



Appeal Decision

Hearing (Virtual) held on 9 January 2024

Site visit made on 5 February 2024

by Mrs H Nicholls FdA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th February 2024

Appeal Ref: APP/Z3825/W/23/3324144

Land North of The Rise, Partridge Green RH13 8JB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Rydon Homes Ltd against the decision of Horsham District Council.
 - The application Ref DC/22/0301, dated 3 February 2022, was refused by notice dated 28 February 2023.
 - The development proposed is Outline Application for redevelopment of the site to provide up to 55 dwellings, ancillary parking and associated infrastructure with all matters reserved except access.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application was made in outline form with detailed access and all other matters reserved for future consideration. The appeal application was submitted with an illustrative layout and parameters plan. I have taken these plans into account on an indicative basis.
3. The second reason for refusal listed in the Council's decision notice relates to the effects of the proposal on Great Crested Newts, which are a protected species. Evidence submitted prior to the hearing enabled the Council to agree that this issue could be satisfactorily resolved subject to the imposition of planning conditions. The Council no longer sought to defend this issue at the hearing and I have assessed the appeal on this basis.
4. The third reason for refusal related to the absence of a planning obligation made under S106 of the Town and Country Planning Act 1990 to secure affordable housing and other necessary contributions to comply with the requirements of the development plan. A S106 obligation was submitted in final draft version ahead of the hearing and the completed version was received on the 18 January 2024. On the basis that the obligations were considered necessary and reasonable to make the development acceptable in planning terms, the Council agreed that the submission of the S106 resolved the third reason for refusal.
5. A unilateral undertaking (UU) signed and dated 8 January 2024 was also received dealing with the issue of effects on the integrity of the Arun Valley Special Area of Conservation, Special Protection Area and Ramsar sites (the Protected Sites). I deal with this as part of the main issue below.

6. On the 15 December 2023, the Council advised of a material change of circumstances in connection with the emerging Regulation 19 Horsham District Local Plan 2023-2040 (eLP) which had been endorsed by its Full Council prior and on which consultation would commence in mid-January 2024. As part of the eLP, the appeal site is identified as one to be allocated for a housing development. The eLP still only attracts limited weight but I have taken account of the proposed allocation of the site insofar as it is relevant to the appeal before me.
7. A Statement of Common Ground (SoCG) was submitted in November 2023. The National Planning Policy Framework (the Framework) was revised and published in December 2023. Neither party explicitly brought any revisions to my attention during the hearing, but I have since sought comments on an issue of relevance to housing land supply. Therefore, neither party was prejudiced by the consideration of the updated Framework.

Main Issue

8. The effect of the proposed development on the integrity of the Protected Sites, with particular regard to water abstraction.

Reasons

9. The scheme is for the construction of up to 55 houses on c. 4.2 hectares of agricultural land comprising two adjoining fields to the north of Partridge Green, in West Sussex. Existing residential development exists to the South of the site and the road access from Littleworth Lane is from the west.
10. Water supply to Horsham District is largely provided by Southern Water from its Sussex North Water Resource Zone (WRZ) which is an area of serious water stress. The appeal site would also be supplied with water from the WRZ.
11. The River Arun and its floodplain contain habitats and species of international importance, recognised within the designation of the Protected Sites under the Conservation of Habitats and Species Regulations 2017, as amended, (Habitats Regulations). They support a series of wetland meadows, alluvial grazing marsh and former raised peat bog, dissected by a network of ditches. Variation in soils and water supply lead to a wide range of ecological conditions and hence a rich and diverse flora and fauna. The relevant qualifying features of the Protected Sites formally comprise: wildfowl and waterbird assemblages, including Bewick's swan, shoveler, teal and wigeon; wetland invertebrates, as well as a range of rare flora, including duckweed, water-cress, milfoils, dropworts and pondweeds.
12. The conservation objectives for the Protected Sites are to ensure their integrity by maintaining or restoring the extent, distribution, structure and function of the qualifying habitats and species, the processes on which they rely and the population and distribution of those species within the sites. The hydrology of the Arun River is the major factor affecting the quantity, depth and flow of water within the Protected Sites, which in turn contribute to achieving the favourable conservation status of their qualifying features.
13. Water abstraction within the WRZ is adversely affecting the integrity of the Protected Sites through the reduction in water levels and flow within their wetland habitats. This is set out in the Position Statement and Addendum of

Natural England¹ (NE). Accordingly, NE advises that further developments within the WRZ must not add to existing impacts, and that one way of achieving this is to demonstrate water neutrality, i.e., no additional abstraction from the WRZ.

