

**TOWN AND COUNTRY PLANNING ACT**  
**1990**  
**SECTION 78 APPEAL**

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Appeal Ref: APP/A1720/W/21/3271412

LPA Ref: P/18/1073/FP

Section 78 appeal against refusal of planning permission for:

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.

at

Land south of Romsey Avenue, Portchester

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**SUPPLEMENTARY ECOLOGY PROOF OF EVIDENCE**  
**OF NICHOLAS SIBBETT CEcol CMLI CEnv MCIEEM**  
**ON BEHALF OF FAREHAM BOROUGH COUNCIL**

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2nd August 2021

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# 1 INTRODUCTION AND SCOPE OF SUPPLEMENTARY EVIDENCE

- 1.1 My name is Nicholas Sibbett and I have been appointed by Fareham Borough Council (“the Council”) as its ecology witness for the Public Inquiry. My Proof of Evidence was submitted to the Planning Inspectorate’s Case Officer on 16<sup>th</sup> July 2021. In my proof I highlighted in paragraph 5.25 in respect of Reason for Refusal b) and the Appellant’s proposed Bird Conservation Area that:

*“To be relied upon in deciding whether to grant permission, mitigation must not only be effective but also secured in perpetuity. In the absence of a costed Management and Monitoring Plan, it is unclear if the appellant has considered the cost and practical issues required, such as weekly fence monitoring and repair, ongoing public engagement to dissuade trespass, etc as well as bird monitoring and habitat management. Furthermore, the management of the bird reserve has not been included in the appellant’s draft Unilateral Undertaking. This raises doubt as to the financial viability of the mitigation and its likely efficacy and there is no mechanism to secure it. Certainty is needed before granting permission, and it is therefore not acceptable for fundamental details of the proposed mitigation to be parked for consideration at reserved matters stage.”*

- 1.2 On 23<sup>rd</sup> July 2021, late in the day, a revised Unilateral Undertaking (UU) was emailed to the Council. The revised UU included, for the first time, provision for the Bird Conservation Area (in Schedule 3). The Council provided comments to the Appellant on that draft, but also wished

for me to express my views on the provision made in relation to the Bird Conservation Area. On 27<sup>th</sup> July 2021 the Council therefore emailed the Planning Inspectorate indicating (among other things) that it intended for me to prepare a Supplementary Proof on this issue. The same day, the Appellant submitted a further draft of the UU to the Planning Inspectorate, which has been uploaded within Item H on the inquiry website.

- 1.3 In light of these new matters provided at this late stage by the Appellant, this Supplementary Proof of Evidence is provided to assist the Inspector in her understanding of the provision for the Bird Conservation Area in the 27<sup>th</sup> July version of the UU. In particular, I believe that the UU still does not provide adequate certainty of the installation and permanent management of the Bird Conservation Area.
- 1.4 All other matters in my Proof of Evidence remain unchanged.
- 1.5 The evidence in this Supplementary Proof is true and has been prepared, and is given in accordance with, the guidance of my professional institutions, and I confirm that the opinions expressed are my own professional opinions.

## **2 BIRD CONSERVATION AREA REVISIONS TO THE UNILATERAL UNDERTAKING**

### **The location of the Bird Conservation Area**

- 2.1 The 'Definitions' table at the beginning of Schedule 3 defines the Bird Conservation Area as being "the land edged blue on Plan 1". No 'Plan 1' has yet been included and so there is currently no legal certainty as to the area of the land which relates to the UU.

### **Bird Conservation Area scheme definition**

- 2.2 Clause 2.1 of Schedule 3 prohibits commencement unless the Bird Conservation Area Scheme has been submitted to and approved by the Council. Clause 2.2 then prohibits commencement unless and until the Bird Conservation Area has been laid out in accordance with the approved Bird Conservation Area Scheme.
- 2.3 The 'Definitions' table at the beginning of Schedule 3 defines the 'Bird Conservation Area Scheme' as a scheme of works to include the means for the formation, laying out and provision of the Bird Conservation Area, together with a list of features of the Scheme which must be included.
- 2.4 The definition of Bird Conservation Area Scheme is vague and generic. Given the need for certainty that mitigation must be effective in perpetuity, I would expect at this stage that the scheme would include a detailed and costed design for its installation (and I note that Natural England has also drawn attention to the need for a "costed management plan" [Core Document CDB.9a at page 2]). It is simply not possible to assess with the requisite certainty the ability of the scheme to meet the stringent tests under an

appropriate assessment with such minimal detail on the design of the scheme. Postponing the details of the scheme to a later time (clause 2.1) does not give the Inspector the required certainty that the design is suitable.

- 2.5 Moreover, the list omits the viewing hide proposed in the ES / HRA, with no information as to whether this is a deliberate or inadvertent omission.
- 2.6 The list also includes vehicular tracks and paths, presumably with the paths being intended for pedestrian use. There is also an obligation (clause 2.5) for paths to be at least 2m wide with 0.5m grass verges on each side. Vehicular tracks have not previously been proposed and it was previously assumed that management vehicles could drive on the grass. Paths are not required by brent geese or wading birds in their use of the land. The proposed paths imply (and this is made expressly clear in the transfer scenario by the reference to public access in clause 2.3.1) that the Bird Conservation Area would be open to the public, thus causing harmful disturbance to the birds and compromising the function of the Bird Conservation Area.

