

FAREHAM BOROUGH COUNCIL

Section 78, TOWN & COUNTRY PLANNING ACT 1990

STATEMENT OF CASE

**FAREHAM BOROUGH COUNCIL
(The LOCAL PLANNING AUTHORITY)**

LAND TO THE SOUTH OF ROMSEY AVENUE, FAREHAM

**FOREMAN HOMES LTD
LPA Ref: P/18/1073/FP
PINS Ref: APP/A1720/W/21/3271412**

20th MAY 2021

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1.0 Introduction

- 1.1 This Statement of Case (SoC) sets out Fareham Borough Council's ('the Council's') case in respect of an appeal ('the Appeal') made by Foreman Homes Ltd ('the Appellant') against the refusal to grant planning permission for an outline application for 225 Dwellings, Bird Conservation Area And Area Of Public Open Space With All Matters Reserved Except For Access (the 'Appeal Development').
- 1.2 The Application was refused planning permission for the 12 reasons set out in the Council's decision notice dated 21st September 2020.
- 1.3 The Planning Inspectorate ('PINS') has confirmed that the Appeal will be heard via an inquiry.
- 1.4 In advance of the inquiry, the Council will seek to agree one or more Statements of Common Ground and a Core Document list with the Appellant. It will also work with the Appellant to seek agreement on conditions and a Section 106.
- 1.5 The Council's evidence will address all reasons for refusal (save any which are resolved in advance of the inquiry) and will include reference to case law, appeal decisions and other materials relevant to its case.
- 1.6 The remainder of this SoC is structured as follows:
- **Section 2 – Appeal Development:** Provides a description of the Appeal Development.
 - **Section 3 – Appeal Site and Surrounding Area:** Provides a description of the Appeal Site and surrounding area and the relevant planning history.
 - **Section 4 – Reasons for Refusal:** Describes the Reasons for Refusal.
 - **Section 5 – Relevant Policy Framework:** Sets out the relevant national and local policy framework.
 - **Section 6 – Proper Approach to Determining this Appeal:** Outlines the correct approach to determining this Appeal with reference to relevant case law.
 - **Section 7 – Weight to be Afforded to adopted Development Plan Policies:** Sets out how adopted policies should be treated in the absence of a five-year housing land supply.
 - **Section 8 – The Council's Case:** Sets out the Council's case with

specific regard to the reasons for refusal and provides the planning balance.

- **Section 9 – Planning Conditions and s106:** Addresses conditions and Section 106 planning obligations.
- **Section 10 – Witnesses:** Sets out the Council’s anticipated Expert Witnesses.

2.0 Appeal Development

2.1 The Appeal Development (application P/18/1073/FP) is described in the Committee Report (FBC.1) dated 16th September 2020 as follows:

'Outline Planning Application For Residential Development Of 225 Dwellings, Bird Conservation Area And Area Of Public Open Space With All Matters Reserved Except For Access'

2.2 Further detail is given in section 3 of the Committee Report.

2.3 Matters of scale, appearance, layout and landscaping are reserved for future determination.

2.4 Access is not reserved. The proposed access arrangements are described in paragraph 3.2 of the Committee Report.

2.5 The Application was accompanied by an 'areas plan' (drawing no. 16.140.28) which shows the areas of the site intended for residential development, open space and bird mitigation.

2.6 The Application attracted a total of 494 objections from 308 residents, which are summarised in section 6 of the Committee Report along with the consultation responses.

3.0 Appeal Site and Surrounding Area

- 3.1** The Appeal Site comprises 12.55 hectares (approximately 31 acres) of Grade 1 (excellent quality) and Grade 2 (very good quality) agricultural land currently used for growing crops. The site is located outside of the defined urban settlement boundaries (to the south of existing houses in the urban area on Romsey Avenue).
- 3.2** The Appeal Site is part of a Primary Support Area (F21) as identified in the current use mapping to support the Solent Waders and Brent Goose Strategy 2020 ('SWBGS') (FBC.6).
- 3.3** To the immediate east of the Appeal Site lies land now in use as public open space in connection with the development of 120 houses on the north side of Cranleigh Road (planning application reference P/15/0260/OA) allowed on appeal in 2016 (appeal reference APP/A1720/W/16/3156344).
- 3.4** To the south-west of the Appeal Site lies Wicor Recreation Ground and the ground of AFC Portchester football club around which there is a band of mature trees.
- 3.5** There is no site-specific planning history relevant to the Appeal Site.

4.0 Reasons for Refusal

4.1 At the meeting of the Planning Committee held on 16th September 2020, Members of the Committee unanimously resolved to refuse planning permission for the following reasons:

'The development is contrary to Policies CS2, CS4, CS5, CS6, CS14, CS16, CS17 & CS18 of the Adopted Fareham Borough Core Strategy 2011 and Policies DSP2, DSP6, DSP13 & DSP40 of the Adopted Local Plan Part 2: Development Site and Policies Plan,

And paragraph 170 of the National Planning Policy Framework (NPPF), and is unacceptable in that:

- a) The provision of residential development in this location would be contrary to adopted Local Plan policies which seek to prevent additional residential development in the countryside;*
- b) The proposal fails to appropriately mitigate the likely adverse effects on the integrity of European Protected Sites which would arise as a result of the effect of the development on, and loss of part of, a Primary Support Area for Brent geese and waders;*
- c) The proposal would result in extra parking restrictions being placed on Beaulieu Avenue and Romsey Avenue and on-street parking being displaced from the access road into the development site onto Romsey Avenue. As a result the development would lead to an increase in car parking on both Beaulieu Avenue and Romsey Avenue which would be inconvenient to users of the highway and harmful to highway safety;*
- d) The proposal fails to provide sufficient information to demonstrate that protected and priority species would be protected and enhanced;*
- e) The proposal fails to provide sufficient information to demonstrate the satisfactory disposal of surface water;*
- f) The proposal would result in the loss of best and most versatile agricultural land;*
- g) In the absence of a legal agreement to secure such, the proposal fails to appropriately secure financial contributions towards off-site highway improvements to mitigate the impact of the development on the strategic highway network; improvements and measures to promote sustainable modes of travel; measures to mitigate the increase in traffic in the vicinity of Wicor Primary School; the introduction and/or amendment of traffic*

regulation orders in Beaulieu Avenue and Romsey Avenue, and; travel plan approval and monitoring fees;

- h) In the absence of a legal agreement to secure such, the proposal fails to appropriately secure mitigation of the likely adverse effects on the integrity of European Protected Sites which, in combination with other developments, would arise due to the impacts of recreational disturbance;*
- i) In the absence of a legal agreement to secure the provision of public open space and contributions towards the associated management and maintenance of the open space, the recreational needs of residents of the proposed development would not be met;*
- j) In the absence of a legal agreement to secure such, the proposal fails to make on-site provision of affordable housing at a level in accordance with the requirements of the local plan;*
- k) In the absence of a legal agreement to secure contributions to education, the needs of residents of the proposed development would not be met;*
- l) In the absence of a legal agreement to secure a financial contribution towards improvements to the local public rights of way network, the proposal fails to mitigate the harm from the increased usage of public rights of way as a direct result of the development.'*

4.2 The decision taken by Members is recorded in minutes of the meeting (FBC.3).

4.3 The decision notice refusing planning permission was issued on 21st September 2020. An informative on the decision notice made it clear that had it not been for the overriding reasons for refusal, the Council would have sought to address points g) - l) above by inviting the Applicant (now Appellant) to enter into a legal agreement with the Council under Section 106 of the Town & Country Planning Act 1990 ('TCPA'). This remains the position with the Appeal Development.

