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

CLOSING 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 website[1].

A. INTRODUCTION

1. These Closing 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. As I noted in Opening, the Proposal is highly controversial. It attracted a total of 494 objections from 308 residents at application stage[2] and further objections at appeal stage[3]. Numerous local residents took time to give evidence in the public session and reported not only their individual views, but also those of the wider community (see, for example, the submission from Carol Puddicombe[4], which reported on interviews of almost 200 people). It is unambiguously clear that local residents, who know this area intimately, are profoundly concerned about this Proposal.

3. Concern is entirely warranted. As has been demonstrated in the Council's evidence, the Proposal is contrary to the policies and spatial strategies of both the adopted and emerging local plans as well as NPPF policy, and its impacts would be very harmful indeed.

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[1] https://moderngov.fareham.gov.uk/ieListDocuments.aspx?CId=363&MId=4041&Ver=4
[2] CDC.1 at §6.1 and CDC.2 at page 1
[3] Item F
[4] INQ.4

4. The Appellant has presented something of a moving target in these proceedings, with significant changes in position in its Statement of Case, and a flurry of new materials in June and July including an entirely new Environmental Statement. Yet it remains half-cocked, with out-of-date species surveys still being updated and the crucially important Brent Geese mitigation still up in the air. The Unilateral Undertaking has been evolving throughout the inquiry, and has now split into two with multiple drafts submitted right up to the wire. The Appellant has also submitted notes on habitats issues[5] which ought on any reasonable view to have been part of the evidence submitted with the original Proofs, and Mr Sibbett has been put to the trouble of providing a Note in response with an urgency entirely of the Appellant's making. This sort of approach is regrettable in all cases, but particularly so where, as here, a proposal risks harm to European Sites, when the need for clarity and certainty is particularly acute.

B. POLICY FRAMEWORK

The Development Plan

5. 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 level[6] comprises[7]:
    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").

6. 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 Welborne[8].

[5] INQ25 and 26
[6] The Hampshire Minerals and Waste Plan is also part of the development plan, but is not relevant to this Appeal
[7] Sennitt Proof §7.1.1
[8] Main SOCG §4.6

7. A range of policies from the Core Strategy and DSP are agreed to be relevant to this Appeal[9], and the relevant provisions of 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 consideration[10]. Anything less would fail to respect the primacy given by statute to the development plan[11]. There have been findings in recent appeal decisions that criteria (ii) and (iii) of Policy DSP40 may be unduly restrictive in striking the balance between housing land supply and other factors, leading to "considerable" rather than full weight being accorded to those criteria[12]. No such views have been expressed about criterion (v), and it has recently been found that "it is consistent with the Framework and conflict with that requirement [i.e. criterion (v)] would be a matter of the greatest weight"[13]. DSP40 is therefore fundamental, but other policies are also relevant: of these, CS2, CS6, CS14, CS16 and DSP6 should be given significant weight and the remainder full weight, as Mr Sennitt described[14].

The Emerging Local Plan

Introduction

8. As Mr Sennitt explained[15] 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.

9. The Emerging Local Plan has proceeded to Regulation 19 publication[16] (the final stage before submission) twice. The first publication draft[17] was consulted upon for six weeks between 6th

[9] Main SOCG §§4.3 and 4.4
[10] Sennitt Proof §9.3.3
[11] CDK.4 ***Hopkins Homes v SSCLG*** [2017] 1 WLR 1865 at [21] *per* Lord Carnwath
[12] CDJ.4 at §110; INQ.13 at §46
[13] CDJ.4 at §111
[14] Sennitt Proof §9.3.4-5
[15] Sennitt Proof §7.4.1 to 7.4.3
[16] That is, publication pursuant to Regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2021 ("the 2021 Regulations")
[17] CDF.4

November and 18th December 2020. It was then revised in the light of changes to the Planning Practice Guidance. The revised publication draft[18] has very recently completed its six week consultation (which ran from 18th June to 30th July) and the Council is currently reviewing the responses.

10. Under the Council's current Local Development Scheme ("LDS")[19] the submission of the Emerging Local Plan to the Secretary of State for independent examination is scheduled for Autumn 2021 and thereafter, the Emerging Local Plan is expected to be subject to independent examination in Winter/ Spring 2021/ 2022 and adopted in Autumn/ Winter 2022.

Weight to be Attached to the Emerging Local Plan

11. The weight to be attached to the Emerging Local Plan is governed by the three factors set out in paragraph 48 of the NPPF. On the first of these, the Plan is at a relatively advanced stage of preparation, having undergone multiple consultations and reached Regulation 19 stage. On the third, the Council considers its policies to be consistent with the NPPF. However, it has not yet been through independent examination and the extent of objections to its policies (the second factor under paragraph 48) is not yet fully known. Although the current Regulation 19 consultation has now closed, the Council has not yet been able to analyse all responses. In these circumstances, the Council and Appellant agree that "limited weight" should currently be attached to the Emerging Local Plan[20]. However, limited weight is not no weight and it is therefore important to consider certain aspects and policies.

Treatment of the Appeal Site under the Emerging Local Plan

12. As Mr Sennitt describes in section 7.6 of his Proof, the Appeal Site was submitted in response to a call-for-sites exercise in 2015 and was included as Housing Site HA5 in the 2017 draft Local Plan[21]. The Appellant made much play of this in its application materials, rightly viewing it as

[18] CDF.5
[19] CDF.6 at §3.8 Table 1
[20] Main SOCG §4.13
[21] CDF.1 at pages 145-6

material[22]. However, although the LVIA in the updated ES fails to recognise this[23], the Appeal Site has not been carried forward as an allocation in either the 2020 publication draft[24] or the current publication draft[25]. It is outside the Urban Area boundary as shown on the Draft Policies Map and therefore in countryside.

13. As Mr Sennitt notes in §7.6.3 of his Proof, the current publication draft plan identifies a site near to the Appeal Site as a draft housing allocation: site Moraunt Drive, Portchester (HA12)[26]. Portchester has therefore not been neglected in the Emerging Local Plan, but under a plan-led approach, the Appeal Site has not been favoured.

Relevant Policies of the Emerging Local Plan

14. The relevant policies from the Emerging Local Plan are helpfully summarised in section 7.7 of Mr Sennitt's Proof.

The National Planning Policy Framework

15. Mr Sennitt addressed the relevant policies of the 2019 version of the NPPF in section 7.8 of his Proof. As you have heard, on 20th July 2021 a new version of the NPPF was published, which immediately replaced the 2019 version. As explained in the 26th July 2021 Paris Smith Memorandum, and as is common ground, the revised NPPF is not substantively different from its predecessor for the purposes of this Appeal, though many of the paragraph numbers have changed.

C. 5-YEAR HOUSING LAND SUPPLY

16. 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 SOCG[27], the parties have reached

[22] See, for example, the Planning Statement (CDA.6) at page 7 and the Design and Access Statement (CDA.8) on pages 8, 20 and 22
[23] CDAA.1d Updated ES Vol 3 LVIA at §3.10 and §8.2
[24] CDF.4
[25] CDF.5
[26] Full planning permission has been granted for this on 7th May 2021 – Sennitt Proof §7.6.3
[27] CDD.2

considerable agreement on five-year housing land supply issues, as a result of which you have been able to take the housing evidence as read[28]:

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 2025[29].

b. It is agreed that the housing requirement falls to be measured against the local housing need figure calculated using the standard method[30].

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)[31] but that this requires a 20% uplift, giving a five-year requirement of 3,234 dwellings[32].

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 2025[33]. The Council considers the 5YHLS position to be 3.57 years while the Appellant considers it to be 0.93 years[34].

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 1808[35]) it is not considered necessary for you to conclude on the precise extent of the shortfall[36]. Nonetheless, Mr Sennitt provided substantial detail in section 10 of his Proof, explaining recent improvements in the Council's 5 year housing land supply

[28] Pre-Inquiry Note of 4th August 2021
[29] 5YHLS SOCG §3.1
[30] 5YHLS SOCG §3.2
[31] 5YHLS SOCG §3.3
[32] 5YHLS SOCG §§3.30-5
[33] 5YHLS SOCG §2.2
[34] 5YHLS SOCG §§4.1 and 4.2
[35] CDK.8
[36] 5YHLS SOCG §5.3

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.

D. AFFORDABLE HOUSING

17. It is also common ground that there is a significant unmet affordable need within the Borough[37], something which Mr Sennitt explored in section 11 of his Proof, and he rightly accorded "significant weight" to the benefit of affordable housing provision[38]. In his Main Proof, Mr Brown suggested that "great weight" should be accorded to it[39], but he accepted[40] that this was not a term used in relation to affordable housing in any of the decisions before you. The NPPF requires "great weight" to be accorded in a very limited range of circumstances and this is not one of them. In truth, as Mr Brown accepted[41], the Proposal provides affordable housing at the minimum policy compliant level under Policy CS18. Significant weight is appropriate, but great weight is not.