14. Given that impacts on the Protected Sites' integrity cannot be screened out, under Regulation 63 of the Habitats Regulations, I am required to undertake an Appropriate Assessment (AA) of the implications of the proposed development, including consideration of any conditions or restrictions, such as legal obligations, to which it is proposed a permission should be given and to the manner in which it is proposed the development should be carried out. The representations of NE as the statutory nature conservation body should also be taken into consideration.
15. It is common ground between the main parties² that the proposed development of up to 55 dwellings would increase water abstraction within the WRZ, resulting in a likely significant effect on the integrity of the Protected Sites. Accordingly, the parties agree that mitigation measures are required to ensure the appeal scheme would be water neutral. Having regard to the qualifying features of the Protected Sites, their conservation objectives and the nature of the proposal, I independently reach the view that the appeal proposal, without mitigation, would result in an adverse effect on the integrity of the Protected Sites, either alone or in combination with other plans and projects.
16. The Appellant has sought to quantify the potential water demand from the proposal in the Water Neutrality Statement³ (Neutrality Statement). This outlines the predicted water usage based on the predicted occupation of 121.1 persons against typical Building Regulation⁴ water usage limits of either 125 litres/person/day (l/p/d) or 110 l/p/d, then anticipates a reduction in demand to be achieved through the installation of highly efficient fixtures and fittings, i.e., taps, toilets, washing machines and dishwashers to a limit of 85.35 l/p/d. A further reduction per dwelling to a limit of 49.78 l/p/d is also indicated as being achievable through the use of a rainwater harvesting system which would use greywater for suitable sources within the house, although these would need to be managed and maintained by a centralised management company.
17. Taking the combined demand reduction measures into account, the total residual water demand figure to offset for 55 dwellings would be a total of 6,028.86 litres per day, or 2,200,533.9 litres per annum. A percentage above this figure to add as a precautionary buffer has not been specified. Nonetheless, the Council are broadly in agreement with the measures that are suggested and the reduction in demand that they could achieve, subject to the imposition of relevant conditions and a robust planning obligation.
18. However, reducing the water demand can only go so far, and it is clear that the proposal will need to draw from other measures to achieve absolute neutrality. To this end, there are two possible routes. One involves buying into the scheme under development through the Council and other affected bodies

¹ *Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 – Interim Approach and Addendum to Natural England's Position Statement*

² Statement of Common Ground, dated 7 November 2023

³ Stuart Michael Associates, dated 9 June 2023

⁴ Building Regulations Part G: Sanitation, hot water safety and water efficiency of the Building Regulations 2010 (2015 Edition with 2016 Amendments)

within the WRZ⁵ as a financial contribution towards an equivalent reduction in mains water demand elsewhere (when available); the emerging *Strategic North Offsetting Water Scheme*, or 'SNOWS'. The other is to devise a site-specific solution. I consider each of these in turn.