5.0 Relevant Policy Framework

- 5.1 By Sections 70(2) and 79(4) of the TCPA and Section 38(6) of the Planning and Compulsory Purchase Act 2004 ('PCPA'), applications for planning permission and appeals must be determined in accordance with the development plan unless material considerations indicate otherwise. This section of the SoC sets out the relevant planning policy framework for the consideration of this Appeal.
- 5.2 The policies set out in the September 2020 Committee Report are detailed within this Section. Where the policies are considered particularly relevant to this Appeal they are outlined in more detail.

The Development Plan

- 5.3 The statutory development plan relevant to the consideration of this Appeal comprises the following documents:
- i. Local Plan Part 1 (LPP1): Fareham Borough Core Strategy – Adopted 4th August 2011.
 - ii. Local Plan Part 2 (LPP2): Development Sites and Policies – Adopted 8th June 2015.
- 5.4 The development plan policies that are referenced in the Council's Planning Committee report as being relevant for the Application are as follows:

Adopted Fareham Borough Core Strategy

CS2: Housing Provision
CS4: Green Infrastructure, Biodiversity and Geological Conservation
CS5: Transport Strategy and Infrastructure
CS6: The Development Strategy
CS14: Development Outside Settlements
CS15: Sustainable Development and Climate Change
CS16: Natural Resources and Renewable Energy
CS17: High Quality Design
CS18: Provision of Affordable Housing
CS20: Infrastructure and Development Contributions
CS21: Protection and Provision of Open Space

Adopted Development Sites and Policies

DSP1: Sustainable Development
DSP2: Environmental Impact
DSP3: Impact on Living Conditions
DSP6: New Residential Development Outside of the Defined Urban Settlement
DSP13: Nature Conservation
DSP14: Supporting Sites for Brent Geese and Waders

DSP15: Recreational Disturbance on the Solent Special Protection Areas
 DSP40: Housing Allocations

- 5.5 The policies found to be breached in the Council's reasons for refusal are CS2, CS4, CS5, CS6, CS14, CS16, CS17 & CS18 of LPP1 and DSP2, DSP6, DSP13 & DSP40 of LPP2. These are addressed in more detail below, together with Policy DSP14.

Local Plan Part 1: Fareham Borough Core Strategy – Adopted 4th August 2011

- 5.6 **Policy CS2 (Housing Provision)** states:

'3,729 dwellings will be provided within the Borough to meet the South Hampshire sub-regional strategy housing target between 2006 and 2026, excluding the SDA. Priority will be given to the reuse of previously developed land within the existing urban area.

Housing will be provided through;

- i. Completions between April 2006 and March 2010 (1,637 units);*
- ii. Sites that already have planning permission (1,434 units);*
- iii. Dwellings on previously developed land;*
- iv. Sites allocated in earlier local plans;*
- v. The Strategic Development Allocation at the former Coldeast Hospital;*
- vi. The Strategic Development Location at Fareham Town Centre; and*
- vii. New allocations and redesignations to be identified through the Site Allocations and Development Management DPD*

The supply of sites will be kept up-to-date through a regular review of the Strategic Housing Land Availability Assessment which will identify sites. Those that are allocated will be done so through the Site Allocations and Development Management Development Plan Document. The Annual Monitoring Report will inform the pace of housing delivery and update the housing trajectory.

Development will achieve a mix of different housing sizes, types and tenures informed by the Housing Market Assessment and the Council's Housing Strategy.'

- 5.7 **Policy CS4 (Green Infrastructure, Biodiversity and Geological Conservation)** states, in relevant part:

'Habitats important to the biodiversity of the Borough, including Sites of Special Scientific Interest, Sites of Importance for Nature Conservation, areas of woodland, the coast and trees will be protected in accordance with the hierarchy of nature conservation designations.

...

In order to prevent adverse effects upon sensitive European sites in and around

*the Borough, the Council will work with other local authorities (including the Partnership for Urban South Hampshire) to develop and implement a strategic approach to protecting European sites from recreational pressure and development. This will include a suite of mitigation measures, with adequate provision of alternative recreational space for access management measures within and around the European sites and mitigation for impacts on air quality due to road traffic, supported by developer contributions where appropriate. **Development likely to have an individual or cumulative adverse impact will not be permitted unless the necessary mitigation measures have been secured.**' (emphasis added)*

5.8 Policy CS5 (Transport Strategy and Infrastructure) states, in relevant part:

'The Council will, where necessary work with the Local Highways Authority, Highways Agency and transport operators to promote, permit, develop and/or safeguard a high quality and sustainable integrated transport system for the Borough...

Development proposals which generate significant demand for travel and/or are of a high density, will be located in accessible areas that are or will be well served by good quality public transport, walking and cycling facilities.*

The Council will permit development which:

- Contributes towards and/or provides necessary and appropriate transport infrastructure including reduce and manage measures** and traffic management measures in a timely way;*
- **Does not adversely affect the safety and operation of the strategic and local road network**, public transport operations or pedestrian and cycle routes;*
- Is designed and implemented to prioritise and encourage safe and reliable journey's by walking, cycling and public transport.*

**Accessible includes access to shops, jobs, services and community facilities as well as public transport.*

*** Reduce management includes policies and strategies that can lead to a reduction in vehicle, principally car, use or to redistribute use in space or time.'* (Emphasis added).

5.9 Policy CS6 (The Development Strategy) states, in relevant part:

'Development will be focused in:

- i. Fareham (Policy CS7), the Western Wards & Whiteley (Policy CS9), Portchester, Stubbington & Hill Head and Titchfield (Policy CS11);*
- ii. Land at the Strategic Development Locations to the North of Fareham (Policy CS13) and Fareham Town Centre; (Policy CS8);*
- iii. Land at the Strategic Development Allocations at the former Coldeast Hospital (Policy CS10) and Daedalus Airfield (Policy CS12).*

In identifying land for development, the priority will be for the reuse of previously developed land, within the defined urban settlement boundaries including their review through the Site Allocations and Development Management DPD, taking into consideration biodiversity / potential community value, the character, the accessibility, infrastructure and services of the settlement and impacts on both the historic and natural environment. Opportunities will be taken to achieve environmental enhancement where possible.

Development which would have an adverse effect on the integrity of protected European conservation sites which cannot be avoided or adequately mitigated will not be permitted. (emphasis added)

5.10 Policy CS14 (Development Outside Settlements) states that:

Built development on land outside the defined settlements will be strictly controlled to protect the countryside and coastline from development which would adversely affect its landscape character, appearance and function. Acceptable forms of development will include that essential for agricultural, forestry, horticulture and required infrastructure. The conversion of existing buildings will be favoured. Replacement buildings must reduce the impact of development and be grouped with other existing buildings, where possible. In coastal locations, development should not have an adverse impact on the special character of the coast when viewed from the land or water.' (emphasis added)

5.11 Policy CS16 (Natural Resources and Renewable Energy) states, in relevant part, that:

New development will be expected to safeguard the use of natural resources by:

- *Demonstrating the latest best practice for energy efficiency, passive solar design and water conservation in the construction and use of the buildings;*
- *Taking measures to reduce carbon emissions, pollution and waste during the construction and operation of new developments through orientation, layout, design and material selection;*
- *Reducing, reusing and recycling waste on-site;*
- ***Preventing the loss of the best and most versatile agricultural land (Grades 1, 2 or 3a of the Natural England Agricultural Land Classifications System);***
- *Protecting mineral resources from permanent development, without first allowing for extraction, which would lead to the sterilisation of the deposit.* (Emphasis added).