E. PRINCIPLE OF DEVELOPMENT OUTSIDE THE SETTLEMENT BOUNDARY AND COUNTRYSIDE AND LANDSCAPE IMPACTS (REASON FOR REFUSAL (A))

18. As Mr Sennitt explained, the Proposal conflicts with Policies CS2, CS6, CS14 and DSP6[42]. However, given the absence of a 5YHLS, it is common ground that Policies CS2, CS6 and DSP6 are out of date and that the weight to be afforded to policy CS14 is reduced[43]. In circumstances, as here, in which a 5YHLS is absent, Policy DSP40 operates as a contingency policy[44], and accordance with it ensures accordance with the development plan as a whole. But breach of it is a matter of the greatest weight, and for the reasons given in relation to grounds (c) and (f) below, it is breached in this case (it is also breached as a consequence of grounds (b) and (d), but each of those would give rise to a statutory bar to granting permission, and so DSP40 would only fall to be considered if the Council's position on those grounds is rejected). As Mr Sennitt explained in §12.2.3 of his Proof, the Proposal also conflicts with the Emerging Local Plan, which although

[37] Main SOCG §4.12
[38] Sennitt Proof §13.1.3
[39] Main Proof §6.45
[40] Under XX
[41] Under XX
[42] Sennitt Proof §12.2.1
[43] Main SOCG §§4.4 and 4.5
[44] CDE.2 at §5.163

only a matter of limited weight given its stage of preparation, further militates against the Proposal.

19. There are also landscape and visual issues to consider in relation to reason for refusal (a). The Appellant rightly understood in its Statement of Case that such issues were implicit within this reason for refusal[45]. And the Council fairly addressed them in its Statement of Case[46]. As Mr Sennitt explained, the Council does not have a freestanding landscape reason for refusal, but as with any rural housing proposal of this scale, a degree of adverse landscape and visual impact will occur (this is common ground[47] and is also accepted in the Appellant's LVIA[48]), which would be in breach of policies CS14, CS17 and DSP6. Mr Sennitt and the Council accept that landscape and visual impacts have been minimised for the purposes of DSP40 criterion (iii) and that residual landscape and visual impacts could be successfully minimised by a positive design response and landscaping strategy at the reserved matters stage[49]. Mr Sennitt also accepted that if DSP40 were found not to be breached, landscape and visual harms would not tip the balance to refusal. But if the Council's case on breach of DSP40 is accepted, landscape and visual impacts (while not themselves giving rise to a breach of DSP40) must be factored into the planning balance as negatives in the usual way, as must the breaches of CS14, CS17 and DSP6 caused by the (albeit limited) landscape and visual harms. The Appellant's suggested approach of ignoring landscape and visual harms simply because they do not themselves amount to a breach of DSP40 wrongly attempts to silo off the issues, which is wholly inconsistent with the approach required under section 38(6) of the PCPA.

F. THE EFFECT OF THE PROPOSAL ON EUROPEAN PROTECTED SITES (REASON FOR REFUSAL (B))

Introduction

20. The Appeal Site is close to a variety of internationally important habitats sites. The Solent and Southampton Water Special Protection Area ("SPA") and Ramsar is 5.14 kilometres to the southwest and the Portsmouth Harbour SPA and Ramsar (also a Site of Special Scientific Interest

[45] Item B1 at §5.12
[46] Item B2 at §8.7
[47] Main SOCG Executive Summary §3(d)
[48] CDAA.1d Chapter 7 Tables 7.1, 7.2, 7.4 and 7.5
[49] Main SOCG Executive Summary §3(d)

("SSSI")) is a mere 185m to the southwest[50]. These are habitats sites of the greatest importance and sensitivity.

21. Two of the reasons for refusal (b and h) concern impacts on European Sites. The latter of these will be resolved (so long as the unilateral undertaking is executed) by payment of the Bird Aware Solent Contribution, which the Council accepts will effectively mitigate the recreational impacts[51]. The former remains a fundamental and insuperable objection to the Proposal.

Habitats Legislation

22. In addressing impacts on European Sites, it is essential to apply the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") rigorously. They impose stringent tests, reflecting the great importance and sensitivity of the habitats and species they seek to protect.

23. The requirements are addressed fully and fairly in §§4.9 to 4.13 of Mr Sibbett's Proof (he was not challenged on any of this) and are summarised in ***R (Mynydd y Gwynt Ltd) v Business Secretary*** [2018] P.T.S.R. 1274[52] and ***R (An Taisce) v SSECC*** [2015] Env. L.R. 2[53]. In closing, I draw particular attention to the following propositions, all of which were accepted by Mr Whitby under cross examination:

    a. You are the competent authority for the purposes of this Appeal. If you are otherwise minded to grant permission, you must undertake an appropriate assessment to consider any likely significant effects on European Sites.

    b. Significant effects are "likely" in this context if they cannot be excluded beyond a reasonable scientific doubt[54].

[50] CDAA.1e Updated ES Vol 4 Appendix F7 sHRA §1.15 Table 1
[51] Sibbett Proof Section 7 and Sibbett Note of 6th August 2021 §1.3
[52] CDK.9
[53] CDK.16
[54] ***An Taisce*** at [17]-[18]

c. A significant effect in respect of Brent Geese and Waders cannot be excluded beyond a reasonable scientific doubt and so an appropriate assessment would be required to consider this impact pathway.

d. An appropriate assessment requires a high standard of investigation[55].

e. The question for the authority carrying out the assessment is: What will happen to the European Site if this plan or project goes ahead; and is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?[56]

f. For an appropriate assessment to be "passed" the competent authority must be certain beyond a reasonable scientific doubt that there will be no adverse effect on the integrity of the European Site in perpetuity[57].

g. The test of certainty beyond a reasonable scientific doubt is a stringent test.

h. In conducting an appropriate assessment (as opposed to screening for likely significant effects) the competent authority must consider mitigation, but to rely on it, such mitigation must be secured in perpetuity[58].

i. Where a competent authority is not certain beyond a reasonable scientific doubt that a plan or project will not (alone or in combination with others) adversely affect the integrity of a European Site, permission has to be refused unless the derogation tests under Regulation 64 (the IROPI tests) are met.

[55] ***Mynydd*** at [8(3)]
[56] ***Mynydd*** at [8(4)]
[57] ***Mynydd*** at [8(5)-(6)] and ***An Taisce*** at [17]-[18]
[58] ***Mynydd*** at [8(7)]

j. Natural England is the appropriate nature conservation body under the Habitats Regulations. A competent authority would need a cogent explanation if choosing to give anything less than considerable weight to its views[59].

24. These are not, as Mr Boyle characterised them in Mr Whitby's re-examination, "Mr Helme's tests" but what the law requires and for very good reason. To fail to apply them, or to apply them loosely, risks the harm that they were designed to prevent.

Adopted and Emerging Policy

25. In addition to the legislative requirements, there is specific provision for Brent Geese and Waders under both adopted and emerging policy.

26. Policy DSP14[60] makes provision for Supporting Sites for Brent Geese and Waders. It distinguishes between "uncertain" and "important" sites, reflecting the old approach under the 2010 Solent Waders and Brent Goose Strategy. The Appeal Site is shown as "uncertain" on the policies map. However, it is common ground that Policy DSP14 allows classifications to be updated[61], and that a Primary Support Area (unless erroneously designated) is "important" under the Policy. The Appeal Site is shown as part of a Primary Support Area on the policies map for the Emerging Local Plan[62], and protection afforded to it by Policy NE5[63].

Shifts in the Appellant's Position

27. In considering whether the Appellant has satisfied you beyond a reasonable scientific doubt that an adverse effect on integrity will be avoided if the development comes forward, it is highly relevant to consider the twists and turns in its position.

28. In its original Environmental Statement, the Appellant accepted the Primary Support Area classification and, on that basis, considered the Appeal Site to be of "county value to SPA birds

[59] ***Mynydd*** at [8(8)]
[60] CDE.2 page 32
[61] Main SOCG §2.8
[62] Sibbett Proof §5.1
[63] CDF.5 at page 248

forming part of the qualifying habitat areas"[64]. It noted that the Appeal Site was not "currently managed in a favorable (sic) way for SPA birds" but it did not seek to reduce the Site's value on that basis[65]. It therefore accepted that the impact in the absence of mitigation would be a "certain major adverse impact"[66]. It was only after mitigation (based on a mitigation scheme which the Appellant no longer relies on) that the original Environmental Statement considered the impacts could be reduced to "negligible"[67]. As Mr Whitby accepted[68], therefore, at application stage the Appellant adopted Natural England's and the Council's position that mitigation calibrated to the ability of the Site to support Brent Geese and waders when under appropriate habitat management was required.

29. This common ground on the level of mitigation required (but not whether the mitigation would be successful) was subject to an abrupt and unheralded reversal in the Appellant's Statement of Case[69]. It was now suggested for the very first time that no mitigation whatsoever was required under the Habitats Regulations[70]. This new position was based on an obvious failure to understand the precautionary approach under the Habitats Regulations, as the reference to "doubt" in §5.39 makes clear.

30. The Appellant's new position that no mitigation at all was required under the Habitats Regulations was maintained in its shadow HRA, though in somewhat unclear terms[71]. However, it was rightly abandoned by Mr Whitby under cross examination, when he accepted in clear and unqualified terms that mitigation for impacts on Brent Geese and Waders was required to secure compliance with the Habitats Regulations. This was not the end of the twists and turns in the Appellant's position, however. As explained below, Mr Whitby also accepted in clear and unqualified terms under cross examination that to secure compliance with the Habitats Regulations it was necessary for mitigation to be calibrated to the ability of the Site to

[64] CDA.4 page 58 §5.5
[65] CDA.4 page 58 §5.5
[66] CDA.4 page 60 §6.1.1.5
[67] CDA.4 page 73
[68] Under XX
[69] Item B1
[70] Item B1 §5.35
[71] CDAA.1e at §§3.68 to 3.75.

support Brent Geese and waders when under appropriate habitat management. Yet under re-examination he sought to abandon this clear concession.