### **Management of the Bird Conservation Area**

- 2.7 The UU makes provision for either transfer to an appropriate body or management by a Management Company. The choice of which of these to utilise is entirely for the Owner, which is unsatisfactory. Management by a management company should be a last resort, and only if it is properly evidenced that it will be effective in perpetuity.
- 2.8 At this stage, whichever management option were being

pursued, I would expect to see a costed Management Plan, so it is clear as to the nature of the proposed management, by whom it would be carried out and how much it will cost. The Mitigation Guidance [Core Document CDH.7 at paragraph 21] rightly expresses a preference for endowments, which require considerable sums to be provided since it is the interest which funds the ongoing management in perpetuity. In this case, no management plan has been supplied. There is therefore no assurance that the Appellant or Owner understand the management needs of the Bird Conservation Area or that the Owner is able/willing to pay or secure the necessary amounts.

2.9 So far as the provision for transfer is concerned (clause 2.3.1):

a) The inclusion of Hampshire and Isle of Wight Wildlife Trust (HIWWT), Hampshire County Council and the RSPB as potential management bodies has not been evidenced within or separately to the UU, and the Council is not aware of any discussions with those bodies. In its 26<sup>th</sup> August 2020 consultation response [Core Document CDB.9c] at page 2, Natural England stated (rightly in my view) that “discussion and agreement with an appropriate management organisation is also required as this is a key prerequisite to ensuring the bird reserve will be effective for the lifetime of the development”. It appears that these organisations may have been included speculatively. I have no confidence that the long-term management of the land has been secured by them or another suitable body.

- b) There is also an inconsistency between the definition of Bird Conservation Area Transfer (which lists HIWWT and the County Council) and clause 2.3.1 (which lists HIWWT and the RSPB).
- c) There is no provision for a mechanism to ensure management if the original transferee ceases management (either entirely or in part).
- d) The definition of 'Bird Conservation Area Transfer' makes reference to a "reasonable sum for the future management and maintenance of the Bird Conservation Area". There is no detail on what this sum would be, how it would be calculated, how it would be provided or whether the Owner is able/willing to pay or secure it. Given the need for certainty that mitigation will be effective in perpetuity, I would expect an exact sum to be specified and properly evidenced.
- e) Clause 2.3.1 makes provision for not commencing the Development unless the transfer has been completed. However, it does not require the transferee to manage or maintain the Bird Conservation Area (either at all or in accordance with the approved scheme).
- f) As already noted, clause 2.3.1 makes express provision for public access, which would cause harmful disturbance to the birds.

2.10 So far as the provision for a Management Company is concerned:

- a) As already noted, this is intrinsically less satisfactory than management by an expert body and should be a

last resort, and only if it is properly evidenced that it will be effective in perpetuity.

- b) Clause 2.3.2 requires the submission of details (to be approved under clause 2.4), including how the Management Company will be funded, but there is no detail on the funding arrangements, how much is required, and whether they can viably be secured in perpetuity.
- c) Although details must be approved under clause 2.4, there is no requirement for the Management Company to manage or maintain the Bird Conservation Area (either at all or in accordance with the approved scheme).
- d) There is no provision for a mechanism to ensure management if the original Management Company ceases management (either entirely or in part, whether through insolvency or otherwise).

### **Monitoring**

- 2.11 There are no proposals in the UU for monitoring the condition of the Bird Conservation Area, nor the birds using it. In the absence of monitoring, there would be no recognition of any shortfalls in management or any understanding of bird use.
- 2.12 Moreover, there are no obligations for remedial management in the light of monitoring, nor for amendments to the Bird Conservation Area Scheme should they prove necessary.

### 3 CONCLUSION

- 3.1 I conclude that the Bird Conservation Area is inadequately defined, without design details; there is no certainty as to the management to be carried out (or even a requirement that it be carried out), the duration over which this would take place, who would carry out such management, how much it will cost; and likewise there is no indication as to whether the Owner is able/willing to pay those costs. Further, it is proposed to create pedestrian paths which are not required for the management of the land and which do not contribute to its conservation function; the use of the paths would cause harmful disturbance to Brent geese and waders/wildfowl. No monitoring is proposed, nor is there an obligation to undertake remedial management, nor for amendments to the Bird Conservation Area Scheme should they prove necessary.
- 3.2 Even if the Bird Conservation Area had been satisfactory in all other ways (which I consider it is not - see my Proof of Evidence), the UU is inadequate. The Inspector in my view is not able to use the UU as evidence to ascertain beyond reasonable scientific doubt that the development would not have an adverse effect upon the integrity of Portsmouth Harbour SPA (and the associated SSSI and Ramsar) as a result of impacts on Brent Geese and waders.
- 3.3 Reason for Refusal b) is not satisfied and I maintain my position in my main Proof that the appeal should be dismissed.