5.12 Policy CS17 (High Quality Design) states, in relevant part:

'All development, buildings and spaces will be of a high quality of design and be safe and easily accessed by all members of the community. Proposals will need to demonstrate adherence to the principles of urban design and sustainability to help create quality places. In particular development will be designed to:

- respond positively to and be respectful of the key characteristics of the area, including heritage assets, landscape, scale, form, spaciousness and use of external materials,*
- ...*
- ensure that the public realm has pedestrian priority, is safe, secure, functional and accessible, and is constructed of quality materials and is well maintained,*
- ...*
- provide appropriate parking for intended uses taking account of the accessibility and context of a development and tackling climate change...'*

5.13 Policy CS18 (Provision of Affordable Housing) states:

'The Council will require the provision of affordable housing on all schemes that can deliver a net gain of 5 or more dwellings.

- i. On sites that can accommodate between 5 and 9 dwellings developers will be expected to provide 30% affordable units or the equivalent financial contribution towards off-site provision.*
- ii. On sites that can accommodate between 10 and 14 dwellings developers will be expected to provide 30% affordable units.*
- iii. On sites that can accommodate 15 or more dwellings developers will be expected to provide 40% affordable units.*

Development proposals will be required to provide a mixture of dwelling types, sizes and tenures reflecting the identified housing needs of the local population.

Where development viability is an issue, developers will be expected to produce a financial assessment in which it is clearly demonstrated at the maximum number of affordable dwellings which can be achieved on the site.

Should a site fall below the above identified thresholds but it is demonstrably part of a potentially larger developer site, the Council will seek to achieve affordable housing on a pro rata basis.

The level of affordable housing provision will also be subject to other planning objectives to be met from the development site.'

Local Plan Part 2: Development Sites and Policies – Adopted 8th June 2015

5.14 Policy DSP2 (Environmental Impact) states, in relevant part:

‘Development should provide for the satisfactory disposal of surface and waste water, and should not be detrimental to the management and protection of water resources.’

5.15 Policy DSP6 (New Residential Development Outside of the Defined Urban Settlement Boundaries) states, in relevant part:

‘There will be a presumption against new residential development outside of the defined urban settlement boundaries (as identified on the Policies Map). New residential development will be permitted in instances where one or more of the following apply:

- i. It has been demonstrated that there is an essential need for a rural worker to live permanently at or near his/her place of work; or*
- ii. It involves a conversion of an existing non-residential building where:
 - a) substantial construction and do not require major or complete reconstruction; and*
 - b) evidence has been provided to demonstrate that no other suitable alternative uses can be found and conversion would lead to an enhancement to the building’s immediate setting;**
- iii. It comprises one or two new dwellings which infill an existing and continuous built-up residential frontage, where:
 - a) The new dwellings and plots are consistent in terms of size and character to the adjoining properties and would not harm the character of the area; and*
 - b) It does not result in the extension of an existing frontage or the consolidation of an isolated group of dwellings; and*
 - c) It does not involve the siting of dwellings at the rear of the new existing dwellings.**

...

New buildings should be well-designed to respect the character of the area and, where possible, should be grouped with existing buildings.

Proposals should have particular regard to the requirements of Core Strategy Policy CS14: Development Outside Settlements, and Core Strategy Policy CS6: The Development Strategy. They should avoid the loss of significant trees, should not have an unacceptable impact on the amenity of residents, and should not result in unacceptable environmental or ecological impacts, or detrimental impact on the character or landscape of the surrounding area.’ (Emphasis added)

5.16 Policy DSP13 (Nature Conservation) states, in relevant part:

‘Development may be permitted where it can be demonstrated that;

- i) *Designated sites and sites of nature conservation value are protected and where appropriate enhanced;*
- ii) *Protected and priority species populations and their associated habitats, breeding areas, foraging areas are protected and, where appropriate, enhanced;*
- iii) *Where appropriate, opportunities to provide a net gain in biodiversity have been explored and biodiversity enhancements incorporated; and*
- iv) *The proposal would not be prejudice or result in the fragmentation of the biodiversity network.*

Proposals resulting in detrimental impacts to the above shall only be granted where the planning authority is satisfied that (this should not be applied to impacts on SPA designated sites which are subject to stricter protection tests as set out in The Conservation of Species and Habitats Regulations (as amended) 2010):

- i) *Impacts are outweighed by the need for, and benefits of, the development; and*
- ii) *Adverse impacts can be minimised and provision is made for mitigation and, where necessary, compensation for those impacts is provided.'*

5.17 Policy DSP14 (Supporting Sites for Brent Geese and Waders) states:

'Development on 'uncertain' sites for Brent Geese and/or Waders (as identified on the Policies Map or as updated or superseded by any revised plans, strategies or data) may be permitted where studies have been completed that clearly demonstrate that the site is not of 'importance'.

Development on 'important' sites for Brent Geese and/or Waders, (as identified on the Policies Map or as updated or superseded by any revised plans, strategies or data) may be granted planning permission where:

- i. *it can be demonstrated that there is no adverse impact on those sites; or*
- ii. *appropriate avoidance and/or mitigation measures to address the identified impacts, and a programme for the implementation of these measures, can be secured.*

Where an adverse impact on an 'important' site cannot be avoided or satisfactorily mitigated, an Appropriate Assessment will be required to determine whether or not the proposed development would have an adverse effect on the integrity of the Special Protection Areas supporting sites. Where an adverse effect on the integrity of a Solent Special Protection Area cannot be mitigated, planning permission is likely to be refused.'

5.18 Policy DSP40 (Housing Allocations) states:

'The sites set out in Appendix C, Table 8 and shown on the Policies Map are allocated for residential development and should be developed in line with the principles set out in their respective Development Site Briefs.

Sites listed in Appendix C, Table 9 and shown on the Policies Map have extant planning permission for residential development and are allocated for residential development. In instances where the planning permission for a site is listed in Appendix C, Table 9 lapses, the Council will consider similar proposals and/or the preparation of an additional development site brief to set out the parameters for an alternative form of residential development.

All sites listed in Appendix C will be safeguarded from any other form of permanent development that would prejudice their future uses as housing sites to ensure that they are available for implementation during the plan period.