31. The burden is on the Appellant here. It must satisfy you beyond a reasonable scientific doubt of the correctness of its position. Its twists and turns underscore its clear inability to do so.

The Natural England Objection

32. Natural England has adopted a consistent position since the time of its pre-application advice: (i) mitigation is required and is required to be calibrated to the ability of the Site to support Brent Geese and waders when under appropriate habitat management; and (ii) it cannot be concluded beyond a reasonable scientific doubt that the Appellant's proposed mitigation would be effective so as to avoid an adverse effect on integrity. Its consultation responses have culminated in its objection of 30th July 2021, made having considered the Appellant's updated Environmental Statement and Shadow Habitats Regulations Assessment.

33. Mr Whitby sought to cast doubt on Natural England's clear position, suggesting that it had not embarked on a detailed rebuttal of the Environmental Statement. But Natural England cannot be expected to provide such detailed rebuttals on all proposals. And as Mr Whitby accepted[72], he had no reason to doubt that Natural England had considered the Environmental Statement and Shadow Habitats Regulations Assessment carefully and come to a considered view. Moreover, Natural England is well aware of the network of supporting sites (including the Appeal Site) through its work as part of the Solent Waders and Brent Geese Strategy Steering Group ("the Steering Group").

34. Mr Whitby therefore fairly accepted that there was no reason to depart from the general approach[73] that Natural England's views must be given "considerable weight"[74], such that you would need cogent reasons to disagree with them. Moreover, he expressly accepted that Natural England's views were "reasonable" [75]. This presents profound challenges to the Appellant in

[72] Under XX
[73] ***Mynydd*** at [8(8)]
[74] Under XX
[75] Under XX

seeking to convince you that its position (entirely out on a limb as it is) is certain beyond a reasonable scientific doubt.

The Strategy and the Mitigation Guidance

35. The Solent Waders and Brent Goose Strategy 2020 ("the Strategy")[76] and the Guidance on Mitigation and Off-setting Requirements 2018 ("the Mitigation Guidance")[77] are important documents for the purposes of this Appeal. Both Mr Sibbett and Mr Whitby recognised the considerable expertise at local and national level of the Steering Group that produced them[78] and it is clear that they should command substantial weight in these proceedings.

36. The Strategy is a non-statutory document presenting evidence, analysis, and recommendations to inform decisions relating to strategic planning as well as individual development proposals[79]. The Steering Group recommend that the Strategy be treated as an agreed evidence base for considering all relevant planning proposals[80]. Both Mr Sibbett and Mr Whitby rightly accepted that Inspectors should be slow to depart from it in considering planning proposals[81].

37. Its underlying principle (recognising the vulnerability of the network of sites it seeks to protect) is to wherever possible conserve extant sites, and to create new sites, enhancing the quality and extent of the feeding and roosting resource[82]. Its primary aims include: maintaining a network of sites through better management and protection from development and recreational pressure, and to ensure that they will be resilient to the pressures of climate change and predicted sea level rise in the future; and providing a strategy that will ensure that the network of important sites is protected, whilst reducing the current uncertainty over site use, in order to better inform key coastal stakeholders[83]. Consistent with this, its principal objective is to inform decisions relating to strategic planning as well as individual development proposals, to ensure that sufficient feeding and roosting resources continue to be available and the integrity of the network of sites

[76] CDH.6
[77] CDH.7
[78] Sibbett XIC, Whitby XX
[79] CDH.6 page 5
[80] CDH.6 page 37
[81] Sibbett XIC, Whitby XX
[82] CDH.6 page 5
[83] CDH.6 page 5

is restored and maintained, in order to ensure the survival of the Solent's coastal bird populations. The underlying principle is to, wherever possible, conserve extant sites and to create new sites, enhancing the quality and extent of the feeding and roosting resource[84]. Mr Sibbett and Mr Whitby both accepted the appropriateness of all of this[85].

38. The Mitigation Guidance provides a "preferred approach"[86] for development to be located outside the network of sites protected under the strategy, which is plainly sensible. However, it provides an approach to mitigation of impacts on such sites in order to ensure compliance with the Habitats Regulations. The approach for Primary Support Areas is given in §§17 to 23 and the requirements are appropriately exacting.

Should the Appeal Site be Reclassified?

39. In the run-up to the Appeal, the Appellant's position appeared to be that the Appeal Site's classification under the Strategy should be changed, but Mr Whitby made clear in his Rebuttal[87] that the Appellant was not seeking this. It was right not to do so: §9 of the Mitigation Guidance is very clear that reclassification can only occur if: (i) confirmed by 3 consecutive years of surveys to the agreed survey methodology; and (ii) the site has been under appropriate habitat management conditions throughout the survey period. In this case, there have not been 3 consecutive years of surveys[88], and the site has not been under appropriate habitat management since the winter of 2013/14 (as a result of which it does not currently support feeding of Brent Geese, but it still provides some support for the species and for waders, as Mr Sibbett described[89]).

40. It is extremely important to understand the rationale for §9 of the Mitigation Guidance, which is to protect the network of sites under the Strategy. As Mr Sibbett pointed out at §5.7 of his Proof (and the Appellant has no answer to this) if reclassification could occur by a landowner taking a

[84] CDH.6 page 12
[85] Sibbett XIC, Whitby XX
[86] CDH.7 §1
[87] §2.3
[88] Indeed the winter bird surveys have not been updated at all since 2017 (updated ES Chapter 10, §10.3.13) which is unacceptable in itself, since they are out of date (see CDH.36).
[89] Main Proof §5.11 to 5.12 and in oral evidence

site into inappropriate management conditions and then waiting three years, it would create a perverse incentive to those seeking to develop sites to take them out of appropriate habitat management to achieve re-designation or de-designation, something which would provide a clear and serious risk of progressive erosion of the network of Primary Support Areas, and which would therefore harm the integrity of the SPA. Such an approach would be in clear conflict with the aims of the Strategy and the requirements of the Habitats Regulations themselves and would be profoundly anti-environmental.

41. The Appellant does not seek the re-designation of the Appeal Site, but in suggesting that the level of mitigation should reflect the current inappropriate management conditions, it is trying to get through the backdoor what it knows it cannot get through the front. It is seeking to leave the site as a Primary Support Area in name only, and to rob it of its significance.

42. In seeking to undermine the Primary Support Area classification, the Appellant suggested the that two counts of 300 Brent Geese on site from 2012 and 2013 were not in accordance with the Strategy. This was an entirely misconceived position, since the Strategy expressly set out that the records gained in the "most recent organised survey" begun in the winter of 2016/17 had been "collated" with previous records and "supplemented" with data from a range of sources[90]. The 300 counts were, therefore, in accordance with the methodology for the Strategy.

43. Mr Whitby accepted[91] that two counts of 300 Brent Geese in 2012 and 2013, if accepted, meant that the site was appropriately categorised as a Primary Support Area. However, he suggested in §5.2 of his Main Proof that misidentification in those counts was "possible"[92]. It would plainly undermine the Strategy if the Steering Group were required to defend each site on every application: the Strategy is intended as an agreed evidence base[93] for obviously sensible reasons. Moreover, there is no basis for suggesting that the 300 counts were not obtained in a robust manner and there is no basis for suggesting that it is at all likely that they are erroneous. Indeed, later in his Main Proof[94], Mr Whitby sought to explain the 300 counts by reference to crops

[90] CDH.6 at page 15
[91] Under XX
[92] Whiby
[93] CDH.6 at page 37
[94] §5.6

providing a feeding resource for Brent Geese in those years. Happily, and very fairly, Mr Whitby conceded under cross examination that you, as competent authority, should proceed on the assumption that those counts were genuine, on which basis it must now be common ground that the Primary Support Area categorisation has been fully justified.

Is Mitigation Required?

44. As already noted, the Appellant's position on whether mitigation is required has been inconsistent, but finally, under cross examination, Mr Whitby accepted in clear and unambiguous terms that mitigation of impacts on Brent Geese and Waders was required, including to secure compliance with the Habitats Regulations. Moreover, he accepted[95] that mitigation was required even if (which is not the case) the Appeal Site were a Low Use Site[96]. Mr Boyle did not seek to go behind this position in re-examination and it is therefore common ground between the Appellant, Council and Natural England that mitigation is required.

At what Level should the Mitigation be Calibrated?

45. The next question is the level at which the mitigation must be calibrated. As Mr Whitby accepted[97] it is not enough to simply offer mitigation; what is required is that sufficient mitigation is secured in perpetuity to avoid a risk to the integrity of the SPA beyond a reasonable scientific doubt. Natural England and the Council have consistently adopted the position that mitigation must be calibrated to the ability of the Site to support Brent Geese and waders when under appropriate habitat management. As explained above, the Appellant originally agreed, but had a volte-face in its Statement of Case. Happily, under cross examination, Mr Whitby conceded in clear and unambiguous terms that, in order to avoid a risk of an adverse effect on the integrity of the SPA beyond a reasonable scientific doubt, the mitigation had to be calibrated to the ability of the Site to support Brent Geese and waders when under appropriate habitat management. That concession was made at several points in the cross examination, including just before the afternoon break, after which I did not return to the issue. Rather surprisingly, the concession was withdrawn in re-examination. Mr Whitby was wrong to do so.

