

**IN THE MATTER OF
THE TOWN AND COUNTRY PLANNING ACT 1990**

**AND IN THE MATTER OF
‘APPEAL A’: LAND AT NEWGATE LANE EAST (NORTH)
‘APPEAL B’: LAND AT NEWGATE LANE EAST (SOUTH)**

**CLOSING SUBMISSIONS
ON BEHALF OF
THE APPELLANTS**

1. These Closing Submissions are made behalf of the Appellants in respect of two conjoined appeals for residential development on adjacent parcels of land (75 dwellings on Appeal A ‘North’; 115 dwellings on Appeal B: ‘South’) off Newgate Lane East in Fareham, Hampshire. Together they will provide some 190 homes (including 40% affordable housing) in the context of an acknowledged shortfall in the Fareham Borough 5-year housing land supply.

2. In the light of the putative reasons for refusal and evidence submitted, at the start of the inquiry, the Inspector identified eight Main Issues:
 - (1) The effect on the character and appearance of the area with particular reference to the countryside and the gap between settlements;
 - (2) The effect on the safety and convenience of highway users;
 - (3) Effect on the supply of housing and affordable housing;
 - (4) Whether the appeal sites are sustainably located;
 - (5) The effect on the spatial strategy;
 - (6) The effect on European Protected Sites and the biodiversity of the appeal sites;

- (7) The effect on best and most versatile agricultural land;
- (8) Whether the proposals make adequate provision for infrastructure.

3. Of these, the question of infrastructure provision [Main Issue 8] has been satisfied by the appropriately worded s. 106 obligations now agreed (albeit unilateral).
4. Similarly, for Main Issue 6, the impact on European sites has been agreed to be mitigated through off-site measures now secured, and the on-site biodiversity objection (chamomile on the South site) has been overcome by a management plan. The parties are agreed that the Inspector, as ‘competent authority’ is able favourably to conclude the ‘appropriate assessments’ under the Habitats Regulations and para. 177 of the NPPF is not engaged.
5. As regards agricultural land quality (in respect of the North site) [Main Issue 7], the Council confirmed that this matter would not justify refusal of planning permission. This is right, given footnote 53 of the NPPF. For details, see Mr Weaver’s evidence: FL&BH5.5 12.95-12.101 and Appx 8.
6. In addition, during the course of the inquiry, the local planning authority abandoned its objection in terms of highways capacity [part of Main Issue 2] and withdrew its evidence in that respect.
7. I begin, however, with considering the development plan and the NPPF. I then take the remaining Main Issues in turn. Finally, I finish with the Planning Balance and Conclusions.

The Development Plan and the NPPF:

8. The development plan consists of the Local Plan Part 1 [‘the Core Strategy’/‘CS’] adopted in August 2011, the Local Plan Part 2 [‘the Development Sites & Policies’/‘DSP’] and the Local Plan Part 3 [‘the Welborne Plan’], both adopted in June 2015.

9. The spatial strategy in the CS is set out in CS2, which sets out development needs in the plan period, CS6, which establishes the settlements and allocations to deliver development needs, in CS14 which restricts development outside settlement boundaries and allocations and in CS22, which establishes the principle of strategic gaps. This strategy is then delivered in the DSP through its allocations, its identification of settlement boundaries and strategic gap boundaries and through DSP6, which is the counterpart of CS14. In addition, DSP40 provides an ‘exceptions’ policy to release land for development outside settlement boundaries/within the strategic gaps, if the Council cannot demonstrate a 5-year housing land supply¹.
10. The Appellants, for the reasons set out below, consider the proposals to fulfil the criteria in DSP40 and, as that policy acts as an exception to the restrictive policies CS14, CS22 and DSP6, the proposals are, consequently, in compliance with the development plan, taken as a whole². As such, para. 11(c) of the NPPF is engaged and they should be permitted ‘without delay’.
11. However, if there were breach of any of the criteria of DSP40, breach of the development plan in this case should not prevent development here and permission should still be granted by reference to the second limb of s. 38(6) of the 2004 Act. This is because while the NPPF states that the planning system should be ‘genuinely plan-led’, that assumes the development plan is up to date. Otherwise, the development plan would be to act as a fetter on sustainable development³. Here, the development plan is not up to date⁴.
12. First, the CS policy CS2 pre-dates the NPPF 2012 and does not represent or purport to represent an up-to-date NPPF-compliant assessment of development needs and the DSP did not alter that position⁵. The spatial strategy outlined above, therefore, is predicated on an out-of-date assessment of development needs. This is demonstrated in practice by the emerging Local Plan, which has to grapple with how to find additional land for development. Both settlement boundaries and gap designations are