Where it can be demonstrated that the Council does not have a five year supply of land for housing against the requirements of the Core Strategy (excluding Welborne) additional housing sites, outside the urban area boundary, may be permitted where they meet all of the following criteria:

- i) The proposal is relative in scale to the demonstrated 5 year housing land supply shortfall;***
- ii) The proposal is sustainably located adjacent to, and well related to, the existing urban settlement boundaries, and can be well integrated with the neighbouring settlement;***
- iii) The proposal is sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impact on the Countryside and, if relevant, the Strategic Gaps;***
- iv) It can be demonstrated that the proposal is deliverable in the short term; and***
- v) The proposal would not have any unacceptable environmental, amenity or traffic implications.'* (Emphasis added)**

Other Material Policy Considerations

5.19 Other material policy considerations relevant to the determination of this Appeal include the following documents:

- i. National Planning Policy Framework (2019)
- ii. Fareham Draft Local Plan 2036 (2017)
- iii. Fareham Draft Local Plan 2036 Supplement (2020)
- iv. Fareham Publication Local Plan 2037 (2020)
- v. Fareham Publication Local Plan 2037 Addendum (2021)
- vi. Fareham Landscape Assessment (2017)
- vii. Planning Obligations Supplementary Planning Document for the Borough of Fareham (excluding Welborne) (2016)
- viii. Definitive Strategy - 'Solent Recreation Mitigation Strategy' (December

2017)

- ix. Solent Waders and Brent Goose Strategy (2020)
- x. Solent Waders and Brent Goose Strategy Guidance on Mitigation and Off-setting Requirements (October 2018)

Emerging Local Plan

- 5.20** The Council is in the process of producing a new Local Plan (items ii – v at para 5.19 above relate). The emerging Local Plan will address the development requirements up until 2037 and in due course will replace Local Plan Part 1 (Core Strategy) and Local Plan Part 2 (Development Sites and Policies).
- 5.21** At a meeting of the Council's Executive on February 1st 2021 the Executive Leader announced that, following the publication of the revised Planning Practice Guidance on housing need in December 2020, a further consultation will take place on changes to the Publication Local Plan in early summer 2021 after the necessary technical work has been undertaken. The revised Local Development Scheme is due to be presented for Executive approval on 7th June 2021.
- 5.22** The Council will update the inquiry as necessary on the emerging Local Plan. However, taking the above factors into account, the Council considers that the emerging Local Plan cannot currently be afforded any significant weight in the determination of this Appeal.

6.0 Proper Approach to Determining this Appeal

The Section 38(6) test

6.1 As noted above, by Sections 70(2) and 79(4) of the TCPA and Section 38(6) of the PCPA, this Appeal must be determined in accordance with the development plan unless material considerations indicate otherwise. The Council will demonstrate that the starting point in determining this Appeal is, therefore, to consider the extent to which the Appeal Development accords with or conflicts with the adopted development plan policies. The decision maker must then turn to other material considerations.

Relevant case law on the Section 38(6) test and the tilted balance

6.2 The NPPF is an important material consideration under the section 38(6) test but, as Lord Carnwath made clear in the Supreme Court judgment in **Suffolk Coastal District Council v Hopkins Homes Ltd; Richborough Estates Partnership LLP v Cheshire East Borough Council** [2017] UKSC 37 (“the Suffolk Coastal case”) (FBC.7) at [21], the NPPF “cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme”. This is reiterated in NPPF Paragraph 12: “The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making”. The statutory priority of the development plan was also recognised by the Court of Appeal in **Gladman Developments Ltd v SSHCLG** [2021] EWCA Civ 104 (FBC.8), a case which also addressed the interplay between the section 38(6) test and the tilted balance under paragraph 11(d)(ii) of the NPPF, making clear among other things that a decision-taker may have regard to development plan policies when applying the tilted balance.

6.3 The approach to considering the extent of the housing land supply shortfall is considered further in **Hallam Land Management Ltd v SSCLG** [2018] EWCA Civ 1808 (FBC.9). Paragraphs 51 and 52 below provide further clarification on the approach to be taken.

“51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker’s planning judgment, and the court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the

local planning authority is doing to reduce it, and how much of it the development will meet.

52. Thirdly, the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker. It will not be the same in every case. The parties will sometimes be able to agree whether or not there is a five-year supply, and if there is a shortfall, what that shortfall actually is. Often there will be disagreement, which the decision-maker will have to resolve with as much certainty as the decision requires.

In some cases the parties will not be able to agree whether there is a shortfall. And in others it will be agreed that a shortfall exists, but its extent will be in dispute. Typically, however, the question for the decision-maker will not be simply whether or not a five-year supply of housing land has been demonstrated. If there is a shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule applies. But it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant “non-housing policies” in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in Hopkins Homes Ltd.. It is for this reason that he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land.”

Housing Land Supply

- 6.4** At the time of submitting this SoC, the Council’s most recently published (February 2021) housing land supply position statement identifies that the Council can currently demonstrate a HLS of 4.2 years based on a 20% buffer as required by the Housing Delivery Test in February 2020. The housing land supply position statement is included as appendix FBC.10 to this statement. The Council notes the Appellant’s position on five-year HLS (SoC paragraphs 4.67 to 4.74) and will seek common ground on these issues to limit and focus the issues in dispute. The Council will also seek common ground with the Appellant on issues concerning affordable housing. The Council will provide detailed evidence to the inquiry to support its position to the extent required in light of the common ground reached.

Is the presumption in favour of sustainable development disapplied by NPPF Paragraph 177?

- 6.5** NPPF Paragraph 10 sets out that there is a presumption in favour of sustainable development at the heart of the Framework. NPPF Paragraph 11 explains what this means for plan-making and decision-taking. However, NPPF Paragraph

177 is clear that this presumption does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans and projects) unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site.

6.6 The Officer Report to the Planning Committee sets out impacts of the development on habitats sites, and reasons for refusal b) and h) relate (as addressed below). It remains the opinion of the Council that the presumption in favour of sustainable development should not apply to this Appeal, since an adverse effect on the integrity of habitats sites has not been ruled out beyond a reasonable scientific doubt (the requisite test under Regulation 63 of The Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations'), see **R (Mynydd y Gwynt Ltd) v SSBEIS** [2018] PTSR 1274 at paragraph 8) (FBC.11).

6.7 Unless an Appropriate Assessment concludes that the proposal will (beyond a reasonable scientific doubt, and in combination with other plans and projects) not adversely affect the integrity of any habitats sites, the Appeal must be determined on an un-tilted basis in accordance with the development plan unless material considerations indicate otherwise (the test under Section 38(6) as set out above). Moreover, if any reasonable scientific doubt as to adverse effects on integrity remains following an Appropriate Assessment, planning permission could not lawfully be granted unless the derogation tests under Regulation 64 of the Habitats Regulations are met (see Regulation 63(5) of the Habitats Regulations). An Appropriate Assessment under the Habitats Regulations must be carried out by the Competent Authority which, for the purposes of determining planning appeals, is the Inspector appointed to act on behalf of the Secretary of State. In exercising their duty under the Habitats Regulations a Competent Authority must, for the purposes of the assessment under the Regulations, consult the appropriate nature conservation body [Natural England] and have regard to any representations made by that body (Regulation 63(3)) and must also, if they consider it appropriate, take the opinion of the general public (Regulation 63(4)).

If the presumption in favour of sustainable development is not disapplied, then how should NPPF Paragraph 11(d) be applied?

6.8 The proper approach to paragraph 11 (in the equivalent context of the NPPF 2018) was considered by Mr Justice Holgate in **Monkhill Ltd v SSHCLG** [2020] P.T.S.R. 416 at [39] and [45] (upheld on appeal [2021] EWCA Civ 74) (FBC.12).

6.9 As set out in the decision notice and explained below, the proposal does not accord with the development plan and so does not fall within paragraph 11(c) of the NPPF.