[95] Under XX
[96] The acceptance is plainly correct – see §§35 to 38 of the Mitigation Guidance (CDH.7)
[97] Under XX

46. If the mitigation is calibrated at a lower level than the ability of the Site to support Brent Geese and waders when under appropriate habitat management, it follows that the development would have a more harmful effect on the integrity of the SPA in any year in which the Appeal Site would otherwise have been a field in appropriate habitat management. In order to satisfy you, therefore, that mitigation calibrated at a lower level than the ability of the Site to support Brent Geese and waders when under appropriate habitat management would be sufficient, the Appellant must satisfy you beyond a reasonable scientific doubt that there is no prospect of the field being in appropriate habitat management at any time in the future. That is an impossible task for the Appellant.

47. The decision on which crops to plant is taken year on year. It is not like development, which once built is permanent (unless knocked down). The considerations which inform the decision can change year on year. In this case, in the recent past (2012 and 2013) the field has planted appropriately for Brent Geese and has supported them. As Mr Sibbett explained in §§5.13 to 5.15 of his Proof, choice of crops depends on a range of factors which change over time: market forces change, as do agricultural subsidies, agri-environment schemes, crop varieties, land ownership, and pest species (among other things). The Appellant's suggestion that the field will remain under inappropriate management in perpetuity is based on extremely limited evidence: a few paragraphs in the shadow Habitats Regulations Assessment[98] founded on assertions about the recent decisions of the current farmer and viability. There is no evidence to corroborate these assertions; and whether or not they are currently true, there is no basis for assuming the current, regrettable choice to manage the field unfavourably will continue in perpetuity. Indeed, there are hopes that under the 25 Year Environment Plan and other policy, environmental improvements in farming will come forward in the near future, as Mr Day accepted under cross examination.

48. For those reasons, the only way of avoiding a risk of an adverse effect on the integrity of the SPA is for the mitigation to be calibrated to the ability of the Site to support Brent Geese and waders when under appropriate habitat management. That has been the consistent view of Natural England and the Council, it was the view of the Appellant at application stage, and it was the

[98] CDAA.1e Appendix F7 §§3.40 to 3.48

view of Mr Whitby under cross examination (and also, it appeared, in evidence in chief[99]). There is no basis for adopting a lower mitigation level, which would provide a hugely unfortunate incentive to landowners to keep land in, or put land into, unfavourable management.

Would the Proposed Mitigation Design be Effective if Implemented and Maintained?

49. The Appellant must convince you beyond a reasonable scientific doubt that its mitigation would be effective and sufficient. This it has failed to do.

50. The Appellant's proposed mitigation consists of a fenced bird reserve designed to provide 3.7ha of Brent Goose foraging habitat. It is not fit for purpose, for the reasons explained by Mr Sibbett[100]. In essence:

    a. While the habitats are broadly of appropriate quality, §3.3 of the framework Landscape and Ecological Specification and Management Plan ("fLEMP")[101] has introduced a 7m verge of meadow grassland along the northern and western boundary of the mitigation area in an effort to achieve 10% Biodiversity Net Gain. This 7m verge is now shown in a July 2021 replacement to Appendix F6[102] to the Updated Environmental Statement. Mr Whitby and Mr Day both accepted[103] that this 7m verge is not optimal for Brent Geese. As Mr Sibbett suggested, it should be removed, and this calls into question whether 10% biodiversity net gain (on which the Appellant relies as a benefit of the Proposal) is achievable – Mr Day suggested it is, but accepted that this had not been demonstrated in evidence.

[99] At that stage, he merely said that it was "arguable" that the mitigation did not need to be calibrated to the ability of the Site to support Brent Geese and waders when under appropriate habitat management. That is a long way from suggesting (as he did in re-examination) that it is certain beyond a reasonable scientific doubt that a lower level of mitigation would avoid an adverse effect on integrity.
[100] Proof §§5.16 to 5.22 and orally
[101] Item E3
[102] CDAA.1e
[103] Under XX

b. The reserve would suffer greater disturbance effects than the status quo. As is clear from Drawing 16.140.10 Revision V[104] the number of houses within the problematic 50-500m zone[105] would increase substantially under the proposals, and there would be new estate roads in close proximity to the reserve. The location of the reserve also means that it is close to the Football Club. As Mr Townson explained, Brent Geese currently roost in the northern area of the field[106], but this would be given over to development. The disturbance effects from noise and lighting from the Football Club would therefore be exacerbated. The reserve would also be an island of recreational opportunity surrounded by a sea of demand, as Mr Sibbett explained.

c. The bird viewing hide / platform / screen is likely (given that this would not be a wardened reserve) to lead to anti-social activity and a points source of disturbance.

d. The reserve is small in comparison with the 12.55ha site and of irregular shape, both features that reduce its suitability[107].

e. The wider countryside gap of around 40ha would also be compromised, as Mr Sibbett and Natural England[108] have both explained.

51. Of course, it is not necessary for the Council to convince you that the mitigation will be ineffective. Rather, it is for the Appellant to convince you that there is certainty that it will. In reaching for this high bar, the Appellant has sought to rely on various alleged comparators, but these further undermine its case. In particular:

a. The Appellant has relied on only a few comparators. One cannot demonstrate certainty with such meagre evidence.

[104] INQ.12
[105] CDH.6 page 24
[106] INQ.9(a) at page 8
[107] CHD.6 page 24
[108] CDB.9(c) page 2

b. There is no basis for suggesting the disturbance issues among the comparators are comparable to the Appeal Site, as Mr Sibbett explained[109].

c. Four of the comparators in Table 13 of the shadow Habitats Regulations Assessment are Core Areas, the highest tier of sites in the Strategy's hierarchy, and those that are therefore to be expected to provide higher counts. It provides no support to the Appellant's position about a Primary Support Area to suggest that amenity land in Core Areas can be capable of supporting Brent Geese. The factors in play are different.

d. Various of the comparators (including G30C, P40A and, in one count, G03[110]) have returned counts lower than the two 300 counts on the Appeal Site in any event.

52. For those reasons, the Appellant has failed to demonstrate beyond a reasonable scientific doubt that the mitigation would be effective if secured. And although Mr Whitby expressed certainty on this point in re-examination, that was strikingly different from the uncertainty expressed in §§7.3 to 7.4 and 9.4 of his Proof. Natural England and Mr Sibbett have each been consistent and clear that the requisite certainty does not exist. There is no basis for taking a different view.

Is the Proposed Mitigation Adequately Secured?

53. The short answer is no, for the reasons set out in Mr Sibbett's Note of 19th August 2021. There are numerous issues with the indicative costings set out in the Tetra Tech Note[111] (as set out by Mr Sibbett in §§1.3 to 1.12 of his Note) and the Foreman Homes note[112] on viability relies on this flawed Note and provides no evidence beyond assertion[113]. Moreover, fundamental issues of principle remain:

[109] Proof §5.27
[110] Shadow HRA Table 13 (page 31) and CDA.38 page 4
[111] INQ.25
[112] INQ.26
[113] Sibbett Note of 19th August 2021 §1.13

a. There is no detailed and costed management plan and no specified commuted sum in the Unilateral Undertaking, both of which are required[114].

b. The Appellant's approach (now in the Unilateral Undertaking and conditions) remains vague and generic, with almost all details wrongly postponed to reserved matters stage[115].

c. The requisite discussions and agreement on a suitable body to manage the Bird Conservation Area have not taken place as required[116].

54. For those reasons, even if (which is not the case) the mitigation could in principle avoid an adverse effect on integrity beyond a reasonable scientific doubt, it has not been secured. The Council's drafting suggestions appear likely to be incorporated into the final draft of the Unilateral Undertaking (they were in the version emailed to the Council by Mr Weeks yesterday at 19:34), but these do not get round the fundamental in principle objections.

Overall Conclusions on Reason for Refusal (b)

55. For those reasons, consistent with the views of both Mr Sibbett and Natural England, you are not able to ascertain beyond reasonable scientific doubt that the Proposal would not have an adverse effect on the integrity of the Portsmouth Harbour SPA (and the associated SSSI and Ramsar). Mr Whitby fairly accepted that Mr Sibbett was highly experienced and qualified and that his views were reasonable[117]. He also fairly accepted that Natural England's views were reasonable and should be afforded considerable weight[118] in accordance with the usual approach[119]. In the circumstances, the Appellant has plainly failed to prove its case to the requisite standard. If it wishes to gain planning permission for development of this Site, it should return to the drawing board.

[114] Sibbett Note of 19th August 2021 §1.15
[115] Sibbett Note of 19th August 2021 §1.16
[116] Sibbett Note of 19th August 2021 §1.17
[117] Under XX
[118] Under XX
[119] ***Mynydd*** at [8(8)]

56. Granting permission would be in breach of adopted and emerging policy, as explained by Mr Sennitt[120]. More fundamentally, since the tests under the Habitats Regulations are not met, planning permission cannot lawfully be granted. The failure to secure adequate mitigation for Brent Geese and Waders is therefore fatal to the Appeal.