SNOWS Scheme

19. The SNOWS scheme is not yet in place, but how it would be likely to operate is explained in the Mitigation Strategy⁶ prepared for the WRZ. The first element of the Mitigation Strategy is a programme being implemented by Southern Water to reduce water demand across the network by reducing leakages and household water consumption. The second part to the Mitigation Strategy is to reduce water demand in social housing and property under Council or Registered Provider (RP) control, which would be funded by a tariff on all new development per litre of mains water required to be offset. This would largely involve retrofitting flow regulators into existing social housing stock within the WRZ. The retrofitting scheme would require around 3 to 4 properties to be retrofitted to allow for one new dwelling, and further consideration will need to be given as to how to fund and contract the work to be undertaken.
20. From the evidence, since the publication of the Mitigation Report, doubt has been cast on the success of the programme to remedy leakages in the Southern Water network and data is awaited from the Water Resource Management Plan (WRMP), the publication of which has been delayed and is still as yet, uncertain. Furthermore, the commitment from RPs to the retrofit of flow regulators within their housing stock has not yielded as many dwellings as was initially envisaged. Therefore, based on work undertaken and meetings held since its publication, the Council admitted the data in the Mitigation Strategy is partly out of date even though it is presently still the best available documented evidence as a background document to the eLP.
21. Additionally, when the likely available capacity is known, there is further work to be undertaken to determine the prioritisation for development to access the SNOWS scheme, establish the governing body and set the charging rates. The current high level evidence points to the SNOWS capacity being distributed across the relevant authority areas and in order of the following: (1) critical infrastructure (e.g. education, fire and rescue facilities); (2) policy compliant town centre uses and housing and commercial schemes which provide for immediate delivery (i.e. those schemes in full or with reserved matters); and (3) policy compliant schemes in outline.
22. As the appeal scheme is moving from a speculative one to one on a site which the Council intend to allocate for housing development, it may eventually benefit from capacity under the third or lowest priority category as a policy-compliant or planned scheme. Though whilst it is likely that capacity under the SNOWS scheme would be available within the lifetime of the eLP for it to be found sound with a stepped trajectory, it is not certain that the capacity under would be made available within the far shorter 3 - 5 year timeframe of an outline planning permission.

⁵ Including across the authority areas of Crawley Borough, Chichester District, West Sussex County Council & South Downs National Park Authority

⁶ Sussex North Water Neutrality Study: Part C – Mitigation Strategy Final Report December 2022

Site specific solution

23. In terms of a site specific offsetting scheme, the evidence is relatively minimal. At the hearing, the Appellant's representatives verbally indicated that they were in advanced discussions with a third party capable of offering the necessary offsetting credit. The third party allegedly has access to RP housing stock within the WRZ and the intention would be to retrofit some of its dwellings with flow regulators to minimise their water demand equivalent to the 55 proposed dwellings. The concept is clearly not a novel one, given that it is a part of the emerging SNOWS scheme, but the number of dwellings to be retrofitted, by when and the certainty of access and obligation to maintain such in perpetuity is absent from the verbal indications offered to me.
24. I heard that where evidence of a site-specific solution has recently been put before the Council's Committee, it has resolved to grant planning permission subject to a legal obligation, including the third party, to secure the offsetting measures in perpetuity. Planning permission would then be granted on the completion of the obligation. Again, limited evidence of this approach was put before me other than verbally at the hearing, but the parties were in agreement about such events having occurred. Be that as it may, such an approach would not be available to me.
25. The Appellant and Council put forward two recent appeal decisions that differed in their approach to the issue at hand. The Slinfold decision⁷ referred to a strategic offsetting scheme very briefly, acknowledging that it did not exist at the time of the decision. It also referred to a site specific solution proposed which involved the use of a school premises also within the WRZ. However, the Inspector was not satisfied that the figures presented were sufficiently robust so as to provide the necessary certainty. That case was dismissed.
26. The other appeal decision relates to a site in Storrington⁸ for which the water demand after reduction measures were proposed to be addressed in one of two ways: either through the SNOWS scheme, or by way of installation of a rainwater harvesting scheme at a garden centre in Horsham. These measures were to be secured by negatively worded planning condition (a Grampian condition) as well as a signed and executed UU.
27. In the Storrington decision, the Inspector refers at length to the SNOWS scheme and notes the 'clear momentum' to secure it as efficiently as possible to address the shortfall in housing delivery. The Inspector also reached a conclusion that there was 'firm' evidence that the scheme would be able to access offsetting capacity within the strategic (SNOWS) scheme to mitigate its residual water demand and that it would be a candidate for priority of access to such. The Inspector's conclusions were, in part, based on the SNOWS scheme being operational from January 2024. However, that timeframe has already passed and appears set to be significantly exceeded.
28. The other material distinction between this scheme and the Storrington scheme was that a detailed site-specific mitigation solution was presented in evidence to the inquiry. The figures on the rainwater harvesting capacity were before the Inspector and having also visited the site, he found that together with the precautionary approach built into the calculation and the headroom in the