6.10 NPPF Footnote 7 explains that 'the most important' development plan policies

in determining planning applications for housing are 'out-of-date' where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.

6.11 NPPF Paragraph 11(d) states that for decision-taking, the presumption in favour of sustainable development means as follows:

'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 the Framework taken as a whole.'*

6.12 There are two tests set out at NPPF 11(d). It is the correct approach (see **Monkhill**, FBC.12) to apply these tests sequentially, the first test being whether there are policies within the Framework which provide a clear reason for refusing the Appeal Development. The Council considers that there are policies of this type in the Framework, as referenced at footnote 6 of paragraph 11(d) ('habitats sites'), which are relevant to the determination and give clear reasons for the refusal of the Appeal. There is therefore no need to go on to consider whether the second test, NPPF Paragraph 11d) ii., applies in this instance.

6.13 Should the Inspector find (contrary to the Council's position) that paragraph 11 d) ii. falls to be applied, the Council's position is that the Appeal Development fails the 11 d) ii. test because the adverse effects of the Appeal Development would significantly and demonstrably outweigh the benefits of the development when assessed against the policies of the NPPF as a whole.

6.14 The Council's position is therefore that, both on a tilted and un-tilted basis, the planning balance falls in favour of dismissing the Appeal.

7.0 Weight to be Afforded to Adopted Development Plan Policies

- 7.1** In the absence of a five-year supply of deliverable housing sites, where relevant development plan policies are deemed out-of-date, the Council considers that Policy DSP40 is the most important policy for determining the acceptability of residential development in this Appeal, though the other policies set out above also remain relevant.
- 7.2** Policy DSP40 expressly addresses the manner in which such applications/appeals should be decided in circumstances where a five-year supply cannot be demonstrated and is wholly consistent with the NPPF. The fact that the proposal is in breach of policy DSP40 must therefore be given very substantial weight in the planning balance. This is because the fact that policy DSP40 is breached puts the development squarely at odds with the Council's development strategy and the core principle that planning for the future should be genuinely plan led.
- 7.3** It is by complying with the terms of policy DSP40 that proposed development for housing outside of the settlement boundary may overcome the fundamental constraints of settlement boundary policy. Giving a breach of this policy anything less than very substantial weight would entail a failure to respect the primacy of the development plan and would distort or displace the statutory scheme (to use the words of Lord Carnwath above).
- 7.4** The weight to be afforded to Policy DSP40 has been considered by previous Inspectors in determining appeals within Fareham Borough where there was a shortfall in the five-year housing land supply. Notwithstanding differences in view between the Council and appellant in each of the cases below as to the extent of the housing shortfall, Inspectors supported the Council's view that the breach of policy DSP40 carries significant weight in the planning balance.

Land East of Downend Road, Porchester (FBC.14) (November 2019)

- 7.5** In the case of Portchester, there was a difference of 2.26 years between the HLS position of the Appellant (2.4 years) and the Council (4.66 years). At paragraph 90, the Inspector errs on the side of caution and considers the Appellant's figure better represents the (then) current situation. However, notwithstanding this fact, he concludes at paragraph 97 that great weight should be attached to the conflict with Policy DSP40, CS5 and the development plan.
- 7.6** At paragraph 100, the Inspector concludes that that the adverse impacts of granting planning permission would significantly and demonstrably outweigh the benefits as a whole, which is clearly a decision he has reached having applied the tilted balance set out in NPPF paragraph 11(d) (ii).

Land East of Posbrook Lane (FBC. 15) (April 2019)

7.7 In the Posbrook Lane case, the Inspector decided he had no need to conclude on the precise extent of the housing land supply shortfall which he considered to be significant (paragraph 52). Notwithstanding this, the Inspector determined that because of the lack of a five-year housing land supply, policies to protect the countryside such as CS14, 22 and DSP6 did not have full weight rather that they had significant weight (para 67). However, in respect of Policy DSP40, he concluded at Paragraph 68:

"...The contingency of Policy DSP40 has been engaged by virtue of the lack of a five year housing land supply and it is for these very purposes that the policy was drafted in that way. On that basis the policy has full weight and any conflict with it is also of significant weight... These are two significant policies [DPS5 and DSP40] where weight has not been reduced and the proposal when considered in the round is not in accordance with the development plan taken as a whole.

Land West of Old Street, Stubbington (FBC.16) (January 2019)

7.8 In the case of Land West of Old Street, Stubbington, Hampshire, similarly the Inspector did not determine the precise extent of the shortfall but considered it to be substantial. At paragraph 9, the Inspector noted that the Appellant suggested a housing land supply shortfall of 2.5 years, which was below that suggested by the Council, but she didn't think it necessary to determine the precise extent because the deficit was significant in either case.

7.9 At paragraph 10 she noted that this shortfall rendered policies relating to supply of housing out of date. However, she also noted that policies relating to the protection of landscape character and separation of settlements were not set aside. The NPPF recognises the intrinsic beauty of the countryside and although strategic gaps are not specifically referred to it endorses the creation of high quality places which would include respecting the pattern and spatial separation of settlements. She concluded at paragraph 11 that:

"Policy DSP40 in LPP2 is specifically designed to address the situation where there is a five-year housing supply shortfall as is the case here. It allows housing to come forward outside of settlements and within strategic gaps, subject to a number of provisions. It seems to me that this policy seeks to complement the aforementioned policies in situations where some development in the countryside is inevitable in order to satisfy an up-to-date assessment of housing need. It assists the decision maker in determining the weight to be attributed to the conflict with restrictive policies such as CS14, CS22 and DSP6 and provides a mechanism for the controlled release of land through a plan-led approach. Policy DSP40 is in accordance with Framework policy and reflects that the LPP2 post-dates the publication of the Framework in 2012. Conflict with it would be a matter of the greatest weight."

Conclusions on Weight to be Afforded to Adopted Development Plan Policies

- 7.10** These decisions emphasise that Policy DSP40 should be afforded full weight and that conflict with it should be a matter of substantial/ the greatest weight in the event of a housing land supply shortfall because it provides a mechanism for the controlled release of land through a plan-led approach. The fact that the Inspectors in these cases did not need to determine the extent of the shortfall confirms that the conclusion of these appeals was not affected by the extent of any shortfall.
- 7.11** With regards to other relevant policies, whether or not the policies themselves are 'out-of-date' is not the determinative factor. In the context of a five-year housing land shortfall, the weight to be afforded to the relevant development plan policies is a matter of planning judgement for the decision maker as confirmed in the Supreme Court Judgment in *Suffolk Coastal* [FBC.7, para 56], see also **Oxton Farm v Harrogate BC** [2020] EWCA Civ 805, para 52 (FBC.13).
- 7.12** The Council has a clear strategy for residential development within the Borough. The Development Strategy emphasised within the LPP1 and LPP2 that policies seek to focus development in certain areas, with an emphasis on allocations and strategic allocations. LPP3 builds on this and is central to the Council's strategy. The Welborne Garden Village will provide 6,000 new homes, completely consistent with the emphasis within the NPPF on a Plan-led system.
- 7.13** The relevant Development Plan Policies all form part of a wider development strategy which seeks to protect the countryside, nature conservation interests and focus development on previously developed land and strategic sites consistent with NPPF policies for the protection of the countryside.
- 7.14** For these reasons, whilst full weight cannot be afforded to all of the Development Plan policies in the context of a lack of a five-year housing land supply (with the exception of DSP40), substantial, determinative, weight can still be afforded to them consistent with the Posbrook Lane decision.