G. OTHER BIODIVERSITY CONSIDERATIONS (REASON FOR REFUSAL (D))

Introduction

57. On reason for refusal (d), as I noted in Opening[121], the Appellant has made recent progress in addressing this reason for refusal through the July versions of the fLEMP"[122] and the Framework Construction Traffic Environmental Management Plan ("fCTEMP")[123] and through new information in Mr Day's and Mr Whitby's evidence. As a result, Mr Sibbett has been satisfied that a number of the issues raised in his Proof have been resolved, as explained in his Note of 9th August 2021. However, fundamental issues remain.

58. Under Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations") a decision-taker is prohibited from granting planning permission for EIA development unless a legally compliant EIA has been carried out in respect of the development. As Mr Sibbett explained, and Mr Day agreed[124], in order to achieve this, the decision-taker must have full knowledge of the likely significant effects of the project: ***R v Cornwall County Council ex parte Jill Hardy*** [2001] Env LR 25[125]. As Mr Day agreed[126], the assessment of likely significant effects cannot be put off to reserved matters stage, since the principle of development is established at outline stage[127]. If gaps remain, it is not open to a decision-taker to grant permission until the gaps are filled[128].

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[120] Sennitt §12.3.2
[121] INQ.1
[122] Item E3
[123] *Ibid.*
[124] Under XX
[125] CDK.12
[126] Under XX
[127] ***Hardy*** at [46]
[128] ***Hardy*** at [70-71 and 73]

59. As Mr Sibbett explained, the CIEEM advice is that ecological reports and surveys that are more than 3 years old are unlikely to still be valid and most, if not all, of the surveys are likely to need to be updated[129]. In this case, the updated Environmental Statement accepts that the main survey data for habitats and species from 2014-2018 is out of date[130], and bat surveys[131] and dormice surveys[132] will be ongoing until October 2021. Mr Day suggested that the surveys were ongoing "to ensure the information is up to date for the potential future Reserved Matters application"[133]. He accepted that they may demonstrate that some possible reserved matters layouts and other details may be rendered unacceptable by the results of the surveys once available, but he wrongly suggested that the updated surveys were not required in order to be satisfied that at least some layouts and details would be acceptable[134]. Mr Sibbett rightly disagreed.

60. There is particular reason to consider in this case that the distribution of bats and dormice may have changed, given the Cranleigh Road development which has occurred since the previous surveys were undertaken[135]. And Chapter 10 to the updated Environmental Statement provides evidence that bat use may have changed, with records of barbastelle which were not previously recorded[136].

61. It was suggested to Mr Sibbett in cross examination that you do not need the updated surveys in this case because the impacts on bats and dormice would be beneficial. Mr Sibbett accepted that the physical habitats would be enhanced, but he rightly pointed out that, in the absence of up to date surveys, the impacts of disturbance, illumination, predation from domestic pets, fringe effects from development etc could not be evaluated. Whether the overall effects would be adverse or beneficial, and if adverse the extent to which they can be mitigated, cannot be known until the surveys are complete.

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[129] CDH.36
[130] CDAA.1c Chapter 10, §10.3.26
[131] CDAA.1c Chapter 10, §10.3.11
[132] CDAA.1c Chapter 10, §10.3.15 and Appendix F2 §3.23
[133] Main Proof §4.7
[134] Under XX
[135] CDJ.6
[136] §10.3.27 and 10.4.24 to 10.4.28

62. In relation to badgers, the Appellant's assessment is defective in not having considered[137] the cumulative impacts of the adjacent residential development to the east under the Cranleigh Road scheme[138]. Again, it was suggested to Mr Sibbett in cross examination that this issue could be ignored on the basis that the Proposal was beneficial to badgers, but again Mr Sibbett rightly disputed that this had been established. Although the Proposal provides some enhancements of badger foraging habitat, the proposed open space is now well to the west, and the Proposal also removes a large area of the arable field which, as Mr Sibbett explained, is a current foraging resource. If the Proposal comes forward, the badger group (to the north of the Cranleigh Road open space[139]) will be hemmed in by development to the north, east and west. The current status of the adjoining badger group is unknown[140], but the potential adverse impacts are obvious, and further detailed study is plainly required to understand whether a significant adverse effect on the group will arise from the Proposal in combination with the Cranleigh Road development.

63. For those reasons, permitting the Proposal would breach adopted and emerging policy[141] and, more fundamentally, is proscribed by Regulation 3 of the EIA Regulations. The choice, as Mr Sibbett noted, is to defer the decision until the surveys are complete and the study of badgers done, or to refuse permission.

H. PARKING AND HIGHWAY SAFETY (REASON FOR REFUSAL (C))

Introduction

64. 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). The Appellant investigated alternative arrangements, but these involved third party land and so were not pursued[142].

65. Much as the Appellant might wish to suggest otherwise, the access presents challenges, which the Appellant has sought to overcome through a series of traffic regulation orders (TROs) for

[137] Sibbett Main Proof §6.4
[138] CDJ.6
[139] CDH.10 page 23 Appendix II: Mitigation Plan
[140] Beyond the anecdotal information given by Mr Day orally
[141] Sennitt §12.5.3
[142] CDA.32 Transport Assessment Addendum Vol 1 §2.7

double yellow lines to prohibit on-street parking accompanied by a series of planned highway works to provide inset layby provisions on Beaulieu Avenue, Romsey Avenue and the site access itself[143]. These (among other measures) satisfied the County Council, which raised no objection to the Proposal. However, the highways impacts of the Application have remained highly controversial among local residents. As Mr Philpott noted[144], 231 of the representations on the Application by residents mentioned highways matters and, of these, 105 specifically mentioned the ability to park. The Officer's Report[145] did not recommend refusal on highways grounds, but Members listened to the concerns of residents and applied their local knowledge (as they should) and put forward an additional reason for refusal[146] which became reason for refusal (c)[147]. As Mr Philpott's evidence demonstrated, they were wise to do so: there are very significant impacts on amenity and significant impacts on safety from the Proposal.

Planning Policy

66. The relevant planning policy context is helpfully summarised by Mr Philpott in section 3 of his Main Proof (and also by Mr Sennitt). In closing, I merely wish to re-emphasise the point made in §3.8 of Mr Philpott's Main Proof by reference to what is now §111 of the NPPF (previously paragraph 109) which states that "Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe". Mr Philpott accepted that the impacts on highway safety would not reach the "unacceptable" level and that residual impacts on amenity would not reach the "severe" level under §111, though as he demonstrated, they are "significant" and "very significant" respectively[148]. It is important to emphasise that impacts which do not reach the paragraph 111 thresholds are not ignored in the planning balance, as the Court of Appeal made clear in ***Redhill Aerodrome Ltd v SSCLG*** [2015] P.T.S.R. 274[149]. Such impacts remain material considerations pointing against the grant of permission. Mr Wiseman's

[143] See Highway Works Plan No. 5611.025C (Philpott Main Proof Appendix AP1)
[144] Main Proof §4.56
[145] CDC.1
[146] CDC.3 page 5
[147] CDC.4
[148] Re-X
[149] CDK.13 at [32]

written evidence (epitomised at §5.12 of his Main Proof) suggested he did not understand this, though he accepted the ***Redhill*** principle under cross examination.

The County Council's Position

67. The Appellant relies heavily on having reached agreement with the County Council on highways matters (as set out in the Agreed Statement of Highways Matters between them[150]). However, it is important to recognise that the County Council's views are not binding, nor (unlike those of Natural England) do they have any special status. It is relevant that it raises no highways objection, but no more than that. Moreover, the County Council has been at pains to make clear that its lack of objection to the introduction of parking restrictions is on the basis that it considers that the "parking restrictions will not incentivise inappropriate or dangerous parking and as such will not result in a severe impact on the operation of the highway network"[151]. In both its consultation response of 19th December 2019[152] and the Agreement Statement of Highways Matters[153], it was clear (as Mr Wiseman accepted under cross examination) that amenity impacts were for the Council, not the County Council, to judge.

Potential Displacement of Parking and Effect on Amenity/Convenience

Introduction

68. Mr Wiseman noted (correctly) that the Proposal will not add on-street parking on the surrounding roads, since parking generated by development will be catered for on site[154]. However, the displacement of existing parking on surrounding roads caused by the double yellows will add to the parking pressure, and it is this which causes an unacceptable impact on amenity.

The Appellant's Approach

69. In seeking to justify its position on the impact of parking restrictions on existing on street parking at application stage, the Appellant submitted a Technical Note as Appendix J to the Transport

[150] CDD.3
[151] CDD.3 §4.4 quoted at §2.14 of Mr Philpott's Main Proof
[152] CDB.13b quoted at §2.10 of Mr Philpott's Main Proof
[153] CDD.3 §4.4 quoted at §2.14 of Mr Philpott's Main Proof
[154] Wiseman Main Proof §4.1 and §4.58

Assessment Addendum[155]. It found that the restrictions would lead to displacement of vehicles, but found that (in the scenario applied) the average distance would be 22m[156] and the highest 45.1m[157]. The average includes cars 10 and 11, which (as a result of parking across driveways) are assumed never to be displaced, and it is appropriate to exclude them from the average calculation, which leads to an average displacement of 27m[158]. In any event, overreliance on averages is likely to downplay impacts on amenity: residents won't calculate a rolling average of their displacement, but will remember occasions when they are significantly displaced. Notwithstanding all of this, the Technical Note recognised that the displacement "may be considered an inconvenience to residents" and so (rightly) recognised an impact on amenity, but suggested that "cars should not have been parking within the bellmouth and this displacement of observed parking is a result of enforcing the parking restriction requirement set out in the Highway Code, not as a result of the proposed development"[159]. This is deeply flawed.