⁷ Appeal decision Ref APP/Z3825/W/23/3315111 dated 5 October 2023 following the hearing on 23 August 2023

⁸ Appeal decision Ref APP/Z3825/W/3308455 dated 6 October 2023 following the inquiry held in March 2023

rainwater yield above the volume required to be offset, that the scheme would work in practice to deliver the required offsetting capacity. Though the Garden Centre operator was not a party to the UU and was expected to form a party to a further Supplemental Deed required to be in place prior to commencement of the development, the Inspector concluded that there was sufficient evidence of a commitment to the site specific offsetting scheme being delivered and at the level required to mitigate the effects of the development, should it be needed.

29. The Appellant opines that the evidence before the Storrington inquiry was similar to that before me, and that I can reach a similar conclusion about the availability of offsetting measures during the lifetime of the permission. However, the Storrington inquiry sat in March 2023 and the momentum on the SNOWS scheme has not resulted in it being any closer to becoming imminently operational. Furthermore, there is no site specific option of a comparable nature to that which was before the Storrington inquiry before me. I have not been invited to review any firm evidence or visit any third party site from where any potentially necessary offsetting capacity will be made available. Therefore, in my view, the verbal evidence of this nature offered by the Appellant about the advanced discussions attracts limited weight.
30. The Appellant indicated that the market for offsetting credits was emerging rapidly and that potential offsetting credit providers were favouring those that had extant permissions or resolutions to grant permission before committing their capacity to any developers. I understand the market influences at force and the risks to which either party (credit provider/developer) may be exposed. However, that is not ultimately a matter for me as part of this appeal.

Unilateral Undertaking

31. A UU was submitted the day before the hearing. The UU obliges the owner (undefined) to procure the binding of 'Offsetting Land' with the obligations in the UU through a 'Supplemental Deed'. The occupation of the development is to be prevented until the completion of 'Offsetting Measures' (to achieve a saving of at least 2,200,533.9 litres of water per annum, or greater as may be reasonably required and agreed) to be set out in a 'Water Neutrality Scheme' on the 'Offsetting Land' that will confirm the development to be water neutral. The specifications for the Supplemental Deed which would bind on any successors in title and anyone with an interest in the offsetting land are also appended to the UU.
32. The contingent position set out in the UU is that if prior to the implementation of the development, the Council adopts an 'Offsetting Scheme' and the owner pays a 'Water Neutrality Contribution' to the Council in the requisite amount (not specified as capped to a certain figure), then the need for the procurement of 'Offsetting Land' will cease to be relevant. This essentially means that the developer is obliged to pay a financial contribution (albeit presently undefined), avoiding the test for a condition requiring the same for 'exceptional circumstances' to be demonstrated.

Suggested related planning conditions

33. The Appellant also offers to accept two conditions if in the event the appeal were allowed. The first is a Grampian condition to secure, either (a) water neutrality mitigation via the Council's adopted Offsetting Scheme as set out in