8.0 The Council's Case

- 8.1 The Council's case on each of the reasons for refusal is set out in this section, followed by an overall planning balance. The reasons for refusal are also addressed in detail in the Officer Report to Committee, save reason for refusal (c) which was added by members.
- 8.2 The Council notes at the outset that the Appellant's position is inchoate at this stage on a number of issues, relying on documents that are not yet available (including a CEMP, LEMP, SA Addendum and/or revised ES, shadow Habitats Regulations Assessment, updated ecological surveys and section 106). As the Appellant anticipates, consultation may be required on some of these materials. The Council hopes that, so long as these materials are provided promptly, they will not delay the inquiry timetable. The Council will consider the documents carefully once available and adjust its position to the extent necessary in the light of them.
- 8.3 The Council also draws attention at the outset to the issue of nutrient neutrality. The Application was supported by a nutrient budget calculation which demonstrated that the development would be nitrogen neutral (in fact negative), such that no mitigation would be required in that respect. The Council accepted this (see paragraphs 8.26 to 8.28 of the Officer Report) and this remains its position. However, the Council's approach to nutrient neutrality, together with that of Natural England in its advice on the issue, is currently under challenge in two sets of High Court proceedings (CO/4168/2020 & CO/3397/2020). The hearing of these challenges has very recently taken place and judgment is awaited. The Council will adjust its position on nutrient issues to the extent required if judgment is given prior to the Appeal being determined.

Reason for refusal (a)

'The provision of residential development in this location would be contrary to adopted Local Plan policies which seek to prevent additional residential development in the countryside.'

- 8.4 The Council will demonstrate that the Appeal Development conflicts with LPP1 Policies CS2 and CS6 and LPP2 Policy DSP6 which provide the framework for new housing development and define the appropriate locations for new residential development as being within the settlement boundaries. Development outside of settlement boundaries and within the countryside, such as at the Appeal Site, is strictly controlled except for certain circumstances set out in Local Plan Policy CS14, none of which apply to the Appeal Development.
- 8.5 LPP2 Policy DSP40 allows for additional residential development in the context of a 5YHLS shortfall subject to various criteria being met. The criteria are as

follows:

- i. The proposal is relative in scale to the demonstrated 5 year housing land supply shortfall;
- ii. The proposal is sustainably located adjacent to and well related to, the existing urban settlement boundaries;
- iii. The proposal is sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impact on the countryside and, if relevant, the strategic gaps;
- iv. It can be demonstrated that the proposal is deliverable in the short term; and
- v. The proposal would not have any unacceptable environmental, amenity or traffic implications.

8.6 The Council will demonstrate that the Appeal Development does not meet all of the criteria set out in Policy DSP40. Criteria 'i', 'ii', 'iii' & 'iv' are met. However, the Council will demonstrate that the Appeal Development would have unacceptable environmental, amenity and traffic implications in relation to the other reasons for refusal and therefore fails the final test at criterion 'v'.

8.7 So far as landscape issues are concerned, the Council does not have a freestanding landscape reason for refusal and accepts that landscape and visual impacts have been minimised for the purposes of DSP40 criterion 'iii'. However, a degree of adverse impact is inevitable for a greenfield housing development of this scale, and the Appellant fairly accepts that there will be "minor" landscape impacts (SoC para 1.18). The Council will seek common ground with the Appellant to limit or avoid the need for evidence on this issue.

Reason for refusal (b)

'The proposal fails to appropriately mitigate the likely adverse effects on the integrity of European Protected Sites which would arise as a result of the effect of the development on, and loss of part of, a Primary Support Area for Brent geese and waders.'

8.8 The Council considers that, on the evidence available, an adverse effect on the integrity of habitats sites (specifically the Portsmouth Harbour SPA, also notified as a SSSI / Ramsar) as a result of the effect of the development on Brent Geese and waders cannot be ruled out beyond a reasonable scientific doubt (the requisite test, see **Mynydd** para 8, FBC.11). Although the Appellant suggests otherwise, its position is contingent on materials (including a LEMP, shadow Habitats Regulations Assessment, revised ES, and section 106) that are not yet available.

8.9 The Council also notes that the Appellant's position appears to have shifted in its Statement of Case from its position when the Application was before the

Council. At paragraph 6.1.1.5 of the Environmental Statement, it was stated that the “development will results (sic) in the loss of almost the entire area of the arable land which is currently designated as being a ‘Primary Support Area’ for Brent Geese and waders. This loss of this resource will have a ***certain major adverse impact***”. It was only post-mitigation that the ES assessed the impacts on SPA qualifying habitat as “negligible” (page 73). The ‘Bird Mitigation Reserve Proposals for land off Romsey Avenue, Portchester’ submitted in 2020 as part of the planning application proceeded on the same basis (see page 2).

- 8.10** The Appellant now contends in its SoC that mitigation of impacts on Brent Geese and waders is not required to avoid an adverse effect on integrity (SoC para 5.25, 5.35 and 5.39). The Appellant does not explain its change of position or what if any change in evidence has brought it about. Moreover, the Appellant appears to accept that its proposed ‘bird reserve’ package is required to avoid ‘doubt’ that the development will have an adverse effect on integrity (SoC, para 5.39) and so, applying the precautionary approach required by the Habitats Regulations, it should accept that mitigation is required.
- 8.11** The Appellant asserts that the Appeal Site is unsuitable habitat for Brent Geese and waders and has not been suitable since at least 2015 (SoC para 5.28-9). However, this is inconsistent with the Environmental Statement (Table 11, p48) and page 2 of the ‘Bird Mitigation Reserve Proposals for land off Romsey Avenue, Portchester’ document which show a maximum count of 300 Brent Geese on the site in 2017 over just two visits. It is also inconsistent with the categorisation of the Site as a Primary Support Area under the Solent Waders and Brent Goose Strategy 2020 (‘SWBGS’), an expert advice document (from a team including Natural England) founded on survey work. The Appellant indicates that it has conducted additional bird surveys which have not been reported (SoC, para 5.28), and if these are submitted they will be given full consideration. Such surveys must be viewed in full context, however, having regard to (among other things) the other available evidence and the fluctuations in population sizes that are characteristic of Brent Geese (see paragraph 3.3 on page 21 of the SWBGS).
- 8.12** The Appellant seeks to justify its reliance on limited survey work by reference to LPP2 Policy DSP14 (SoC para 5.26 to 5.28), referring to the distinction between “uncertain” and “important” sites (derived from the 2010 strategy) and drawing attention to the denotation of the site as “uncertain” on the Local Plan Policies Map. However, DSP14 expressly allows for the classification of sites for Brent Geese or Waders to be ‘updated’ and indeed in the Environmental Statement of August 2018 it recognises that the site is to be a Primary Support Area. The Appellant’s SoC, in harkening back to the superseded site classification, therefore fails to apply DSP14 correctly. The current classification for the site as a Primary Support Area (i.e. an area of importance, second only to Core Areas, under the current SWBGS) is clearly shown on the website <https://solentwbgs.wordpress.com/page-2/>. An extract from the current use

mapping shown on the website is included at appendix FBC.6.

