

**IN THE MATTER OF
THE TOWN AND COUNTRY PLANNING ACT 1990
AND IN THE MATTER OF
LAND EAST OF POSBROOK LANE,
TICHFIELD, FAREHAM.**

**CLOSING SUBMISSIONS
ON BEHALF OF
THE APPELLANTS**

1. These Closing Submissions are made on behalf of the Appellants in respect of a non-determination appeal concerning an application for up to 57 dwellings, parking and landscaping ('the scheme', or 'appeal scheme') on land east of Posbrook Lane, Tichfield ('the site'). The site lies outside but immediately adjacent to the out of date adopted settlement boundary of Tichfield in what is recognised to be as sustainably located position in relation to the sustainable settlement of Tichfield. The Council acknowledges that it cannot demonstrate the required 5 year housing land supply and that this situation will not be resolved without development of land outside adopted settlement boundaries and allocations.

2. The appeal scheme comes forward in the context of the refusal on appeal of a larger scheme on land east of Posbrook Lane ('the previous scheme'). The Appellants have reflected on the reasons given for that refusal by the inspector on appeal and devised proposals, now before this inquiry, which respond to those and overcome them. In particular, the issues of landscape and of heritage impacts found objectionable in the previous scheme have been addressed positively in the current proposals. The appeal scheme has kept a swathe of land to the south of the development area free of housing in order to maintain the separation of Tichfield with Great Posbrook Farm, while

proposing significant buffer planting on the south and east of the development area to the landscape and visual enhancement of the current settlement edge.

3. The Council's putative reasons for refusal identified (a) an in-principle objection to development beyond the settlement boundaries; (b) harm to a 'valued landscape'; (c) less than substantial harm to the setting of two Grade II* listed buildings; (d) loss of best and most versatile land; (e)-(k) the absence of a s.106 obligation securing social and other infrastructure.
4. Reasons (e)-(g) and (i)-(k) have now been resolved to the Council's satisfaction. Reason (h) (on-site POS) is subject to a dispute, not as to whether it can be provided, but as to whether it is necessary.
5. Accordingly, at the start of the inquiry, the Inspector identified the following Main Issues:
 - (1) The possible implications of the development on the character and appearance of the area, including the relationship with the settlement boundary;
 - (2) The possible implications of the development on the significance of local heritage assets;
 - (3) The issue of developing on best and most versatile agricultural land;
 - (4) The provision of mitigation in respect of the integrity of European Protected Sites, affordable housing, education, and open space.
6. I take each of those in turn, below. Before turning to them, however, it is helpful to set out the correct approach to decision-taking, in the context of s.38(6) of the P&CPA 2004, the development plan and national policy.

The correct approach to decision-taking:

7. The correct approach to decision-taking has recently been rehearsed in front of and adopted by two inspectors in appeals in Fareham (Newgate Lane N/S¹ and Newgate

¹ CD J.4

Lane E²), and accepted as, essentially, common ground by Mr Jupp for the Council at the recent Crofton Cemetery inquiry³. It is now agreed⁴ to be as follows:

8. The starting point is s.38(6) and the presumption in favour of the development plan, subject to material considerations. Important material considerations in this case include national policy in the NPPF, the extent to which the development plan is up to date, and the ability of the Council to demonstrate the required 5-year housing land supply.
9. The development plan must be read ‘as a whole’ and compliance with it is to be taken ‘as a whole’, in accordance with settled caselaw⁵.
10. In this case, the adopted development plan is the Local Plan Part 1 (‘the CS’) and Local Plan Part 2 (‘the DSP’). Policy CS2 sets out a housing provision which is sought to be met by policy CS6 and the DSP; policies CS14 and DSP6 restrict development outside settlement boundaries and allocations in the DSP.
11. However, as CS2 is rooted ultimately in the now abolished South-East Plan, the development plan strategy is not and does not purport to be based on an NPPF-compliant assessment of development needs. As such the housing requirement in CS2 is agreed to be out of date and the settlement boundaries to which CS14 and DSP6 apply are also agreed to be out of date and the weight of any conflict with them is agreed to be reduced accordingly, in line with the Supreme Court in *Hopkins Homes* at para. 63⁶.
12. Further, and in addition, although there is a dispute on the figures⁷, it is agreed that the Council cannot demonstrate the required 5 year housing land supply and footnote 8 and para 11(d) of the NPPF is engaged such that ‘the most important policies’ (which include CS2, CS6, CS14, DSP6 and DSP40⁸) are deemed out of date such that any breach of them may be accorded reduced weight and (subject to HRA issues) the ‘tilted balance’ is to be applied.