¹ Confirmed, Parker xx CBAC, Day 8

² Ibid & see *R v Rochdale MBC (ex parte Milne)*, per Sullivan J

³ Weaver rx, Day 9

⁴ Parker xx CBQC, Day 8

⁵ Tiley proof FL&BH6.1, para’s 4.17-4.21

under active review, with the Reg 18 draft plan showing proposed allocations and an area of search within what is currently the adopted gap/countryside⁶.

13. In line with the judgement of the Supreme Court in *Hopkins Homes*, the strategy and the settlement/gap boundaries resulting from an out of date assessment of development needs can, therefore, properly be considered ‘out of date’ and given reduced weight accordingly⁷.
14. Secondly, it is common ground that the Council cannot demonstrate the required 5-year housing land supply. As such, Footnote 7 of the NPPF renders the ‘most important [policies] for determining the application’ out of date. It is agreed⁸ that, in terms of locational principle for the development proposed, the ‘most important policies’ are CS14, CS22 and DSP6 and – most particularly - DSP40 and are, accordingly, ‘out of date’.
15. The fact that the most important policies are out of date has two important consequences:
 - the ‘tilted balance’ in para. 11(d)(ii) is engaged⁹; and,
 - the weight to be given to any breach of these out-of-date policies within that tilted balance is reduced accordingly¹⁰.

Main Issue (1): effect on the landscape and strategic gap:

16. It is common ground that the sites do not lie within or form part of a ‘valued landscape’ within the meaning of para. 170(a) of the NPPF. As such, it is ‘off the bottom of the scale’ of the hierarchy implied by para. 171 of the NPPF. Indeed, as

⁶ See illustrated at Weaver Update proof FL&BH5.5, pp 16 and 17; this changed in the Reg 19 plan, but as we know, that was predicated on an erroneous approach to housing requirements, which have now returned to the Reg 18 position – see commentary at Weaver Update proof

⁷ See Weaver Update Proof FL&BH5.5, para. 8.32; CDJ5, Lord Carnwath at para.63; and agreed, Parker xx CBQC, Day 8

⁸ Parker xx CBQC, Day 8

⁹ There being no suggestion from the Council that para. 11(d)(i) is engaged – see Parker xx CBQC, Day 8; [& see comments above on Main Issue 6]

¹⁰ Agreed Parker xx CBQC, Day 8

said in Opening, this is, in truth, a pretty unlovely landscape, the site being bounded on both sides by roads and influenced by development both adjacent and in the near vicinity. In this flat, degraded peri-urban coastal fringe, it is indicative that the nearest major landscaped area is the visual buffer of the tree belt round the sewage works.

17. Further, the landscape character and visual impacts of the proposals are limited almost exclusively to the sites' near edges. The only wider views identified by Mr Dudley for the Council were limited to the outer edge of Bridgemarky to the east.

18. Mr Dudley accepted that it is axiomatic, if urban extensions were to be permitted (generally, or specifically under DSP40), it would be inevitable that existing urban areas would experience a change from being on the edge of the settlement to having new development placed beyond them. Similarly, he accepted that it would be axiomatic for any greenfield urban extension that there would be a site-level change in character from 'green' to 'brown'. In addition, he recognised that settlement in the form of residential development is not uncharacteristic in the receiving landscape – a fact evidenced not only by the influence of Bridgemarky to the east, but also the settlement of Peel Common which wraps round the site on the south and west.

