

IN THE MATTER OF LAND TO THE SOUTH OF ROMSEY AVENUE, FAREHAM
AND IN THE MATTER OF AN APPEAL BY FOREMAN HOMES LTD UNDER SECTION 78
OF THE TOWN AND COUNTRY PLANNING ACT 1990

PINS REF: APP/A1720/W/21/3271412
LPA REF: P/18/1073/FP

OPENING SUBMISSIONS
ON BEHALF OF FAREHAM BOROUGH COUNCIL

References prefaced by "CD" are to Core Documents.
References prefaced by "Item" are to documents within Item folders on the Appeal website¹.

A. INTRODUCTION

1. These Opening Submissions are made on behalf of Fareham Borough Council ("the Council") in the above Inquiry proceedings into the proposal ("the Proposal") of Foreman Homes Ltd ("the Appellant") for an outline residential scheme on the Romsey Avenue site ("the Site").
2. The Proposal is highly controversial. It attracted a total of 494 objections from 308 residents at application stage², which are summarised in section 6 of the Committee Report, and further objections have been raised as part of the Appeal process³. It has also consistently been objected to by the County Council's Senior Ecologist⁴ and by Natural England⁵, including in its most recent consultation response of 30th July 2021⁶.
3. It is controversial for good reason. As will be demonstrated in the evidence of Mr Sennitt, Mr Sibbett and Mr Philpott, it is contrary to the policies and spatial strategies of both the adopted and emerging local plans as well as NPPF policy, and its environmental and highways impacts would be significantly harmful.

¹ <https://moderngov.fareham.gov.uk/ieListDocuments.aspx?CIId=363&MIId=4041&Ver=4>

² CDC.1 at §6.1 and CDC.2 at page 1

³ Item F

⁴ CDB.8a-c

⁵ CDB.9a-c

⁶ Item F

4. The Council's Planning Committee unanimously resolved to refuse planning permission at a meeting on 16th September 2020⁷ and planning permission was duly refused for the 12 reasons set out in the Decision Notice of 21st September 2020⁸. 11 of these reasons had been recommended in the Committee Report⁹ and Members also added a further reason (reason for refusal (c)) relating to highways impacts: this is the democratic planning process in action, and as the evidence of Mr Philpott and the range of local residents who have raised highways issues amply demonstrates, they were wise to do so.

5. The Decision Notice included an informative noting the potential (had it not been for the overriding reasons for refusal) for reasons for refusal (g) to (l) to have been addressed by planning obligations under section 106 of the Town and Country Planning Act 1990 ("the TCPA"). This has not yet occurred, though considerable progress has been made in the Appellant's draft Unilateral Undertaking and it remains the Council's expectation that these reasons for refusal will be resolved. Additional information submitted by the Appellant has also allowed reason for refusal (e) (concerning drainage) to be withdrawn¹⁰. However, reasons for refusal (a), (b), (c), (d) and (f) remain and provide an extremely firm basis for dismissing the Appeal.

B. APPEAL PROPOSAL, SITE AND SURROUNDINGS

6. The Appeal Proposal is an "outline application for 225 dwellings, bird conservation area and area of public open space, with all matters reserved except for access"¹¹. It is set out in five plans, as listed in §3.4 of Mr Brown's Proof.

7. The Appeal Site is a 12.55ha open field located in the countryside outside the settlement limits of Portchester. 47% of it is Grade 1 (excellent) agricultural land and the remainder is Grade 2 (Very Good)¹². It is also environmentally sensitive, both in terms of protected and priority species

⁷ CDC.3

⁸ CDC.4

⁹ CDC.1

¹⁰ Main SOCG Executive Summary §3(m), Main SOCG §5.3 and Appendix A

¹¹ Main SOCG §3.2

¹² CDAA.1c Updated ES Vol 2 Chapter 8 Table 8.4

on site, and in terms of its proximity to internationally important designations. The closest of these, the Portsmouth Harbour Special Protection Area (“SPA”) and Ramsar (also a Site of Special Scientific Interest (“SSSI”)) is a mere 185m to the southwest¹³. These environmental sensitivities present fundamental challenges to any significant development on site.