Causes of Displacement

70. In coming to its view that displacement is "not as a result of the proposed development" the Appellant failed to grasp that Rule 243 of the Highway Code[160] (which says "do not stop or park… opposite or within 10 metres (32 feet) of a junction, except in an authorised parking space") is not a mandatory requirement underpinned by enforceable legislation[161]. Rule 242 (which says "you must not leave your vehicle or trailer in a dangerous position or where it causes any unnecessary obstruction of the road" is a mandatory requirement[162], but there is no evidence that this is breached by the existing parking or that the existing parking has led to any significant issues[163]. It is therefore not appropriate for Mr Wiseman to have alleged that those parking in the junction bellmouths are "illegally parked"[164] and he accepted under cross examination that

[155] CDA.32 Vol 4
[156] CDA.32 Vol 4 at Table 1
[157] *Ibid.*
[158] Philpott Main Proof §§4.12, 4.18 and 4.19 and Rebuttal §3.5
[159] CDA.32 Vol 4 at §1.19
[160] Philpott Main Proof §4.33 and Appendix AP3
[161] Philpott Main Proof §4.34
[162] Philpott Main Proof §4.35-6 and AP3
[163] Philpott Main Proof §4.37-9
[164] Wiseman Main Proof §4.32

the Police had no powers to enforce Rule 243, as a result of which he also accepted that, contrary to his previous view, the displacement of parking is caused by the Appeal Scheme.

Permutations of Vehicular Arrivals

71. The approach in the Appellant's Technical Note relies on a single scenario whereby vehicles arrive such that they are able to park in the nearest alternative parking space to their original position[165]. This assumption is possible, but so are 40 million others, and cherry picking such an optimistic scenario very plainly lacks robustness[166].

72. In order to present a more complete (and less inappropriately optimistic) picture of the potential displacement of vehicle parking, Mr Philpott's team produced a Technical Note[167] adopting the majority of the Appellant's approach but applying it to three scenarios[168]:
    i) Scenario 1: Assessment of a series of random arrival profiles (rounds) for the 11 cars the Appellant's Technical Note considered displacing (i.e. assuming 4 cars on the access road – the Appellant's assumption);
    ii) Scenario 2: A series of random arrival profiles as for Scenario 1, but assuming 7 vehicles on the access road (as identified on Streetview imagery[169]) – a total of 16 cars (14 of which are displaced); and
    iii) Scenario 3: A series of random arrival profiles as for Scenario 1, but assuming 9 vehicles on the access road (as identified by residents' photographs[170]) – a total of 18 cars (16 of which are displaced).

73. Under Scenario 1, the maximum displacement was up to 87.8m[171]. For Scenario 2, it was up to 126.5m[172] and for Scenario 3 it was up to 173.9m[173]. As Mr Philpott recognised, these are merely a subset of the millions of possibilities, but they provide compelling evidence that the

[165] Philpott Main Proof §4.20
[166] Philpott Main Proof §§4.20-4.24
[167] Philpott Main Proof Appendix AP2
[168] Philpott Main Proof §4.40
[169] Philpott Appendix AP2 §1.19 and Figure 4
[170] Philpott Appendix AP2 §1.18 and Figure 3
[171] Philpott Main Proof §4.44
[172] Philpott Main Proof §4.45
[173] Philpott Main Proof §4.46

Appellant's approach underestimates impacts and that, in reality, there is very significant displacement of existing residents' parking which might occur[174].

Quantum of Displaced Vehicles

74. The Appellant's Technical Note assumed that the layby provision for 4 cars to be made on the access road will adequately accommodate the existing demand[175]. This was obviously inappropriate even on the Appellant's position, since its own surveys had recorded 5 vehicles on both days surveyed[176]. Moreover, as already noted, analysis of available Google imagery and images submitted by the public shows demand reaching in the order of 7 to 9 cars[177], which supports Mr Philpott's Scenarios 2 and 3. Although Mr Wiseman did not favour Scenarios 2 and 3, he accepted under cross examination that it was important to be robust and that these scenarios should not be ignored.

75. Despite the evidence showing up to 9 cars using the access road, in his Proof Mr Wiseman applied a scenario assuming only 6[178]. Moreover, in this scenario, Mr Wiseman assumed that cars 6, 8 and 14 would never be displaced. However, this assumption is not warranted, for the reasons explained by Mr Philpott in §§2.4 to 2.10 and 3.4 to 3.5 of his Rebuttal. Mr Wiseman's evidence also overestimated the available off-street parking, as Mr Philpott explained in §§2.1 to 2.3 of his Rebuttal and this had to be corrected in Plan 6729.001 Revision B[179]. Mr Wiseman also repeatedly sought to rely on the extent of off street parking, notwithstanding that he could not say how much of it was available for use, and notwithstanding Mr Jones' evidence in the public session that driveways between houses are very narrow which restricts use.

76. In §4.42 of his Main Proof, Mr Philpott fairly acknowledged that the Appellant could seek to promote additional parking within the development site itself to accommodate the observed additional demand that exceeds the 4 layby provision proposed on the access road, but that this could not be analysed in the absence of such detail. Mr Wiseman sought to address this in §§2.8

[174] Philpott Main Proof §4.48
[175] Mr Wiseman accepted this – Main Proof §4.50, Rebuttal §2.7
[176] Philpott Main Proof §4.27, Appendix AP2 §1.16, Wiseman Main Proof §4.46
[177] Philpott Main Proof §4.28 and AP2 §§1.17-1.19
[178] Wiseman Main Proof §4.51-4.53
[179] INQ.11

to 2.11 of his Rebuttal. However, this analysis is premised on Mr Philpott's Scenario 2 and so ignores Scenario 3. Moreover, cars 6 and 8 are assumed never to be displaced, which is an unwarranted assumption as explained above. Also, cars 14 to 16 are assumed to park in the proposed parking bays within the site, but this is (as Mr Wiseman accepted under cross examination) an optimistic assumption – if other cars did so, as may in reality be the case, the distances would be larger. Even on this overly optimistic scenario, however, the displacement is up to 64m[180]. Finally, it is not certain that the arrangement under Mr Wiseman's Drawing 16.140.29 could come forward: there may be many competing constraints which mean the suggested bays within the Site are not achievable. And in any event, as Mr Wiseman confirmed in answer to one of your questions, bays on site would not be reserved for off site local residents.

Existing Displacement of Road Users

77. The Appellant has also failed to consider or factor in existing displacement, i.e. how far a resident may already be parked away from their home. This had been raised as a significant issue by residents, with one resident explaining that on occasions they had to park over 100m away from their property. In his Rebuttal, Mr Wiseman responded to the specific example of 44 Romsey Avenue, but did not respond to the general point[181]. The Appellant simply does not know how much existing displacement needs to be added to the displacement that will be caused by its Proposal, though Mr Wiseman accepted that existing displacement is likely to add to the distance.

Reliance on the Lambeth Methodology

78. The Appellant has relied upon a 200m threshold derived from a survey methodology which originated from Lambeth Council[182]. A 200m distance equates to approximately a two and a half minute walk (assuming the generally accepted speed of 80m/min)[183]. However, a 200m threshold is inappropriate in this case for two main reasons.

[180] Wiseman Rebuttal Table above §2.11
[181] Wiseman Rebuttal §2.12
[182] CDH.3 page 2
[183] Philpott Main Proof §4.4

79. First, the 200m threshold under the Lambeth Guidance is explicitly concerned with "the area where residents of a proposed development may want to park"[184], not acceptable distances for displacement of existing residents, for whom any unnecessary impacts should be avoided.

80. Second, the 200m threshold applies to a central London Borough, which is very different from suburban Hampshire. Mr Wiseman underscored this point in his Rebuttal, where he raised the North Somerset Parking Standards[185], which apply a 100m threshold. As with the Lambeth methodology, the 100m threshold is aimed at residents of new developments, not at what is an acceptable level of displacement of existing residents. But even if it were viewed as an acceptable level for displacement of existing residents (which it is not), it is notable that the 100m level is breached on numerous occasions in Mr Philpott's Scenarios 2 and 3 (even assuming zero existing displacement – if, as is likely, the cars were already displaced, the number exceeding 100m would be greater still).

81. The Appellant's Costs Application wrongly proceeds on the basis that I suggested a 100m figure as a measure of unacceptability[186]. I did no such thing and nor did Mr Philpott or Mr Sennitt. The Council has been consistently clear that relying on the 200m threshold under the Lambeth methodology[187], or the 100m threshold under the North Somerset Parking Standards[188] is inapposite because they are aimed at residents of new developments, not at what is an acceptable level of displacement of existing residents. Mr Philpott and Mr Sennitt were both clear that significant harms to amenity would arise well below the 100m level of displacement. The reason I put the 100m figure to Mr Wiseman under cross examination was to show the absurdity of his position in considering the North Somerset standards more apposite but nonetheless considering that impacts on amenity were insignificant below 200m. That is an entirely different thing from what the Appellant suggests in footnote 1 to its Costs Application. Significant impacts on amenity can arise at much lower levels, as the County Council has recognised in the Agreed

[184] CDH.3 page 2
[185] Wiseman Rebuttal §2.11 and Appendix 1
[186] Costs Application footnote 1
[187] CDH.3 page 2
[188] Wiseman Rebuttal §2.11 and Appendix 1

Statement of Common Ground[189] by raising the issue of amenity for the Council even in the context of the Appellant's inappropriately favourable approach to displacement.