19. The once-open arable landscape in the immediate vicinity of the appeal sites (LCA 8.1) has been carved up, now, by Newgate Lane East, creating, as Mr Atkin observed, a 'pocket' into which the development proposals fit themselves. Care has been taken in the (illustrative) masterplan to set development back from the existing residential roads to the west and south, so existing residents look out over open space and ecological mitigation areas, while, similarly, the residents of Hambrook Lodge in the centre of the site have their amenity secured by open space and soft landscaping; down the eastern edge, following the line of Newgate Lane East, the additional landscaping reinforces the effect of that road's own landscape planting¹¹.

20. All of this – location in an area not a 'valued landscape', considerable landscape and visual enclosure (the tight 'perceptual envelope' as Mr Dudley put it¹²), careful positioning in relation to existing development and the considered landscaping

¹¹ See eg Doc 17(a) Composite landscape plan

¹² During xx, Day 1/2

proposals themselves – leads to the minimum landscape and visual impact concomitant to a development of 190 dwellings.

21. DSP40(iii) sets a test of ‘minimising’ landscape impacts. It recognises (as it must) that to develop any greenfield site will (given the structure of GLVIA) register an adverse landscape and visual effect. It does not seek ‘no harm’, therefore, as such a test would make the policy self-defeating.
22. As such, it was wrong of the Council¹³ to suggest that a LVIA finding of ‘minor to moderate adverse impact’ to the immediate landscape receptor would lead to a breach of DSP40(iii). Even under CS14/DSP6, such a finding is not unacceptable¹⁴ (it is axiomatic), but as Ms Parker agreed¹⁵, DSP40(iii) is less restrictive than CS14/DSP6 – its job is to facilitate development in the countryside/gap where there is no 5-year land supply. Its terms of ‘minimising’ impact are met by the careful location, scale, disposition and landscape treatment here proposed and the entire absence of any wider landscape/visual harm arising from the development.
23. Similar observations may be made in respect of the strategic gap. Again, DSP40(iii) operates as an exception to CS22. CS22 requires that ‘significant’ harm to the integrity of the gap be avoided as regards coalescence and identity of settlements. DSP40(iii) would relax that even further – the impact (ie ‘significant’ harm to the integrity of the gap) should be ‘minimised’.
24. That has been achieved by these proposals, located as they are to the east of Peel Common. The strategic gap is between Stubbington and Gosport at this point. Although Peel Common does not have a policy settlement boundary, it is clearly distinct from the settlement of Stubbington. One leaves Stubbington before one arrives at Peel Common. One leaves Peel Common before one arrives at Stubbington. Lying to the east of Peel Common, the appeal sites play no role in this relationship and their development will similarly leave it unchanged¹⁶.

¹³ Weaver xx DL, Day 9

¹⁴ Weaver rx CBQC, Day 9

¹⁵ Parker xx CBQC, Day 8

¹⁶ This para: see Atkin proof and xic (Day 2), unchallenged in xx (Day 2/3)

25. Indeed, as to the separation function of land between settlements, it is apparent from the Appellants' evidence that the appeal sites could be developed, and all the land up to the borough boundary to their east could be developed, without any functional harm to the separation of the settlements to the west – quite simply they play no role in preserving Stubbington's 'separate identity'.
26. Consequently, by locating development to the east of Peel Common, the appeal schemes 'minimise' the impact on the gap, as they are not necessary for its functional effectiveness – any more than is the land to their east, proposed under the Reg 18 dLP as allocation HA2. The test in DSP40(iii) is met.
27. Thus, yes there will be a localised landscape and visual impact on a 'non-valued' landscape, and yes there will be development in the strategic gap where currently there is not, but, in both cases, the impacts are 'minimised' by location and design, and the test in DSP40(iii) has been met.
28. Main Issue 1 is not a matter that would justify the refusal of permission.

Main Issue (2): highway safety and capacity

29. As noted above, the Council originally refused permission alleging a 'severe' impact on the capacity of the highway network. Following cross-examination, that allegation was abandoned and the evidence relating to it was withdrawn.
30. The County Council, through the Borough Council, maintained a safety objection in respect of right hand turns on the junction with Newgate Lane and Newgate Lane East.
31. As the Appellants' evidence demonstrates, at these flows and at these speeds and in these visibility conditions, it is perfectly commonplace and in accordance with guidance to propose an indicative arrow. It seems that Hampshire (or officers within it – for there is no published policy to this effect) oppose unsignalized right-hand turns, but each junction must be assessed on its own merits and the national guidance is that

fully signalled right-hand turning is only required where 85th% speeds exceed 45mph¹⁷.