8. It is common ground that the Appeal Site is in a sustainable location, within walking and cycling distance of local services and facilities. However, it has only a single access (onto Romsey Avenue) which presents further challenges for a development of this scale. The Appellant investigated alternative access arrangements, but these involved third party land and so were not pursued¹⁴.

C. POLICY FRAMEWORK

The Development Plan

9. The starting point under the test under section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the PCPA”) is the development plan, which at a local level¹⁵ comprises¹⁶:
 - a. Local Plan Part 1: Fareham Borough Core Strategy (adopted August 2011) (“the Core Strategy”);
 - b. Local Plan Part 2: Development Sites and Policies (adopted June 2015) (“the DSP”);
and
 - c. Local Plan Part 3: Welborne Plan (Adopted June 2015) (“the Welborne Plan”).
10. It is common ground that the Welborne Plan is not applicable to the determination of the Appeal, save for its relevance to the assessment of deliverable housing supply from Welborne¹⁷. However, a range of policies from the Core Strategy and DSP are agreed to be relevant to this

¹³ CDAA.1e Updated ES Vol 4 Appendix F7 sHRA §1.15 Table 1

¹⁴ CDA.32 Transport Assessment Addendum Vol 1 §2.7

¹⁵ The Hampshire Minerals and Waste Plan is also part of the development plan, but is not relevant to this Appeal

¹⁶ Sennitt Proof §7.1.1

¹⁷ Main SOCG §4.6

Appeal¹⁸, and these are helpfully summarised in §§7.2.5 to 7.2.23 of Mr Sennitt’s Proof. Chief among these is Policy DSP40, which expressly addresses the manner in which applications should be decided where (as here) a five-year housing land supply cannot be demonstrated. This policy should be given full (or at the very least substantial) weight in the planning balance and conflict with it should be a matter of the greatest consideration¹⁹. However, other policies are also relevant: of these, CS2, CS6, CS14, CS16, CS22 and DSP6 should be given significant weight and the remainder full weight, as Mr Sennitt describes²⁰.

The Emerging Local Plan

11. The Council is in the process of preparing a new Local Plan (“the Emerging Local Plan”) to address development needs in the Borough up until 2037. On adoption it will replace the Core Strategy and DSP, but not the Welborne Plan.
12. The Emerging Local Plan has proceeded to Regulation 19 publication²¹ (the final stage before submission) twice. The second of these, the revised publication draft²², has very recently completed its six week consultation (which ran from 18th June to 30th July 2021) and the Council is currently reviewing the responses. Under the Council’s current Local Development Scheme (“LDS”)²³ adoption is expected in Autumn/ Winter 2022.
13. The Council and Appellant agree that “limited weight” should currently be attached to the Emerging Local Plan²⁴. However, limited weight is not no weight and it is therefore important to consider certain aspects and policies, as Mr Sennitt does in sections 7.3 to 7.7 of his Proof.

The National Planning Policy Framework

14. Mr Sennitt addressed the relevant policies of the 2019 version of the NPPF in section 7.8 of his Proof. On 20th July 2021 a new version of the NPPF was published, which immediately replaced

¹⁸ Main SOCG §§4.3 and 4.4

¹⁹ Sennitt Proof §9.3.3

²⁰ Sennitt Proof §9.3.4-5

²¹ That is, publication pursuant to Regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2021 (“the 2021 Regulations”)

²² CDF.5

²³ CDF.6 at §3.8 Table 1

²⁴ Main SOCG §4.13

the 2019 version. As explained in the 26th July 2021 Paris Smith Memorandum²⁵, the Council and its witnesses do not consider the revised NPPF to be substantively different from its predecessor for the purposes of this Appeal, though many of the paragraph numbers have changed.

