

FAREHAM

BOROUGH COUNCIL

Report to Planning Committee

Date **12 September 2018**

Report of: **Director of Planning and Regulation**

Subject: **HOW PROPOSALS FOR RESIDENTIAL DEVELOPMENT
SHOULD BE CONSIDERED IN THE CONTEXT OF THIS
COUNCIL'S CURRENT 5 YEAR HOUSING LAND SUPPLY
POSITION**

SUMMARY

At their meeting on the 15th November 2017, the Planning Committee received a report providing an overview of the Cranleigh Road, Portchester planning appeal decision. The report set out the implications of the planning appeal decision for the Council's 5 Year Housing Land Supply (5YHLS) position and advised Members on the approach they should adopt in the determination of planning applications for residential development.

A judgment by the Court of Justice of the European Union in April 2018 followed by the publication of the revised National Planning Policy Framework on 24th July, have implications for how planning applications for residential development should now be determined.

The following report sets out the implications of the Court of Justice of the European Union judgment and the revised National Planning Policy Framework, for those making decisions on planning applications for residential development.

RECOMMENDATION

That the Committee note the content of the report.

INTRODUCTION

1. On 14th August 2017 planning permission was granted on appeal for the erection of 120 dwellings on land North of Cranleigh Road in Portchester (Appeal Ref: APP/A1720/W/16/3156344). One of the Council's grounds for refusing planning permission was that it was unnecessary development in the countryside given the Council's five year housing land supply (5YHLS).
2. The Inspector concluded, contrary to the Council's case that the Council could not demonstrate a 5YHLS, and that permission should be granted. The Inspector's conclusion was that the Council could demonstrate just over two years housing supply in August 2017, considerably below a 5YHLS.

Implications for this Council's decision making on residential proposals prior to 24th July 2018

3. In the report to the Planning Committee on the 15th November 2017, Members were advised of the following:

As Members will be aware, the starting point for the determination of planning applications is section 38(6) of the Planning and Compulsory Purchase Act 2004:

"If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

In determining planning applications therefore, there is a presumption in favour of the policies of the extant Development Plan, unless material considerations indicate otherwise. Material considerations include the planning policies set out in the NPPF, and this contains specific guidance in paragraphs 47, 49 and 14 for Councils unable to demonstrate a 5YHLS.

Paragraph 47 of the NPPF seeks to boost significantly the supply of housing, and provides the requirement for Councils to meet their OAHN, and to identify and annually review a 5YHLS including an appropriate buffer. Where a Local Planning Authority cannot do so, paragraph 49 of the NPPF clearly states that:

"Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a 5-year supply of deliverable housing sites." (emphasis added)

Paragraph 14 of the NPPF then clarifies what is meant by the presumption in favour of sustainable development for decision-taking, including where relevant policies are "out-of-date". For decision-taking (unless material considerations indicate otherwise) this means:

*Approving development proposals that accord with the development plan without delay;
and*

Where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

- *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or*
- *specific policies* in this Framework indicate development should be restricted. (*for example, policies relating to sites protected under the Birds and Habitats Directive and/or Sites of Special Scientific Interest; Green Belt, Local Green Spaces, Areas of Outstanding Natural Beauty, Heritage Coast and National Parks; designated heritage assets; and locations at risk of flooding or coastal erosion).*

The approach detailed within the preceding paragraph, has become known as the “tilted balance” in that it tilts the planning balance in favour of sustainable development and against the Development Plan.

(All text in italics above, under paragraph 3, is quoted directly from the Planning Committee report presented on the 15th November 2017).

4. Since the report was presented in November 2017, Members have considered a number of planning applications for residential development in areas designated as countryside in the adopted Local Plan, and have applied the tilted balance in their decision making.

Implications of the judgment of the Court of Justice of the European Union for assessing the impacts of development upon designated European sites

5. The judgment of the Court of Justice of the European Union (CJEU) relates to the assessment of impacts of new development upon important designated European sites. Before discussing the implications of the judgment, Officers have set out key background information in the following paragraphs.
6. The Solent is internationally important for its wildlife. Each winter, the Solent hosts over 90,000 waders and wildfowl including 10 per cent of the global population of Brent geese. These birds come from as far as Siberia to feed and roost before returning to their summer habitats to breed (source Solent Recreation Mitigation Strategy, December 2017).
7. To protect these over-wintering birds, Special Protection Areas (SPAs) have been designated by the Government. An SPA is a designation under the European Union Directive on the Conservation of Wild Birds. Under the Directive, Member States of the European Union (EU) have a duty to safeguard the habitats of migratory birds and certain particularly threatened birds. Three SPAs have been designated within The Solent. Two of these (the Solent and Southampton Water and the Portsmouth Harbour SPAs) effectively run along the whole of this Borough’s coastline.
8. Legislation (the Conservation of Habitats and Species Regulations 2017) requires mitigation for any impact which a proposed development, in isolation or in combination with other plans, is likely to have on a SPA. It requires local planning authorities to ensure the necessary mitigation will be provided before they grant planning permission. In practice this means that that development proposals cannot be consented or proceed unless there will be no adverse impacts on the integrity of European sites (such as SPAs). If significant effects are assessed as likely to occur, suitable measures for mitigation are required to reduce impacts to acceptable levels.