- the accompanying planning obligation; or (b), a site-specific Water Neutrality Scheme to be approved or as set out in the accompanying planning obligation.
34. A separate condition is also recommended prior to occupation of any dwelling to secure approval that the water neutrality strategy for that dwelling has been implemented in accordance with the Water Neutrality Strategy. The condition also secures retention, management and maintenance of the measures.
35. The pre-occupation condition requiring installation of the site-specific water reduction measures would be necessary, reasonable and related to the scale of development. It is on the basis of the deliverable measures required by this condition that the residual water demand has been identified within the UU (as a starting point, allowing for alternative higher figures incorporating headroom to be agreed).
36. The Council do not consider it reasonable to impose the Grampian condition. The Appellant's Legal Submissions⁹ assert that the Council has erroneously used the Habitats Regulations test instead of the tests for imposition of a Grampian condition and goes on to say that the condition will offer the reasonable scientific basis on which to avoid harm to the integrity of the Protected Sites. It is also suggested that the Grampian test can also be satisfied as there is at least a prospect that the measures can be implemented within the lifetime of the permission.
37. The Appellant also recognised that the approach offered by way of the condition/s and/or UU was not particularly unique and that no exceptional circumstances were being offered to justify a departure from the normal approach of securing the mitigation at the time of granting planning permission. This was not envisaged as being a problem, but rather, if adopted more widely, was suggested as being a solution to allow more permissions to be granted to address the housing shortage despite the prevailing water abstraction constraints.
38. I have taken into account the Appellant's evidence, including the shadow Habitats Regulations Assessment¹⁰, but I find that an issue remains with the Grampian condition and the UU in terms of the tests of reasonableness and how they interact with the different requirements to secure effective mitigation under the Habitats Regulations. As the competent authority under the Habitats Regulations, I am required to be satisfied that no reasonable scientific doubt remains about the proposal's impact on the integrity of the Protected Sites at the time of granting planning permission¹¹. I am mindful of the high bar set and that sometimes, decisions may be necessary on the basis of imperfect evidence¹². However, whilst the evidence is clear on what the effects would be and how they have been minimised through design as far as possible, the two possible solutions to mitigating the residual effects are not fixed. I am presented with only a high level of detail in relation to SNOWS as one option, and even less detail about what a site-specific Water Mitigation Strategy would look like if that were the chosen option. The evidence has not clarified precisely by when either option would be implementable.

⁹ Dated January 2024

¹⁰ Biocensus, dated July 2023

¹¹ Grace and Sweetman v Grace v An Bord Pleanala (C-164/17)

¹² WWF-UK Ltd and RSPB v SoS Scotland C.M.L.R. 1021 [1999] Env LR 632

39. Whilst I understand the way in which either solution would operate if it were available, neither are strictly available to me as part of this scheme now. Rather, the solutions offered are essentially shifting the burden of proof to a future date, depending on what change in circumstances may occur first. This is not sufficient precision for me to rely on to satisfy my duties under the Habitats Regulations and, without fettering the interests of future decision makers, would appear to dispense of the precautionary approach necessary when deciding such matters.
40. Ultimately, the tests for imposition of a Grampian condition and CIL tests¹³ for a planning obligation cannot overrule the duties incumbent on a competent authority under the Habitats Regulations. The test for conditions, and/or of the necessity and reasonableness of a planning obligation will form part of the Appropriate Assessment. If the conditions/S106 measures to secure mitigation are not adequate to eliminate the scientific doubt about the schemes' effect on the integrity of the Protected Sites, then planning permission cannot be granted. That is the case here. Whilst I understand the purpose of the condition and UU to provide some parameters about the confidence of future mitigation measures being securable, they are not robustly secured through either mechanism at this key juncture and that the scheme is a multi-stage consent does not provide me the necessary certainty either.

Reasons of overriding interest

41. Where a plan or project cannot mitigate its impacts on any protected site, the Habitats Regulations allows for it to proceed where there are imperative reasons of over-riding public interest, and if the necessary compensatory measures can be secured. There do not appear to be any imperative reasons of over-riding public interest to support the grant of this scheme, nor have any alternative compensatory measures been advanced.
42. Consequently, the proposed development would harm the integrity of the Protected Sites, with particular regard to water abstraction, thus conflicting with, in particular, Policy 31 of the Horsham District Planning Framework (adopted 2015) which seeks to protect the hierarchy of designated sites and habitats. The likely significant effect on the Protected Sites also brings the scheme into conflict with the Habitats Regulations and the Framework.