- 8.13** The Appellant suggests (SoC para 5.33) that the Appeal Site is not in suitable management for the purposes of the 2018 Mitigation Guidance. However, as the SWBGS sets out, agricultural fields may be suitable habitat for Brent Geese and waders. The Appellant has not established that the Site is not in suitable management, nor that, if in unsuitable management, it does not contribute to the integrity of the SPA.
- 8.14** The Appellant appears to suggest (SoC, para 5.34) that the 2018 Mitigation Guidance only supports Appropriate Assessment for Core Areas, but that is a misreading of the Guidance and would run counter to the approach required under the Habitats Regulations. The Appellant also suggests (SoC para 5.34) that the “essence” of Primary Support Areas is about “future functionality”, but that is incorrect. The Mitigation Guidance makes it clear that Primary Support Areas make an important contribution to the function of the Solent waders and brent geese ecological network (FBC.5, p6). It follows from this that any loss of functioning may risk harm to the SPA birds and risk damage to the integrity of the SPA.
- 8.15** The Council considers that the Appeal Site, if undeveloped, is likely to continue in agricultural management and therefore continue to perform a function as a Primary Support Area for Brent Geese and Waders. Contrary to the Appellant’s position in its SoC, the Council considers that an adverse effect on integrity cannot be ruled out in the absence of mitigation. Although the Appellant has provided some details of its proposed mitigation, the full details of the package and how it will be secured in perpetuity are not yet available, so the requisite certainty that mitigation will be effective in perpetuity cannot exist. The Appellant suggests that details will be “included in the shadow HRA and revised ES” (SoC para 5.37) and the LEMP and section 106. The Council will comment on these details once they are available.
- 8.16** Natural England in its most recent advice of 26th August 2020 has objected because the proposed mitigation is inadequate to sufficiently mitigate the harm, such that the requisite certainty of avoiding an adverse effect on integrity has not been demonstrated. It would require “some cogent explanation” not to give “considerable weight” to those views (**Mynydd** at paragraph 8(8), FBC.11). The Council currently considers that it is not possible to rule out an adverse effect on integrity either with or without the mitigation proposed by the Appellant. The Council will review its position in the light of the various materials promised by the Appellant once they are available, and in the light of any consultation responses from Natural England and other parties.
- 8.17** If an adverse effect on integrity cannot be ruled out, permission cannot be granted unless the derogation tests under Regulation 64 of the Habitats Regulations are met. Harm to the SPA (and SSSI and Ramsar) would also give

rise to breach of LPP1 policies CS4 and CS6 and LPP2 policies DSP13 and DSP14.

Reason for refusal (c)

'The proposal would result in extra parking restrictions being placed on Beaulieu Avenue and Romsey Avenue and on-street parking being displaced from the access road into the development site onto Romsey Avenue. As a result the development would lead to an increase in car parking on both Beaulieu Avenue and Romsey Avenue which would be inconvenient to users of the highway and harmful to highway safety.'

8.18 Reason for refusal (c) relates to the impacts of displaced parking both on the convenience of users of the public highway and also on highway safety.

8.19 In their consultation response dated 19th December 2019 Hampshire County Council (HCC), acting as the Highway Authority, summarised their position on the displacement of parking, based on the details supplied by the Appellant's Transport Consultant during the planning process. Having concluded their position, HCC stated "*...FBC as planning authority should satisfy themselves that walking distance to alternative parking spaces are acceptable on amenity grounds.*"

8.20 Highway evidence will be submitted demonstrating that the potential impacts in terms of displacement of parking submitted as part of the application process were incomplete. Moreover, the evidence will identify that potential displacement could be significantly greater than reported by the Appellant's Transport Consultant, having a direct bearing on users of the highway, particularly existing local residents. Consequently, it will be demonstrated that the proposals have a significant impact on amenity and conflict with Policy DSP40 and the NPPF paragraph 127(f).

8.21 In terms of the impact of displaced parking on highway safety, evidence will be provided to demonstrate that the proposed traffic orders and their likely effects would conflict with the free flow of traffic on an already busy section of the public highway. Evidence will demonstrate that the combination of the general day-to-day activities of the existing residents, existing traffic flows on the highway network and proposed traffic volumes to the development are likely to lead to conflicts. Such conflicts would be contrary to Policies CS5 and CS17 of the Core Strategy.

Reason for refusal (d)

'The proposal fails to provide sufficient information to demonstrate that protected and priority species would be protected and enhanced'

8.22 The Council notes that the Appellant has recognised a shortfall in information and will update its survey information and provide further details in an updated Environmental Statement, CEMP and LEMP (SoC, paras 5.47 to 5.52). Provided they are submitted in a timely manner, the Council will look at any forthcoming submissions and reassess if this particular Reason for Refusal remains or if the Council can agree that concerns over impacts on protected and priority species (and consequent breach of LPP2 Policy DSP13) are satisfied. In particular the Council would wish to raise that there may be tensions between habitat creation and management for Brent geese and for reptiles, badgers and bats, and wish to emphasise the importance of resolving this to the Appellant.

Reason for refusal (e)

'The proposal fails to provide sufficient information to demonstrate the satisfactory disposal of surface water.'

8.23 The Council notes that the Appellant has committed to providing information through the appeal process in relation to this matter (SoC, para 5.73). The Council will review any further information provided and, if necessary, demonstrate that the details submitted to date are insufficient to ensure the satisfactory disposal of surface water on the Appeal Site, which would be contrary to LPP2 Policy DSP2.

Reason for refusal (f)

'The proposal would result in the loss of best and most versatile agricultural land.'

8.24 The fifth test of Policy DSP40(v) is that the proposal must not have any unacceptable environmental implications. Policy CS16 also specifically seeks to prevent the loss of the best and most versatile agricultural land. The NPPF paragraph 170(b) recognises the economic and other benefits of the best and most versatile agricultural land.

8.25 The site is classified as Grade 1 (excellent quality) and Grade 2 (very good quality) agricultural land, i.e. best and most versatile (BMV) agricultural land. The proposal would therefore be contrary to NPPF paragraph 170(b) and Policy CS16 and the permanent loss of BMV agricultural land weighs against granting planning permission.

Reasons for refusal (g) to (l)

8.26 An informative on the decision notice made it clear that had it not been for the overriding reasons for refusal to the proposal, the Council would have sought to address reasons for refusal g) - l) by inviting the Applicant (now Appellant) to

enter into a legal agreement under Section 106 of the TCPA.

- 8.27** This remains the position with the Appeal Development, and it is hoped that a suitably worded legal agreement can be entered into that would overcome these reasons for refusal. In those circumstances, matters relating to reasons for refusal g) to l) would be dealt with in the Statement of Common Ground.
- 8.28** However, at this stage, no suitable legal agreement or unilateral undertaking exists and so the Council's summary case in relation to these reasons for refusal is set out below.

Reason for refusal (g)

'In the absence of a legal agreement to secure such, the proposal fails to appropriately secure financial contributions towards off-site highway improvements to mitigate the impact of the development on the strategic highway network; improvements and measures to promote sustainable modes of travel; measures to mitigate the increase in traffic in the vicinity of Wicor Primary School; the introduction and/or amendment of traffic regulation orders in Beaulieu Avenue and Romsey Avenue, and; travel plan approval and monitoring fees.'