D. HOUSING AND AFFORDABLE HOUSING

15. Since this is a residential-led proposal, it is important to understand the housing land supply position in the Borough. Happily, as set out in the 5YHLS SOCG²⁶, the parties have reached considerable agreement on five-year housing land supply issues, as a result of which you have been able to agree to take the housing evidence as read²⁷:

- a. It is agreed that the five-year period to be used for the purpose of calculating the five-year housing land supply position for this Appeal is 1st January 2021 to 31st December 2025²⁸.
- b. It is agreed that the housing requirement falls to be measured against the local housing need figure calculated using the standard method²⁹.
- c. It is agreed that the starting point derived from the standard method equates to 2,695 dwellings over the five-year period (or 539 dwellings per annum)³⁰ but that this requires a 20% uplift, giving a five-year requirement of 3,234 dwellings³¹.
- d. It is agreed that the Council is unable to demonstrate a five-year supply of housing for the period 1st January 2021 to 31st December 2025³². The Council considers the 5YHLS position to be 3.57 years while the Appellant considers it to be 0.93 years³³.

²⁵ Item E4

²⁶ CDD.2

²⁷ Pre-Inquiry Note of 4th August 2021

²⁸ 5YHLS SOCG §3.1

²⁹ 5YHLS SOCG §3.2

³⁰ 5YHLS SOCG §3.3

³¹ 5YHLS SOCG §§3.30-5

³² 5YHLS SOCG §2.2

³³ 5YHLS SOCG §§4.1 and 4.2

e. Whilst there is a disagreement on the extent of the shortfall, it is agreed, on either position, that the shortfall is significant and the weight to be attached to the delivery of housing from the Proposal is significant; and as such (on principles established by the Court of Appeal in *Hallam Land Management Ltd v SSCLG* [2018] EWCA Civ 1808³⁴) it is not considered necessary for you to conclude on the precise extent of the shortfall³⁵. Nonetheless, Mr Sennitt provides substantial detail in section 10 of his Proof, explaining recent improvements in the Council's 5 year housing land supply position, why the 3.57 year figure on which it relies is robust, and why it is likely to continue to improve in the future through plan-led delivery.

16. It is also common ground that there is a significant unmet affordable need within the Borough³⁶, something which Mr Sennitt explores in section 11 of his Proof.

E. REASONS FOR REFUSAL (A), (B), (C), (D) AND (F)

17. On reason for refusal (a), the Council will demonstrate that the Proposal falls within countryside in both adopted and emerging policy, and that its development would breach numerous policies of the Core Strategy, DSP and Emerging Local Plan including, as a result of the unacceptable environmental, amenity and traffic implications, Policy DSP40. There are also landscape and visual harms³⁷ which must be factored into the planning balance, although there is no freestanding landscape reason for refusal and the Council accepts that these have been minimised for the purposes of DPS40(iii)³⁸.

18. On reason for refusal (b), the Council will show that the Appeal Site is correctly designated as a Primary Support Area under the Solent Waders and Brent Goose Strategy 2020 ("the Strategy")³⁹ and the Emerging Local Plan, that the Proposal would require effective mitigation (calibrated to the Site's demonstrated ability to support 300 Brent Geese) to be secured in perpetuity, but that

³⁴ CDK.8

³⁵ 5YHLS SOCG §5.3

³⁶ Main SOCG §4.12

³⁷ Main SOCG Executive Summary §3(d)

³⁸ *Ibid.*

³⁹ CDH.6

the Appellant's proposed mitigation is neither effective nor secured, such that an adverse effect on the integrity of the Portsmouth Harbour SPA and Ramsar cannot be ruled out beyond a reasonable scientific doubt⁴⁰ and the Proposal is contrary to adopted and emerging local policy and national policy. The Council is strengthened in its view by the continuing objection of Natural England to the Proposal (most recently in its 30th July 2021 consultation response⁴¹): given its status as the appropriate nature conservation body under the Habitats Regulations, its views command considerable weight and you (as competent authority for the purposes of this Appeal) would need cogent reasons for disagreeing with them in the appropriate assessment that would be required were you to consider granting permission⁴².