² CD J.17

³ See Closings in that inquiry at CDH.52; see also the FBC Closing at Romsey Ave inquiry, CDH.51

⁴ Confirmed by Mr Jupp; Jupp xx CBQC, Day 4

⁵ Sullivan J in *R v Rochdale MBC (ex parte Milne)* CDK.12

⁶ CDK.4

⁷ See HLS SoCG, CDD.2

⁸ Planning SoCG at section 4, CDD.1

13. In addition, in this development plan, the absence of a 5-year housing land supply engages the contingency policy, DSP40, which it is agreed operates as an exception to the otherwise restrictive policies, subject to its own five criteria. It is agreed that these five criteria set tests less restrictive than the policies to which it acts as an exception. It has been observed by both recent inspectors that, given the continued inability of the Council to be able to demonstrate the required 5 year housing land supply, they may be still too restrictive (or are being applied too restrictively)⁹.
14. Further, it is agreed that DSP40 is itself a ‘most important’ policy and, so, is subject to the deeming provision in para. 11(d), such that it is itself ‘out of date’ and breach of any of its criteria may be reduced in weight accordingly in the planning balance. The parties are agreed that this weight should be ‘considerable’, not full weight.
15. Lastly, if there is compliance with all five criteria of DSP40, the development is in accordance with the development plan taken as a whole, and para. 11(c) of the NPPF is engaged as well as the presumption in s.38(6); conversely, if there is breach of DSP40, para. 11(d)(ii) is engaged¹⁰ and the breach must be considered through the prism of the ‘titled balance’ such that permission should be granted unless the harms ‘significantly and demonstrably’ outweigh the benefits.
16. In this context, it is notable that the Council only alleges breach of part of DSP40(iii) (landscape) and (v) (heritage), which will be assessed under the Main Issues, below. The Council accepts the locational suitability of the site under DSP40(ii) and (iii); it alleges no Gap impact under (iii); it accepts the site’s scale under (i), its deliverability under criterion (iv), its transport and amenity impacts under (v), and it does not raise ‘agricultural land quality’ as a free-standing objection under criterion (v)¹¹.
17. I turn, now, to the Main Issues.

⁹ CDJ.4 at para 110; CDJ.17 at para 45

¹⁰ Subject to SPA issues under 11(d)(i)

¹¹ Clarified in FBC Opening, Day 1

Main Issue 1: the possible implications of the development on the character and appearance of the area including the relationship with the settlement boundary:

18. The site is recognised, following the decision of the inspector on the previous scheme, to sit within ‘the Lower Meon Valley’, a ‘valued landscape’ within the meaning of para. 174(a) of the NPPF. As Mr Croot for the Council accepted, however, that does not mean, however, that no development cannot acceptably be brought forward within it. Nor does it mean that the landscape value within the ‘valued landscape’ is of equal value or sensitivity. The operative development plan policy DSP40(iii) does not require that there be no harm; it requires that any such harm be ‘minimised’. This the scheme has done, both by its location, adjacent to the existing urban edge (described as ‘harsh’ by the previous Inspector) and in terms of its design and the provision of a significant planting belt.
19. It is very apparent that the area of land proposed for development is more influenced by the adjacent settlement of Tichfield than is the rest of the Lower Meon Valley as one moves south and east of the site. Although produced for another purpose, Mr Croot’s ZTV gives an indication of the theoretical extent of visibility of the existing housing at Bellfield, given that it sits at the same elevation as the proposed appeal scheme, but does not have the benefits of the proposed planting. In addition, the Inspector’s site visit will show, walking the various footpaths and routes in the Lower Meon Valley, how prominent the existing urban edge is.
20. The scheme has responded positively to this and it is common ground that it will deliver an improved settlement edge when experienced from the south and east, compared to the existing, whilst delivering development in keeping with the ‘village’ character of the adjacent settlement.
21. By contrast to the ZTV at Mr Croot’s appendix, the ZTV at Mr Smith’s appendix does take into account the woodland planting. Comparing the two shows very starkly the extent of the beneficial impact of the scheme, taken as a whole, as do the accompanying photomontages at Yr 15. Bellfield/Tichfield will have a markedly less visual ‘spread’ over the valued landscape of the Lower Meon Valley with the proposal in place than without it, as the planting grows.

22. For this reason, the Appellant's LVIA records a 'negative becoming positive' nature of effect for the landscape character receptors. Even Mr Croot, for the Council recognised the beneficial effects of the planting, reducing the impacts on the available views to the south and east of the site.
23. It is important to note, in this context, just how little was disputed by Mr Croot, of the Appellant's evidence. He had accepted and (he said) used the Appellant's LVIA methodology, rather than doing his own. He had accepted as appropriate the identification of the LVIA's landscape receptors, and took no issue with the recorded impacts on the 'features' and 'preceptual' landscape receptors. Of the area-based landscape receptors, other than the site itself, he took no issue with the value, susceptibility or sensitivity ascribed to them, his only issue was with magnitude.
24. That in turn, rested, it finally appeared on one factor (out of three in the [agreed] methodology on Magnitude) alone, namely his opinion on the extent of the visibility of the development, but that in turn rested on his ZTV which, he acknowledged, took no account at all of the planting proposals – whose overall efficacy was not ultimately in doubt, even once the restrictions of the sewer easement were taken into account [see drawing PL20].
25. As such, there was no evidential justification to elevate the magnitude of effect above that recorded in the LVIA. But, even taken at its highest, Mr Croot records a finding, for the 'valued landscape' of the Lower Meon Valley as no more than 'moderate' harm. In LVIA terms this is below the register of 'significant'. The Appellant's evidence finds, and it is submitted that it is correct to do so, that there will be a net beneficial effect on landscape character.
26. Similarly, as regards the visual assessment, Mr Croot accepted the identification of the 14 viewpoints as representative of the local visual receptors, and did not dispute the findings of 10 of those 14. Of the 4 where he did come to a different conclusion, again, he accepted the sensitivity ascribed, and his issue was concerning magnitude.
27. Of these four disputed visual receptors, even so, he found, at year 15 only 'moderate/minor' or 'minor' visual impact for receptors 10, 12 and 13; even for