32. These speed measurements are to be taken in accordance with standardised methodology in order to achieve consistency of approach¹⁸. This looks for measurements on 'neutral' days (eg not weekends or Bank Holidays) within 'neutral' months and outside peak hours - ie typically 10.00-12.00 and 14.00-16.00¹⁹.
33. Caution must therefore be used in relation to Mr Mundy's Nov 2020 surveys as²⁰ they were conducted in national Lockdown and included two weekend days out of four. But, even taking that into account, neither they nor the previous two periods of traffic survey provided by HCC to the Appellants show an 85th% speed of more than 45mph between the indicated off-peak hours 10am-12 noon and 2pm-4pm. No separate all signalled right hand turn is required.
34. Mr Mundy sought to pray in aid experience at other junctions, but as no traffic flows, traffic speeds or percentage of right turners was provided, there is no means of assessing comparability of those junctions with this one. Safety record is generally judged by personal injury records in the previous 3 years. Looking at accidents over 10-year period, therefore, gives a misleading perspective in any event.
35. The key evidence is the performance of the junction itself. At present, it operates safely with 20 odd right-turners in the AM peak facing circa 1600 vehicles northbound²¹. In the future, it will operate effectively as a priority junction at all times other than the AM peak – ie most of the time, and safely²². At the AM peak, the agreed modelling shows the right turners making use of the intergreens²³. That is *safer* than at present, as the northbound traffic is held by a red signal²⁴.
36. The net effect is a *greater* degree of safety than at present. In short, this is not a scheme which should be dismissed on highways safety.

¹⁷ DMRB,CD123; CDH.3

¹⁸ DMRB, CD185; SoCGT, Appx F

¹⁹ Ibid p.9

²⁰ See evidence of Hoskins x, xx and rx, Days 5 and 6

²¹ Mundy xx CBQC, Day 5

²² Hoskins xic, Day 5

²³ Hoskins – agreed LinSig modelling at Appx F, pp. 308 (see also updated LinSig results: Inq Doc 25)

²⁴ Hoskins xic and rx, Days 5 and 6

Main Issue (3): effect on the supply housing and affordable housing

37. It is agreed that the Council cannot demonstrate a 5 year housing land supply. As such, as noted above, para. 11(d) of the NPPF is engaged by Footnote 7, ‘the most important policies’ are deemed out of date and the operation of the ‘tilted balance’ in para 11(d)(ii) is brought into effect.
38. The actual shortfall is a matter of dispute but the Council and Appellants agree that whichever party is closest in their assessment, the shortfall remains material and the ‘most important’ policies, now deemed ‘out-of-date’, are to have their weight reduced accordingly²⁵.
39. Again, the absence of a 5-year housing land supply also triggers the operation of development plan policy DSP40, which itself provides an exception to the countryside/gap constraining policies, by encouraging development outside settlement boundaries, subject to its own criteria.
40. The Appellants consider, on the evidence, that each of the criteria in DSP40 is met. However, as is apparent, DSP40 is itself a ‘most important policy for determining the applications’ (one might say it is *the* most important one), so para. 11(d) operates to render it ‘out of date’ – in short, its criteria are not apparently sufficiently flexible (or being sufficiently flexibly applied) to allow for the establishment of a 5-year housing land supply. As such, if there is a breach of any individual criterion (which is not at all accepted), that breach should similarly be accorded reduced weight in the planning balance under para. 11(d)(ii).
41. 190 dwellings, with 40% as affordable, will make a real and meaningful contribution to a long standing and woeful housing shortfall, providing real homes for real families. That is a benefit to be accorded substantial weight. Ms Parker²⁶ corrected her

²⁵ Parker xx CBQC, Day 8, despite Mr Lintott’s disavowal of that evidence in xx of Mr Weaver, day 9

²⁶ Parker xic, Day 7

written evidence, orally, and accepted that ‘significant’ weight should be given to the provision of housing and for affordable housing.