19. Until recently, the Appellant agreed that effective mitigation was required, but this was subject to an abrupt and unheralded change in its Statement of Case⁴³. It now suggests that, because the Site has recently been subject to a management regime that is unsuitable for Brent Geese and waders, it does not currently perform as a Primary Support Area, and it contends that no mitigation is therefore required (although mitigation is nonetheless offered). Under this new primary position, an owner of a Primary Support Area could take it out of suitable management for whatever reason (including in a cynical attempt to gain planning permission) and then reap the rewards by securing a planning permission with either lesser mitigation than would have been required or no mitigation at all. This is an anti-environmentalist approach that would undermine the Strategy and the protection of European Sites under the Habitats Regulations. Avoiding such an absurd and damaging outcome is why, consistent with the protection afforded by the Habitats Regulations, the Solent Waders and Brent Goose Strategy Guidance on Mitigation and Off-Setting Requirements 2018 ("the Mitigation Guidance")⁴⁴ allows for reclassification of sites only if confirmed by three consecutive years of surveys under appropriate habitat management conditions. The Appellant's primary position on reason for refusal (b) should therefore be rejected, and the focus should be on whether there is certainty of adequate

⁴⁰ The requisite test under the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"): see *R (An Taisce) v SSECC* [2015] Env. L.R. 2 at [17] to [18]

⁴¹ Item F

⁴² *R (Mynydd y Gwynt Ltd) v Business Secretary* [2018] P.T.S.R. 1274 at [8(8)]

⁴³ Item B.1 at §5.35

⁴⁴ CDH.7 at §9

mitigation in perpetuity for loss of a site capable of supporting 300 Brent Geese (and also waders), which as already explained there is not.

20. On reason for refusal (c) the Council will show through Mr Philpott's evidence that the Proposal (through displacement as a result of the extra parking restrictions to be imposed) will cause inconvenience and loss of amenity to residents and other road users. Although such impacts are not "severe" for the purposes of NPPF paragraph 111, they are significant and must be factored into the planning balance as significant planning harms. Mr Philpott will also demonstrate that servicing activities combined with high parking demand and a significant increase in daily traffic arising from the Proposal are likely to give rise to conflict and as a result prejudice highway safety.
21. On reason for refusal (d), the Appellant has made recent progress in addressing this reason for refusal through the July versions of the Framework Landscape & Ecological Specification & Management Plan ("fLEMP")⁴⁵ and the Framework Construction Traffic Environmental Management Plan ("fCTEMP")⁴⁶ and through new information in Mr Day's and Mr Whitby's evidence. As a result, Mr Sibbett is satisfied that a number of the issues raised in his Proof have been resolved, as explained in his Note of 9th August 2021. However, as a result of ongoing surveys, significant gaps remain in the ecological evidence and it is not possible to evaluate all likely significant effects of the Proposal until the survey work is complete⁴⁷. This is a fundamental problem⁴⁸. The assessment of badgers has also not considered⁴⁹ the cumulative impacts of the adjacent residential development to the east under the Cranleigh Road scheme⁵⁰.
22. Finally, on reason for refusal (f), it is common ground⁵¹ that the loss of best and most versatile agricultural land alone (i.e. if there were no other harms) would not be sufficient to warrant the refusal of planning permission. But it is also common ground that it remains a matter to be

⁴⁵ Item E3

⁴⁶ *Ibid.*

⁴⁷ Sibbett Main Proof §§6.2 to 6.3

⁴⁸ See Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and *R v Cornwall County Council ex parte Jill Hardy* [2001] Env LR 25) (CDK.12)

⁴⁹ Sibbett Main Proof §6.4

⁵⁰ CDJ.6

⁵¹ Main SOCG §4.10

weighed as a harm in the overall planning balance and that the better the quality of agricultural land being lost (here the highest grades), the greater the weight to be afforded on the negative side of the planning balance. Here, as Mr Sennitt explains⁵², the loss should attract significant weight in the planning balance.