Five year housing land supply

43. It is common ground between the parties that the Council can only demonstrate a 2.9 year supply¹⁴ of deliverable housing sites relative to the five year requirement under the National Planning Policy Framework (the Framework). As the annualised requirement is 911 dwellings, the shortfall is at least around 1,800 dwellings which I regard as a significant shortfall and which the Council do not envisage being addressed until the adoption of the eLP.
44. Under the Framework, where the necessary housing land supply cannot be demonstrated, paragraph 11 d) is engaged. This requires that planning permission should be granted unless, (i), the application of policies in the Framework that protect areas or assets of particular importance provide a clear reason for refusing the development proposed; or (ii) any adverse impacts of

¹³ Regulation 122 of the Community Infrastructure Levy Regulations 2010, as amended

¹⁴ As confirmed by the 2022/2023 Annual Monitoring Report published January 2024

doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

Planning Balance

45. By virtue of the absence of certainty on the mitigation measures that could be secured at this point in time to protect the integrity of the Protected Sites, the scheme is in conflict with the Habitats Regulations and the development plan, when taken as a whole. Footnote 7 of the Framework sets out the protected areas and assets of importance, and includes habitat sites. As I have found there to be harm to the Protected Sites, there is a clear reason why the development should be refused having regard to the Framework. Therefore, I cannot proceed to the tilted balance under Framework paragraph 11 d) ii).
46. Nonetheless, there would be public benefits from the scheme, as agreed by the parties. These would take the form of the contribution to the local housing stock from the 55 new dwellings to respond to the identified shortfall in housing land. As 40% of the dwellings would also be affordable, (up to 22 units), there would be a notable contribution to meeting the unmet affordable housing need in the area. The boost to the supply of housing and provision of affordable housing at the scale proposed is a significant benefit of the scheme.
47. The scheme would also deliver a Biodiversity Net Gain on the site equivalent to more than 20%, subject to future layout, landscaping and conditions details. This would be a modest additional benefit of the scheme. The provision of traffic calming along Littleworth Lane and inclusion of a pedestrian/cycle connection are also modest additional public benefits.
48. The construction phase would also generate an economic boost to the area, albeit of a modest duration. The future occupation of the proposed dwellings by incoming residents would also generate economic benefits throughout the lifetime of the development. These are also capable of attracting moderate weight.
49. However, even considered together, these benefits are not sufficient to outweigh the identified harm to the Protected Sites or the conflict with the development plan such that they indicate that a decision should be taken other than in accordance therewith. There are no other considerations advanced that do so either.

Other Matters

50. A number of interested parties took part in the hearing to elaborate on concerns raised in writing about the scheme, principally in relation to the effect on highway safety and capacity, drainage, and on neighbouring occupiers. Some of these issues may also be relevant to raise in connection with the Council's eLP consultation currently underway. In any event, the matters raised were not in dispute between the parties and as the appeal is failing for reasons relating to the main issue, they are not determinative.

Conclusion

51. For the reasons outlined, the appeal is dismissed.

H Nicholls

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Richard Turney	Counsel, Landmark Chambers
Mr Peter Rainier	DMH Stallard
Mr Tim Wood	Stuart Michael Associates
Ms Erica Peck	Rydon Homes Ltd
Rob Bourn	Orion Heritage
Dr Stephanie Wray	Director Nature Positive and RSK Biocensus

FOR THE LOCAL PLANNING AUTHORITY:

Mr Adrian Smith	Major Applications Team Leader
Mr Matthew Porter	Senior Planning Officer
Mr Clark Gordon	Water Neutrality Project Manager

INTERESTED PARTIES:

Mr & Mrs Webb	Local resident
Councillor Green	West Grinstead Parish Councillor
Mr Geoffrey Sirley	Local resident
Councillor Joanne Knowles	West Grinstead Ward & Parish Councillor

DOCUMENTS RECEIVED AFTER THE HEARING:

DOCUMENT 1	Signed S106 legal obligation
DOCUMENT 2	Email with 2 No revised planning conditions
DOCUMENT 3	Email from the Council on 5YHLS
DOCUMENT 4	Email from the Appellant on the 5YHLS
DOCUMENT 5	Email from the Council with link to 2022/2023 Annual Monitoring Report