Impact of Additional Displacement on Road Users

82. As Mr Philpott noted, it is generally accepted that residents will naturally try to park as close to their homes as possible, something which is reflected in the British Parking Forum Position Paper quote which he provides at §4.61 of his Main Proof. But the Appeal Proposal will militate against this, causing displacement which will inevitably cause harm to the amenity of existing residents and road users. The question is the weight to attach to such harm.

83. Amenity is inevitably subjective and context dependent. What may be acceptable to an able-bodied individual may be less acceptable to someone with a mobility impairment, a small child, or someone with a car full of shopping. Moreover, acceptability of displacement will also depend on what a resident has historically experienced. For example, someone who lives in a central London borough which may be subject to controlled parking zones is more likely to be accommodating about displacement than a resident who has enjoyed unfettered kerbside parking adjacent to their property.

84. This is a suburban context in which parking is a key concern of local residents. It is highly pertinent that, of the 231 representations made on the application by residents that mention highway matters, 105 specifically mention the ability to park[190]. The enjoyment of parking in close proximity to their property is plainly a matter which affects local residents' amenity. But this will be harmed by the displacement caused by the Appeal Scheme, and harmed considerably more than the inappropriately optimistic evidence of Mr Wiseman. Mr Philpott's evidence should be preferred, and the amenity impacts recognised as "very significant"[191] and weighed accordingly in the planning balance.

Impact on Highway Safety

Activities Prohibited and Permitted on Double Yellow Lines

[189] CDD.3 at §4.4
[190] Philpott Main Proof §4.56
[191] Re-X

85. Given the Appellant's reliance on double yellow lines, it is important to understand what their effect will be. As Mr Philpott explained (and Mr Wiseman did not contest this), they generally prevent waiting or parking by virtue of Rule 238 of the Highway Code[192], which is a mandatory requirement underpinned by legislation, but some activities are permissible without breaching the Code, including stopping to load or unload, or parking with a valid Blue Badge for up to 3 hours[193].

Consideration of Vehicle Volumes and Composition

86. As Mr Philpott explained[194], over the course of a typical weekday the Appellant's surveys identify that Romsey Avenue carries 1,057 vehicles, of which 45 are classified as HGVs. There is, however, a considerable peak in flows in the morning and afternoon periods, during which school traffic is likely to be at its greatest. As Mr Philpott indicated, the surveys show that Romsey Avenue carries a reasonable volume of vehicles at present. The Appeal Development would effectively double this[195].

87. Unfortunately, the Appellant did not include any estimation of service vehicles likely to access the development proposals and so Mr Philpott analysed this in §§5.14 to 5.19 of his Main Proof. He concluded at §5.18 that there was "the potential for 67 daily service vehicles visiting the proposed development, 9 of which are classified as OGV's". Mr Wiseman rightly pointed out in §3.7 of his Rebuttal that these are two-way flows, so there will by "33/34 daily service vehicles arriving at the site and only 4/5 daily OGV's". That is correct, but of course, the vehicles go in and out through the same access and so each vehicle will make two passes.

Parking Stress

88. Appendix H of the Transport Assessment Addendum provides details of the parking stress for the area which was subject to the parking surveys. It identifies the site access road as being at

[192] Philpott Main Proof §5.2 and Appendix AP3
[193] Philpott Main Proof §5.3 and see https://www.highwaycodeuk.co.uk/road-markings.html and https://www.gov.uk/government/publications/the-blue-badge-scheme-rights-and-responsibilities-in-england/the-blue-badge-scheme-rights-and-responsibilities-in-england
[194] Philpott Main Proof §5.8, see also Wiseman Rebuttal §3.3
[195] Philpott Main Proof §5.13, see also Wiseman Rebuttal §3.4

100% stress[196], with Beaulieu Avenue being up to 83% stressed[197]. These two roads form part of the main route between the A27 and the proposed development and have been identified by the Appellant as suffering from high parking stress. This matters, because as set out in §§4.5 and 4.6 of Mr Philpott's evidence, the Lambeth Parking Survey Methodology identifies that high parking stress can contribute towards highway safety issues.

Potential for Prejudicing Highway Safety

89. As Mr Philpott explained[198], the purpose of the proposed TROs is to preserve the free flow of traffic and swept paths of larger vehicles accessing the development site, but if a vehicle were to stop on the double yellow lines, it is possible that service vehicles (particularly larger ones) could be obstructed resulting in blocking back of the highway, or inappropriate manoeuvres, mounting of the footway etc. Mr Wiseman suggested that this was an existing issue and that the geometry would not change, but the crucial factor is that the flows will double as a result of the Proposal.

90. It is reasonable to assume that existing residents or others on Beaulieu Avenue and Romsey Avenue will need to stop on the proposed double yellow lines to undertake permitted loading/unloading activities or for disabled parking activities. Although the TRICS system does not allow direct interrogation of datasets for such activities, the "servicing" activity may be used as a proxy. Applying this to the 17 existing dwellings which have frontage onto the proposed double yellow lines would mean approximately 2 to 3 vehicles stopping on the double yellow lines daily for servicing activities[199].

91. In his Rebuttal, Mr Wiseman pointed out that not all servicing vehicles will be large[200], but some will be. Mr Wiseman also suggested that the carriageway width is sufficient for an HGV to pass another on Romsey Avenue, such that the occasional vehicle stopping on the double yellow lines

[196] CDA.32 Vol 3 page 28 and Philpott Main Proof §5.22
[197] CDA.32 Vol 3 page 29 and Philpott Main Proof §5.22
[198] Philpott Main Proof §5.25
[199] In §5.30 of his Main Proof Mr Philpott suggested 5 vehicles, but he accepted that the TRICS data provides two-way flows, so the number is 2-3, as Mr Wiseman pointed out in §3.11 of his Rebuttal.
[200] Wiseman Rebuttal §3.9

would not be problematic[201]. He supported this with a tracking drawing (Drawing 6729.009) showing a large refuse vehicle passing two HGVs parked in front of property numbers 24-26 and 18-10. But the drawing does not show other locations for parked vehicles (such as adjacent to numbers 28-30 or 23) which would lead to a blockage, even with a smaller vehicle than an HGV.

92. Mr Philpott freely acknowledged that rule 242 of the Highway Code should prohibit obstruction of the highway, but as he pointed out, the driver of a loading/unloading vehicle is only likely to be aware they have caused an obstruction once it has occurred, at which point there is a potential for highway safety to have been compromised[202]. Given the frequencies of servicing to both the existing and proposed residents, there is a real possibility of an obstruction and consequent safety issues occurring on a frequent, daily, basis, which will be significantly worse than the status quo.

93. As Mr Philpott recognised[203], it is possible that the Appellant could promote loading restrictions in addition to the double yellow lines and, at least in theory, eliminate obstructions from occurring. However, no such restrictions have been proposed, and any such restrictions would further impact on the amenity and enjoyment of the public highway that residents presently enjoy.

Overall conclusions on highways impacts

94. Mr Wiseman's suggestion that the impacts of the TROs and parking bays would be beneficial is not credible, and is inconsistent with the assessment of residual negative impacts in Table 6.9 of Chapter 6 of the updated Environmental Statement[204]. Moreover, as he accepted under cross examination, Mr Brown was wrong at §1.35 of his Main Proof[205] to suggest that the County Council "recognise this as an improvement on the existing situation". They did no such thing, as the Agreed Statement of Highway Matters makes clear[206]. They merely came to the view that

[201] Wiseman Rebuttal §3.12
[202] Philpott Main Proof §5.32
[203] Philpott Main Proof §5.34
[204] CDAA.1c
[205] Page 78 – the numbering went awry here
[206] CDD.3 at section 4

the parking restrictions would not be dangerous and there would be no "severe" impact on the operation of the highway network[207]. That view was expressly based on the Appellant's suggested average parking displacement of 22m[208], which has been comprehensively undermined by Mr Philpott's evidence. Even on the Appellant's unduly favourable approach, the County Council nonetheless recognised that there could be an amenity issue, and expressly deferred to the Council on this[209].

95. In reality, as Mr Philpott explained the impacts on amenity of existing residents and on safety would be "very significant" and "significant" respectively, and these must be factored into the planning balance. The Appellant's consistent attempt to belittle them betrays a concerning lack of regard for local residents, who would suffer the consequences of the Appellant's Proposal.

96. Given the impacts on amenity and highway safety, the Council considers that the Appeal Development breaches Core Strategy Policies CS5(3) and CS17, NPPF paragraphs 110(b) and (d) and 130(f) or emerging policy. Mr Philpott and Mr Sennitt both accepted that NPPF paragraph 111 is not breached by the Proposal, since its thresholds are not met, and Mr Sennitt accepted that consequently DSP40(v) is not breached on traffic grounds alone. However, that does not mean that traffic impacts are ignored under Policy DSP40(v): as Mr Sennitt explained, it requires an assessment of whether environmental, amenity and traffic implications taken in the round are unacceptable. Although the traffic impacts on their own are below the threshold to breach DSP40(v), as Mr Sennitt explained, they must be factored in alongside the environmental and amenity implications, both of which (taken on their own) cross the threshold into unacceptability.