42. The LPA pins its hopes on a future improvement in supply rendered uncertain and increasingly distant by both its continued reliance on ‘jam tomorrow’ from Welborne, and by having taken the gamble with its Regulation 19 emerging Local Plan that it could bank on its housing requirement being *reduced*. The Council lost that gamble and must now find (at least) the numbers originally set out in the Reg 18 plan.
43. None of that changes the support to be given to these appeals proposing housing here and now, in the face of a current and continuing shortfall. Bargate Homes has contractual control of both the North and South sites and, being owned by Vivid, one of the largest affordable housing providers in the south of England, has no need of bank funding and will be able to proceed to build out as soon as conditions are discharged. Not only would Vivid deliver the much-needed affordable housing, Bargate’s commercial profits are re-invested by Vivid in their wider affordable housing programme.
44. That is an especial benefit given that the Council has managed to accrue a 1,806 shortage of affordable dwellings 2011-2019²⁷. Households in need have risen by 1,000 to 3,000 since 2016²⁸ and the identified need of 220 dpa²⁹ can be compared to an average delivery of 76dpa since 2011. Of the 3,500 affordable houses required to be delivered by 2036³⁰, the Council only expects to deliver only 800³¹.
45. Sadly, the Council’s hope of achieving 1,800 affordable units (30%) from Welborne must now be revised. The Council has had, now, to accept a 10% affordable unit provision. Thus, what would have been 1800 comes down to 600 (not all of which will be delivered by 2036 on the Council’s own trajectory)³².
46. The appeal site’s contributions of 40%, in the context of the above should be welcomed indeed. Ms Parker is right to accord it (orally at least) significant weight.

²⁷ Tiley Proof FL&BH6.1, Table 16.3

²⁸ CDG.8, p. 11

²⁹ CDG.8, p. 14

³⁰ CDG.8, p. 14

³¹ CDG.8, p. 17 (absent Welborne).

³² CDG.5, Table 3

Main Issue (4): whether the proposals are sustainably located:

47. No accessibility objection is raised by HCC. This is telling. It is not that HCC did not engage with the issue of accessibility, It did, as is made clear in its consultation responses³³. It sought – and obtained – contributions to improvements to walking and cycle routes and to continued bus subsidy. With these secured, it was content that the appeal sites were accessibly located for access to services and facilities by walking, cycling, bus and rail transport.
48. It was Ms Parker, for the Borough Council, who sought to dispute accessibility as part of her case against the development under policy DSP40(ii). However, in order to do so she had, first, to don the mantle of a highways expert, despite no highways expertise and unsupported by highways expert evidence³⁴ and, secondly, adjust the applicable guidelines on preferred walking distances. Without this, the agreed distances³⁵ show a significant range of services and facilities across all the land uses needed to serve residential development: education, employment, retail, health provision, leisure
49. That this is a sustainable location should come as no surprise. Although in the ‘countryside’ for policy purposes, the sites lie next to Gosport (and hence the services in Bridgemary), immediately to the south of Fareham and its train station and between the employment locations associated with the Daedelus Airfield and HMS Collingwood. As well as walking and cycling routes, there is bus provision within easy walking distance of the sites and the proposed Tocan crossing will improve accessibility for both proposed and existing residents.
50. Accessibility is not a binary/’hard edged’ matter, or a ‘tick box’ as Mr Jones put it, as the NPPF, section 9, makes clear. The opportunities for sustainable travel vary with location and must be maximised by each development³⁶. That is what has been done

³³ Jones Rebuttal FL&BH2.4, Section 2

³⁴ Parker xx CBQC, Day 6

³⁵ SoCGT, tables 2.5 and 2.6 and Fig 8.

³⁶ NPPF para. 108

here. The Travel Plan has been approved as appropriate and its targets for modal share and modal shift agreed as achievable³⁷. Ms Parker was misguided in seeking to doubt the accessibility of the site in those terms³⁸.

