planning obligations but was further complicated by the recent death of the applicant. This would inevitably lead to further and possibly protracted delays to secure the necessary execution of any amended or replacement obligation.
33. In any event, for the reasons set out above, I share the Council's concerns about the enforceability of the existing UU. Therefore, in the absence of a planning obligation that would secure the change of use of 0.42ha of agricultural land to a woodland in perpetuity, I cannot be certain that there would be no adverse effects on the integrity of the protected areas. This leads me to conclude that the scheme fails to comply with the Habitats Regulations.

## **Other Matters**

### *Suitability of location*

34. The Parish Council expressed concerns about the lack of facilities in the village available to meet the needs of residents. Its representatives considered that future occupants would be over reliant on the use of cars to get around and access the services they need, even with the site's proximity to the railway station. However, Hambrook/Nutbourne is identified in the development plan as a service village. This is partly because the District is highly constrained by the Downs and the habitats sites to the south. This significantly restricts the areas which are suitable for accommodating new housing. In these circumstances the limited range of services currently provided locally would not be a sufficient justification for rejecting the proposal.
35. Furthermore, I note that as part of the development which has recently been granted permission on the northern edge of Hambrook, it is intended that a new shop and community facility will be provided. This suggests that there is every possibility that facilities in the area will improve in the coming years.

### *Recreational Disturbance affecting the Chichester and Langton Harbour Special Protection Area (SPA)*

36. The site is located within the 5.6km buffer zone of the Chichester and Langstone Harbours SPA. This is part of the area along the south coast which provides the essential winter feeding and roosting for thousands of birds referred to earlier.
37. Within this area NE have advised that any net increase in the number of dwellings is likely to result in a significant effect on the protected area, either alone or in combination with other developments. This would arise from disturbance as a result additional visits to the area. Over 90% of recreational activities are walking, jogging and cycling; disturbance by dogs is particularly

harmful accounting for nearly half of all major bird flights. Although surfing, horse riding and rowing accounts for less than 10% of the activities, each occurrence can create substantial disturbance.

38. The authorities, in partnership with Natural England, have developed mitigation strategies to reduce the level of disturbance. This is focussed on marketing and education initiatives, encouraging responsible dog walking, visitor management and bird management projects. All these activities are supported by a team of rangers. The details are set out in the Solent Recreation Mitigation Strategy (SRMS), which has also set out a tariff-based approach requiring contributions from all residential development to fund its implementation over the long term.
39. The S106 agreement would secure the payment of an index-linked contribution towards the SRMS. On that basis Natural England is satisfied that there would be no adverse effects on the integrity of the SPAs, arising from recreational disturbance. I see no reason to come to a different conclusion.

*Other provisions within the S106 agreement*

40. The completed S106 agreement sets out how the affordable housing will be secured in perpetuity and would be a combination of properties available to rent and as DMS housing. A nominations agreement would ensure that the homes are made available to those with local connections to the area at the appropriate rent or cost.
41. The agreement would secure the provision and long-term management of the landscape buffers around the site. These are essential to make the proposal acceptable in planning terms. It would also provide a financial contribution towards highway works on the A27. These are justified to mitigate the effects of additional traffic from the development on the strategic highway network.
42. I am satisfied that these provisions are reasonable and comply with the Community Infrastructure Levy Regulations. I have therefore taken the S106 agreement into account in reaching my decision.

**Planning Balance**

43. Although the proposal would result in the construction of new homes beyond the settlement boundary of Nutborne East, it would deliver much needed affordable housing in an area identified by the development plan as a service village. The scheme would qualify with the Framework's requirements for an entry level exception site and provide homes for rent and for sale at discounted prices. It therefore offers considerable public benefits which carry significant weight in the scheme's favour. I was also satisfied that the risk of the DMS housing not being sold to people with a local connection was not a sufficient reason to reject the scheme as a whole. In these respects, the benefits of the proposal outweigh the conflict with the development plan.
44. However, although I am satisfied that any harm to European protected sites arising from recreational disturbance could be mitigated, the same does not apply when considering the issue of nutrient neutrality. Whilst the mitigation measures for achieving nutrient neutrality have been agreed, the means of securing them for the duration of the development has not been provided with an adequate degree of certainty.

45. This leads me to conclude that the proposal would give rise to adverse effects on the integrity of the Habitats sites. Having regard to footnote 7 to paragraph 11 d) i) of the Framework this is a clear reason for dismissing the appeal. This would be the case, regardless of whether or not the Council could demonstrate a 5-year supply of deliverable housing sites.

### **Conclusion**

46. For this reason, I conclude that the appeal should be dismissed.

*Sheila Holden*

INSPECTOR

### **APPEARANCES**

#### **FOR THE APPELLANT**

|                      |                                                |
|----------------------|------------------------------------------------|
| Ned Helme            | Counsel                                        |
| Jeremy Higgins MRTPI | Associate Director, Southern Planning Practice |
| Peter Hunt           | Managing Director, PNH Properties Ltd          |
| Andy Williams        | Commercial Director, PNH Properties Ltd        |
| Luc Algar            | Moore Barlow (Solicitor)                       |
| Nigel Jacobs MRTPI   | Director of Operations, Intelligent Land       |

#### **FOR THE LOCAL PLANNING AUTHORITY**

|                      |                          |
|----------------------|--------------------------|
| Andrew Robbins MRTPI | Senior Planning Officer  |
| Bryn Jones RICS      | Housing Enabling Officer |

#### **INTERESTED PERSONS**

|                    |                                                |
|--------------------|------------------------------------------------|
| Jane Towers        | Vice Chair – Chidham & Hambrook Parish Council |
| Sue Bramwell-Smith | Local resident                                 |
| Dave Moore         | Local resident                                 |

### **DOCUMENTS SUBMITTED AT AND AFTER THE HEARING**

- 1 Draft S106 agreement (completed agreement submitted 10 December 2021)
- 2 Appeal decision APP/L3815/W/21/3274502
- 3 Appeal decision APP/L3815/W/20/3266072
- 4 The Council's annual statement on the 5YHLS, published 25 November 2021
- 5 Unilateral Undertaking dated 10 December 2021