- 8.29** As identified in the Committee Report, Hampshire County Council has requested that the Appellant enter into a Section 106 to secure financial contributions and various mitigation and enhancement measures in order to make the development acceptable. In the absence of such a Section 106 the Appeal Development would conflict with LPP1 Policy CS5.

Reason for refusal (h)

'In the absence of a legal agreement to secure such, the proposal fails to appropriately secure mitigation of the likely adverse effects on the integrity of European Protected Sites which, in combination with other developments, would arise due to the impacts of recreational disturbance.'

- 8.30** In the absence of a Section 106 the Appeal Development would fail to provide satisfactory mitigation of the 'in combination' effects that the proposed increase in residential units would cause through increased recreational use on European Protected Sites (EPS).
- 8.31** Policy DSP15 (Recreational Disturbance on the Solent Special Protection Areas (SPA)) states, in relevant part:

*'In Combination Effects on SPA
Planning permission for proposals resulting in a net increase in residential units*

may be permitted where 'in combination' effects of recreation on the Special Protection Areas are satisfactorily mitigated through the provision of a financial contribution that is consistent with the approach being taken through the Solent Recreation Mitigation Strategy. In the absence of a financial contribution toward mitigation, an Appropriate Assessment will be required to demonstrate that any 'in combination' negative effects can either be avoided or satisfactorily mitigated through a developer provided package of measures.'

- 8.32** There would therefore be a clear conflict with this policy in the absence of a Section 106 given that the Appellant has not demonstrated that negative effects could be avoided or satisfactorily mitigated, and an adverse effect on integrity could not be ruled out under the Habitats Regulations.

Reason for Refusal (i)

'In the absence of a legal agreement to secure the provision of public open space and contributions towards the associated management and maintenance of the open space, the recreational needs of residents of the proposed development would not be met.'

- 8.33** The Council will demonstrate that the policy requirements set out under Policy CS21 and in the Council's adopted Planning Obligations SPD should be met with regards to the provision of new public open space to meet the recreational needs of residents.

- 8.34** It is anticipated that the provision of a policy compliant level of public open space could be secured through an appropriately worded Section 106, and the Council will work with the Appellant in this regard.

- 8.35** Upon receipt of a satisfactory Section 106 to secure the delivery and ongoing retention and management of the open space and play provision, this reason for refusal could be addressed. In the absence of any such agreement the Appeal Development would conflict with LPP1 Policy CS21.

Reason for Refusal (j)

'In the absence of a legal agreement to secure such, the proposal fails to make on-site provision of affordable housing at a level in accordance with the requirements of the local plan.'

- 8.36** Policy CS18 requires that *'on sites that can accommodate 15 or more dwellings developers will be expected to provide 40% affordable units.'*

- 8.37** This reason for refusal could be overcome subject to securing this level of affordable housing within a suitably worded Section 106.

Reason for refusal (k)

'In the absence of a legal agreement to secure contributions to education, the needs of residents of the proposed development would not be met.'

8.38 LPP1 Policy CS20 states, in relevant part:

'Development will be required to provide or contribute towards the provision of infrastructure through planning conditions, legal agreement or directly through the service provider.'

8.39 It is anticipated that contributions towards schools and education facilities would be secured through an appropriately worded Section 106, and the Council will work with the Appellant in this regard.

8.40 Upon receipt of a satisfactory Section 106 to secure educational needs of the development, this reason for refusal could be addressed. In the absence of any such Section 106 the Appeal Development would conflict with LPP1 Policy CS20.

Reason for refusal (l)

'In the absence of a legal agreement to secure a financial contribution towards improvements to the local public rights of way network, the proposal fails to mitigate the harm from the increased usage of public rights of way as a direct result of the development.'

8.41 The Officer Committee Report explains that Hampshire County Council Countryside Service have set out the likely impact of the development on the public rights of way network in the surrounding area. It is anticipated that the increased recreational pressure on public footpaths and accessible areas of countryside could be addressed through a financial contribution towards improvements to the wider network in the local area.

8.42 Upon receipt of a satisfactory Section 106 to secure a financial contribution towards improvements to local public rights of way this reason for refusal could be addressed. In the absence of any such Section 106 the Appeal Development would conflict with LPP1 Policy CS20.

Planning Balance

8.43 Through the preceding sections of this statement, the Council has set out the correct approach to determining the Appeal, the weight to be given to adopted development plan policies and what evidence will be given in relation to each of

the stated reasons for refusal. The Council's evidence submitted to the inquiry will then, taking all of this into account, carry out the planning balance.

- 8.44** The planning balance will take fully into account the benefits of the development. The significant benefits of provision of market and affordable housing in the context of a lack of a five-year housing land supply and a need for affordable housing, and the social and economic benefits associated with construction and operation of such a development, are fully acknowledged. However, these must be weighed against the harm identified in reasons for refusal a) – l).
- 8.45** The starting position, as always, is the development plan. As set out above, the Council considers that the proposal breaches a number of development plan policies and the development plan as a whole.
- 8.46** The Council considers that, on the evidence currently available, an adverse effect on the integrity of the SPA (also notified as a SSSI and Ramsar) cannot be ruled out beyond reasonable scientific doubt. As a result, permission cannot be granted unless the derogation tests under Regulation 64 of the Habitats Regulations are satisfied. Moreover, an adverse effect on integrity (whether or not the derogation tests are met) means that the presumption in favour of sustainable development is disapplied by paragraph 177 of the NPPF. When carrying out the planning balance therefore, the proper approach in this case is to do so as an un-tilted balance in accordance with Section 38(6) of the PCPA.
- 8.47** Should the Inspector find for whatever reason there to be (beyond a reasonable scientific doubt) no adverse effect on the integrity of any habitats sites (and carry out an Appropriate Assessment concluding so) then the Council accepts NPPF paragraph 11(d) would be engaged given the lack of a five-year housing land supply. In such a scenario there would be no "clear reason for refusing the development" under Limb i. and it would therefore be necessary to carry out the tilted balance under the test in Limb ii. Even in these circumstances, the Council considers that, having regard to the policies in the NPPF and the three dimensions of sustainability, the Appeal Development fails the Limb ii. test because the adverse effects of the Appeal Development would significantly and demonstrably outweigh the benefits of the development.
- 8.48** The Council will also demonstrate that the conflict between the Appeal Development and the adopted development policies can be attributed very significant weight in the planning balance.
- 8.49** The Council will provide evidence to show that the Appeal should therefore be dismissed and planning permission refused.

8.0 Planning Conditions and Section 106

Conditions

- 8.1** The Council will seek to agree a list of planning conditions with the Appellant. Any areas of disagreement will be addressed in evidence and/or in the Statement of Common Ground as necessary.

Section 106

- 8.2** The Council will seek to agree a draft Section 106 Agreement with the Appellant in advance of the Inquiry. Any areas of disagreement will be addressed in evidence and/or in the Statement of Common Ground as necessary. The Council will also provide a CIL Compliance Schedule justifying the contributions sought.

9.0 Witnesses

9.1 The Council expects to call upon expert witnesses at the Inquiry to deal with the following matters unless resolved through negotiation of Statements of Common Ground such that evidence does not need to be presented:

- Planning matters (including countryside issues, five-year housing land supply, agricultural land quality, and surface water drainage)
- Highways matters
- Habitats and other ecological matters