51. It may be noted that Policy DSP40(ii), in addition to requiring sustainable location, also requires ‘adjacency’ to adopted settlement boundaries. This has been construed by the Council itself as being satisfied by ‘close proximity’ rather than ‘abutting’³⁹. Which makes eminent sense. In addition, even ‘poor’ connectivity has not, in the past, led the Council to conclude DSP40(ii) to have been breached⁴⁰, while on at least one occasion⁴¹ non-adjacency (ie breach of DSP40(ii)) has been found by the Council *not* to lead to a conclusion of a breach of policy DSP40 (and the development plan) taken as a whole.
52. This sensible, flexible approach to a permissive policy intended to facilitate development in the context of an acknowledged 5 year land supply failure has, sadly, not been the approach of Ms Parker in formulating her case against these proposals. Rather, she has taken ‘adjacent’ to mean ‘contiguous with’ and therefore ruled the appeal sites out by virtue of the settlement boundary of Bridgemary lying the other side of Brookers Lane.
53. The nonsense, in planning terms, of that is shown by contemplating what would have happened had the Reg 18 allocation HA2 been taken forward (or were it to be taken forward in the future). Then, the settlement boundary would move westwards, and the appeal sites would abut it. On Ms Parkers’ analysis, the DSP40(ii) test of ‘adjacency’ would now be met – yet the appeal proposals themselves would not have moved location, not would their accessibility to the services and facilities of Bridgemary have been altered.
54. In summary, policy DSP40(ii) is adequately satisfied by the appeal proposals and the sites may properly be concluded to be sustainably located, as acknowledged by the highways authority.

³⁷ SoCGT

³⁸ As, ultimately, she perhaps came to recognise – Parker xx CBAC, Day 6

³⁹ See Weaver Appx 4 and 5

⁴⁰ See Weaver Appx 6

⁴¹ See weaver Appx 14

Main Issue (5): Effect on the spatial strategy of the area:

55. The site is sustainably located by reference to accessibility by non-car means. The County Council Highway Authority, subject to certain infrastructure improvements, do not object on accessibility or sustainability grounds. They are right not to do so.
56. The site lies outside the adopted settlement boundaries and in a (currently) adopted gap. But these policies of restraint are not delivering and cannot deliver the present and future development needs of the Borough. Unsurprisingly, therefore, both are under review and will be replaced by the emerging local plan. Indeed, the Reg 18 (sensibly) proposed to replace the gap notation, identify a large housing allocation to the east of Newgate Lane East and further identify an area of search to the west for a 'strategic growth area'. As such, it cannot be said that this is a location in-principle contrary to any up-to-date spatial strategy.
57. In addition to the above, the *adopted* spatial strategy provides a permissive policy outside settlement boundaries in the form of DSP40. This acts as an exception policy to gap and countryside restraints where, as here, the Council cannot demonstrate a 5 year housing land supply. In those circumstances its criteria become the operative development plan policy tests for permission.
58. As indicated above, DSP40, too, is subject to being rendered out of date by para. 11(d) and Footnote 7 of the NPPF, but in its own terms, it is satisfied, on the Appellants' evidence, by these two proposals. They are well related to the adjoining settlement and cause no unacceptable landscape or highways impacts. As such, the proposals accord with the spatial strategy of the area, which is to permit development in such locations when needed to maintain a 5 year land supply and significantly boost the supply of housing.

Planning Balance: sustainable development

59. The schemes accord with policy DSP40 and the development plan 'taken as a whole' and should get the support of para. 11(c) of the NPPF.

60. In the alternative, they get the support of para. 11(d)(ii) of the NPPF in that their many and manifest benefits are not 'significantly and demonstrably' outweighed by any harms arising: they

- are acceptable in terms of highways safety and capacity;
 - are well located in terms of accessibility;
 - have limited impact on best and most versatile agricultural land;
 - cause only limited and localised landscape impact; and
 - have no material impact on the separate identity of settlements
- they bring forward 190 dwellings including 40% much-needed affordable dwellings in the context of a failure to be able to demonstrate a 5 year housing land supply and in the context of a severe and worsening affordable housing shortfall

61. These appeals are for proposals which amount to sustainable development, within the meaning of the NPPF and should be approved in the public interest.

Conclusion:

62. For all of the above reasons, and having heard the testing of the evidence, the Inspector is urged, respectfully, to allow both appeals and to grant permission for the development here sought.

CHRISTOPHER BOYLE QC

25th February 2021

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