I. <u>THE LOSS OF BEST AND MOST VERSATILE AGRICULTURAL LAND (REASON FOR REFUSAL (F))</u>

97. The Proposal would result in the loss of 12.55ha of best and most versatile agricultural land ("BMV land") of the highest grades (47% Grade 1 and 53% Grade 2[210]). In evidence in chief, Mr

[207] CDD.3 at §4.4
[208] CDD.3 at §4.3
[209] CDD.3 at §4.4
[210] CDAA.1c Chapter 8 at Table 8.4

Brown wrongly sought to suggest that only the area being built on will be lost, but all will be lost to agriculture and the loss is therefore the whole site, as the updated Environmental Statement understands[211], and as Mr Brown accepted under cross examination.

98. The Appellant seeks to reduce the significance of the loss of BMV land on the basis that such land is common in the Borough, but this does not reduce the harm from its removal, which should be fully factored into the planning balance. Moreover, as the updated Environmental Statement makes clear[212], although Grade 2 land is common in the Borough (52.2% as compared with 16.2% for England as a whole), Grade 1 land is less common in the Borough than the national average (2.2% in Fareham compared with 3.1% in England as a whole).

99. Mr Brown sought to draw parallels with the Land East of Newgate Lane East decision[213], in which the Inspector had found that loss of 76%[214] of a 4.1ha[215] site made up of Grade 3a BMV land would not represent an unacceptable environmental implication in the terms of DSP40(v). But that is a much smaller and lower Grade site. Mr Brown also sought to rely on the Cranleigh Road decision[216], which did involve Grade 1 and 2 BMV land, but the area (5.5ha[217]) is much smaller than would be lost here, and the limited analysis in the decision letter[218] does not even analyse DSP40 and does not consider the rarity of Grade 1 BMV land in Fareham.

100. The loss here of 12.55ha of Grades 1 and 2 BMV land is considerable, and in cumulation with other development is rightly recognised in the Appellant's Updated Environmental Assessment as a moderate adverse effect which is significant in EIA terms (i.e. significantly harmful to the environment)[219]. The loss is plainly (on its own) an unacceptable environmental implication of

[211] CDAA.1c Chapter 8 at §8.6.5
[212] CDAA.1c Chapter 8 Table 8.5
[213] INQ.13
[214] INQ.13 at §34
[215] INQ.13 at §3
[216] CDJ.6
[217] CDJ.6 at §28
[218] CDJ.6 at §§28-30
[219] CDAA.1c Chapter 8 at §8.9.5

the Proposal which breaches Policy DSP40(v) and CS16[220] and emerging policy[221]. Although it is common ground that the loss of BMV land alone (i.e. if it were the only harm) would not be sufficient to warrant the refusal of planning permission[222], it is a significant harm which on its own causes the proposal to be in breach of DSP40(v) and therefore the development plan overall, and which must be weighed accordingly in the planning balance.

J. SURFACE WATER DRAINAGE (REASON FOR REFUSAL (E))

101. At application stage, both the County Council (as Lead Local Flood Authority)[223] and Council considered that insufficient information had been provided on surface water disposal, which led to reason for refusal (e). As noted by Mr Sennitt in §12.6.1 of his Proof, on 11th June 2021, the Appellant (as it had previously committed to do[224]) provided additional information on surface water drainage issues in the form of a Technical Note dated 26th May 2021 from Stuart Michael Associates[225]. This satisfied the County Council[226] and the Council, subject to the imposition of a condition recommended by the County Council[227] which has been included within the draft conditions. The Council has therefore been content to withdraw reason for refusal (e)[228].

K. REASONS FOR REFUSAL (G) TO (L)

102. 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"). At the time of writing, it is the Council's expectation that these reasons for refusal will be overcome by execution of the main Unilateral Undertaking.

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[220] Although Policy CS16 is more onerous than NPPF policy, it is broadly aligned and commands significant weight: Sennitt Proof §9.3.5
[221] Sennitt Proof §12.7.4
[222] Main SOCG Executive Summary §3(j)
[223] CDB.6a-c
[224] Statement of Case §5.73
[225] CDAA.2b
[226] Main SOCG Appendix A – letter of 17th June 2021
[227] *Ibid.* at page 2
[228] Main SOCG §5.3

L. BENEFITS OF THE PROPOSED DEVELOPMENT

103. In recommending refusal, Officers (and in accepting that recommendation, Members) had proper regard to the benefits of the Proposal[229] and Mr Sennitt very fairly did 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 recognised[230] and as is common ground[231]) deserve significant weight in the planning balance.

104. There are associated economic benefits as a result of the construction process, including the potential creation of new jobs and increased local expenditure and there are also economic benefits from expenditure from future occupants of the proposed houses themselves. Mr Sennitt rightly attached significant weight to those benefits as well.

105. In terms of the asserted environmental benefits, as Mr Day and Mr Brown both accepted, Biodiversity Net Gain is a requirement and so is not a significant benefit, and as explained above, there is in any event doubt as to whether 10% net gain is achievable. As for the sustainability of the Appeal Site in locational terms[232], that is again an expectation of policy rather than a benefit. Finally, so far as the potential link to the open space in the Cranleigh Road site is concerned[233], Mr Brown accepted under cross examination that this has not been secured, and so it cannot be relied upon.

106. Overall, Mr Sennitt rightly viewed the benefits of the Appeal Proposal as significant[234] but they must be weighed against the harms.

M. PLANNING BALANCE

107. As set out under Ground (b) above, there is no basis for finding (contrary to the views of Mr Sibbett and Natural England) that an adverse effect on the integrity of the Portsmouth Harbour SPA can be ruled out beyond a reasonable scientific doubt. The Appellant rightly does not

[229] CDC.1 at §8.69
[230] Proof §13.1.1 and 13.1.2
[231] 5YHLS SOCG §5.3 (delivery of housing) and Main SOCG §4.12 (affordable housing)
[232] Main SoCG Paragraph 2.1
[233] Brown Proof §2.4
[234] Proof §13.1.7

suggest that the derogation tests under Regulation 64 of the Habitats Regulations could be met. Regulation 63 therefore provides a statutory bar to the granting of permission. As set out under Ground (d) above, as a result of the Appellant's failure to update its bat and dormice surveys and to study cumulative impacts on badgers, Regulation 3 of the EIA Regulations provides a further statutory bar to the granting of permission.

108. It is therefore only if you reject the Council's (and Natural England's) position on Grounds (b) and (d) that a planning balance arises. In that scenario, 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 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. In this scenario, the harms would be those under Grounds (a), (c) and (f).

109. Under Ground (f), the considerable loss of BMV land is harmful and in breach of policy. On its own, it puts the Proposal in conflict with Policy DSP40(v), the most important policy for the purposes of the Appeal. Under Ground (c), as Mr Sennitt explained, the very significant harm to amenity is in breach of policy, and again, on its own, puts the Proposal in conflict with Policy DSP40(v). As Mr Sennitt accepted, the traffic impacts are not in themselves sufficient to breach Policy DSP40(v), but the proper approach to that criterion is to consider environmental, amenity and traffic implications cumulatively, and the traffic implications therefore add to the extent of the breach. In any event, they are independently material considerations that must be factored into the planning balance (see ***Redhill Aerodrome Ltd v SSCLG*** [2015] P.T.S.R. 274[235]). Finally, under Ground (a), there are, as set out above, landscape and visual harms which, although limited (and not in themselves in breach of Policy DSP40), must be factored into the planning balance. The Appellant thinks otherwise, but its attempt to silo off issues is entirely inappropriate and antithetical to the overarching approach required under section 38(6) of the PCPA.

110. It is clear that the Proposal breaches a range of policies including Policy DSP40 and that it breaches the development plan overall. The breach of other policies beyond DSP40 (including

[235] CDK.13 at [32]

CS5 and CS17 on reason for refusal (c) and CS16 on reason for refusal (f)) means that the lack of compliance with the development plan is more significant and more weighty, yet this is something the Appellant seems determined to ignore.

111. The breaches of the strategy and policies of the development plan are a fundamental issue under a plan-led system, but this is something never adequately recognised under the Appellant's case or evidence. The development plan has a primacy given by both statute and policy and this cannot be displaced or distorted by other considerations (see ***SSCLG v Hopkins Homes Ltd*** [2017] 1 WLR 1865 at [21])[236]. Moreover, the breaches of the strategy and policies of the development plan (and indeed the Emerging Local Plan) mean that the Proposal should be seen as "undermining the credibility" of the plans and "inimical to the plan-led system itself", which not only offends the primacy given to the development plan by statute, but is also "contrary to a basic policy of the NPPF" and a highly important "adverse impact" within paragraph 11(d)(ii) (see ***Gladman Developments Ltd v SSHCLG*** [2021] EWCA Civ 104 at [56][237]).

112. For those reasons, even if (which is not the case) reasons for refusal (b) and (d) had been overcome, 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 from reasons for refusal (a), (c) and (f).

N. OVERALL CONCLUSIONS

113. For the reasons given above, I invite you to dismiss the Appeal.

NED HELME

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19th August 2021

[236] CDK.4. See also §12 of the NPPF.

[237] CDK.20