9. In deciding whether a proposal might have a significant effect or not, this Council is required to undertake an assessment on a case by case basis. For all plans and projects, particularly involving any new residential units, the first part of the assessment involves formal *screening* for any likely significant effects (either alone or in combination with other plans). The established legal position in the UK for many years has been that mitigation measures should be taken into account in screening proposals under the legislation.
10. Members will be aware that the Solent Recreation Mitigation Strategy has been developed and implemented to address the very issue of mitigating the impacts of additional residential development upon nearby SPAs. As this Council ensures that financial contributions are secured towards the Solent Recreation Mitigation Strategy in all relevant cases, Officers have taken the mitigation measures into account at the screening stage. Taking account of the mitigation, Officers have concluded that there would be no significant effects and accordingly have not undertaken any further assessment before proceeding to determine the application. Because of the borough's proximity to these SPAs, this approach applies to all applications for net new residential development.
11. However, this position has changed as a consequence of a recent judgment of the CJEU in the case of *People Over Wind, Peter Sweetman v Coillte Teoranta*.
12. Whilst it is not intended to set out the details of the case in full here, the Court has made it clear in its judgment that it is not permissible to take account of measures intended to avoid or reduce the harmful effects of development upon a European site (such as an SPA) at the screening stage.
13. It was the Court's view that the existence of mitigation measures in the first place "presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out." Taking account of mitigation measures at the screening stage would "be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the Directive".
14. In order to ensure that this Council's planning decisions fully accord with this judgment, Officers are undertaking detailed assessments (known as 'Appropriate Assessments') on all relevant proposals. Members will see reference to the Appropriate Assessments within Officers' reports to the Planning Committee for relevant applications.

Implications of the judgment of the CJEU for deciding planning applications for residential development

15. The ruling by the CJEU also has wider implications for how planning applications, especially those for new residential development in the countryside, are determined. This is explained in detail below.
16. The revised National Planning Policy Framework (NPPF) was published on the 24th July 2018. The introduction to the NPPF states that:

"Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise. The National Planning Policy Framework must be taken into account in preparing the development plan, and is a material consideration in planning decisions. Planning policies

and decisions must also reflect relevant international obligations and statutory requirements.”

17. “The presumption in favour of sustainable development” is set out in paragraph 11 of the revised NPPF and states:

Plans and decisions should apply a presumption in favour of sustainable development....

For decision-taking this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

18. The footnote to paragraph 11 explains that ‘out-of-date’ includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out elsewhere in the NPPF); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years.

19. Paragraph 177 of the NPPF states that:

The presumption in favour of sustainable development does not apply where development requiring appropriate assessment because of its potential impact on a habitats site is being planned or determined.

20. In approaching decision-making on planning applications in the light of the recent CJEU judgment, the position now appears to be as follows:

a) The tilted balance under paragraph 11 of the NPPF is triggered “*where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date*”;

b) In such cases, the tilted balance requires permission to be granted unless, inter alia, “*the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed*”;

c) such ‘policies in this Framework’, as referred to in the preceding paragraph, include “*habitats sites*”, which in turn include Special Protection Areas (SPAs); and

d) Paragraph 177 states that “*The presumption in favour of sustainable development does not apply where development requiring appropriate assessment because of its*

potential impact on a habitats site is being planned or determined”.

21. Taken on its face value, and as a consequence of the ruling of the CJEU, paragraph 177 removes the presumption in favour of sustainable development as a result of an Appropriate Assessment being required. This would mean in turn that this Council is no longer required to undertake the (tilted balance) test set out at paragraph 11 of the NPPF, quoted in paragraph 20 of this report, for any applications for new residential development.
22. Officers are aware that the approach set out in the preceding paragraph (being that the ‘tilted balance’ is permanently disapplied as a consequence of paragraph 177 of the NPPF) is subject to challenge elsewhere in planning appeals in England. Arguments advanced are that such an approach is not required by the language of paragraph 177 and would be wholly unprincipled, since there is no good reason why a proposal that has passed an Appropriate Assessment (and the adverse effects on integrity have been ruled out as a result of proposed mitigation measures) should not benefit from the tilted balance in the same way that a proposal that is not subject to an Appropriate Assessment would. Neither is harmful, so there is no reason why a different approach would apply to them. Accordingly, paragraph 177 disengages the tilted balance only while the appropriate assessment is awaited or being carried out or if it has come down against the proposal.
23. In light of the ‘newness’ of the revised NPPF, and in the knowledge of challenges underway against how paragraph 177 should be applied, Officer reports will assess planning applications adopting a precautionary approach for the present time until such time as the Council can robustly demonstrate that it has a 5YHLS or there is further clarity provided from the Courts or government. In applying a precautionary approach, Officers will firstly consider development proposals without applying the tilted balance set out in Paragraph 11 of the NPPF, and then secondly by applying the tilted balance. Determining development proposals in this way, together with taking into account other material planning considerations, will ensure that the decisions of this Council on this point are legally robust.

CONCLUSION

24. That the contents of this report be noted.

Risk Assessment

25. If the approach set out at paragraph 23 is not followed by decision makers, there is a risk that decisions could be successfully challenged by way of Judicial Review.

Background Papers: Planning Inspectorate appeal decision on Cranleigh Road Portchester (Appeal reference APP/A1720/W/16/3156344)

Report to Planning Committee on 15th November 2017

Enquiries:

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