F. BENEFITS OF THE PROPOSED DEVELOPMENT

23. In recommending refusal, Officers (and in accepting that recommendation, Members) had proper regard to the benefits of the Proposal⁵³ and Mr Sennitt very fairly does the same in section 13 of his Proof. The main benefits of the Proposal are the provision of market and affordable housing, both of which (as Mr Sennitt recognised⁵⁴ and as is common ground⁵⁵) deserve significant weight in the planning balance, as do associated economic benefits.

G. PLANNING BALANCE

24. Mr Sennitt addresses the planning balance in section 14 of his Proof, finding that planning permission should be refused. As he explains, he proceeds on the assumption (which remains likely but not certain) that a unilateral undertaking allowing the Council to withdraw reasons for refusal (g) to (l) will be executed. If that does not occur, his conclusion that planning permission should be refused will be further reinforced.

25. As in all cases, the Appeal Proposal must be determined in accordance with the development plan unless material considerations indicate otherwise (as set out in section 38(6) of the PCPA). The NPPF is a material consideration in the section 38(6) test, but does not displace the primacy given to the development plan.

26. The Council considers that the Proposal breaches a number of development plan policies and the development plan as a whole. This includes DSP Policy DSP40, to which the “greatest weight” must be given, since it sets a plan-led and fully NPPF-compliant approach to circumstances in which (as is currently the case) the Council cannot demonstrate a five-year housing land supply.

⁵² Sennitt Proof §12.7.4

⁵³ CDC.1 at §8.69

⁵⁴ Proof §13.1.1 and 13.1.2

⁵⁵ 5YHLS SOCG §5.3 (delivery of housing) and Main SOCG §4.12 (affordable housing)

27. As a result of the absence of a five-year housing land supply, paragraph 11(d) of the NPPF is engaged unless disapplied. However, in this case the Council considers that the presumption is disapplied by paragraph 182 of the NPPF, since, as explained above, an adverse effect on the integrity of habitats sites cannot be ruled out beyond reasonable scientific doubt.
28. If the Council's view that an adverse effect on the integrity of habitats sites cannot be ruled out is accepted, it means that planning permission cannot lawfully be granted unless the derogation tests (the so-called IROPI tests) under Regulation 64 of the Habitats Regulations are met. The Appellant has not to date suggested this, and it would be fanciful to consider that they could be met for an ordinary housing proposal that could be located elsewhere.
29. Planning permission also cannot lawfully be granted if you accept the Council's view that the outstanding surveys mean that there is not full knowledge of the likely significant effects of the Appeal proposal⁵⁶.
30. Should you find following an appropriate assessment that (contrary to the Council's position) it is certain beyond a reasonable scientific doubt that there would be no adverse effect on the integrity of any habitats sites, and should you also find (again contrary to the Council's position) that the surveys are sufficiently complete, then the Council accepts that NPPF paragraph 11(d) would be engaged given the lack of a five-year housing land supply. In such a scenario (i.e. one in which reason for refusal (b) had been overcome), 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 Proposal fails the Limb ii. test because the benefits (significant though they are) would be significantly and demonstrably outweighed by the very substantial adverse effects of the Proposal (which in this scenario would be those from reasons for refusal (a), (c), (d) and (f)).

⁵⁶ See Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and *R v Cornwall County Council ex parte Jill Hardy* [2001] Env LR 25) (CDK.12)

H. OVERALL CONCLUSIONS

31. For these reasons, which will be explored in evidence, I will in due course invite you to dismiss the Appeal.

NED HELME
39 ESSEX CHAMBERS
81 Chancery Lane, London, WC2A 1DD

10th August 2021