viewpoint 3, which is immediately adjacent to the site, he found only a ‘moderate’ impact. The Appellant, through its LVIA and Mr Smith’s evidence considers there will be visual benefits with the proposal, but taken at its highest, the Council’s evidence does not amount to significant visual harm.

28. The ‘valued landscape’ is indeed protected (and – as regards the relationship with the settlement boundary – enhanced). The DSP40(iii) test of ‘minimise’ harm is met.

Main Issue 2: The possible implications of the development on the significance of local heritage assets:

29. The Reason for Refusal concerned itself with only two local heritage assets, the barn and farmhouse at Great Posbrook, both listed Grade II*. The Council’s evidence confirmed that no harm was alleged in respect of any other heritage assets, in particular, the Tichfield Conservation Area, Tichfield Abbey, the three locally listed buildings in the farmstead or the nearby historic canal.
30. Again, in respect of the significance of the two listed buildings, very little is in issue, the matter having been thoroughly researched for the last inquiry and for this. While it is recognised the appeal site is in the setting of the listed (and locally listed) buildings in the former farmstead complex of Great Posbrook Farm, the analysis on behalf of the Appellants is that the appeal scheme will not harm the heritage significance of the Grade II* listed buildings, as alleged, or at all.
31. Indeed, even Ms Markham agreed that the relationship of Great Posbrook with the settlement edge of Tichfield will be improved as a result of the proposals. This is important. No party doubts that the significance of the two listed buildings is positively contributed to by their farmland setting, but that contribution is not equal to all points of the compass. It is in views from the south, along Posbrook Lane and footpath 34 that the important relationship of the barn and the farmhouse are seen and best appreciated.

32. The experience, particularly along footpath 34, however, is intruded into by the existing settlement edge of Bellfield/Tichfield, which was found by the last inspector to be a detracting factor in the setting of the listed buildings. By contrast, it is acknowledged by the Council that there will be an improvement in the settlement edge as a result of the proposals. The Heritage SoCG records common ground that the planting ‘would improve the experience of the former farmstead [from footpath 34] and this would be *an enhancement to the setting and appreciation of the significance of the grade II* listed buildings.*’¹²
33. By contrast, the issue for the northern (and one might also say the eastern) part of the setting is not so much the ability to experience the relationship of the buildings with each other, as to do with a sense of separation of Great Posbrook as a farmstead from Tichfield as a village. In this, it is clear that the proposals have responded positively to the previous Inspector’s findings.
34. The previous scheme brought development right up to the northern boundary of the farmstead, and wrapped round to the east. It, to use the previous Inspector’s words, ‘subsumed’ Great Posbrook into Tichfield. The appeal scheme has removed the development wrapping round the farmstead, and pulled the development to the north away from the northern boundary of Great Posbrook, interposing an appreciable (78.8m) gap of undeveloped land, part planted with woodland and part managed as open grassland. The effect is that, as acknowledged by Historic England in its consultation response, is that the proposals ‘[allow] the farmstead to continue to be read as a distinct and separate feature’¹³
35. As such, on the Appellant’s case, there is no net harm to the significance of the two listed buildings and para. 202 of the NPPF will not be engaged. However, it is worth noting that even on the Council’s case, put at its highest, the impact is only at ‘the lower end’ of a ‘less than substantial harm’. This, the Appellant’s planning evidence finds is more than adequately outweighed by the public benefits of the scheme, such that para. 202 is satisfied, national policy in respect of protecting the historic environment is met,

¹² CDD.4, para.3.12

¹³ CDB.11

and there would, accordingly, be no ‘unacceptable’ environmental impact under DSP40(v).

Main Issue 3: best and most versatile agricultural land

36. Loss of best and most versatile land is acknowledged by the Council not to justify refusal of permission. This is correct, given the terms of the NPPF, asking that its economic benefits be taken into account; there is a pressing need to release this land for much-needed housing and affordable housing in the Borough.
37. Although the Council state that its loss needs to go into the balance and is a ‘breach’ of DSP40(v), it does not contend that were landscape [DSP40(iii)] and heritage [DSP40(v)] resolved in favour of the development, that agricultural land would render the scheme unacceptable under DSP40.
38. That accords with the approach taken by recent inspectors, who place ‘limited’ weight on this point. No different approach is warranted here.

Main Issue 4 (a) onsite-public open space provision:

39. This issue, too, is not one that stands in the way of the grant of permission. IF public open space is required on site, the s.106 obligation provides it, to the south of the development area. The land would be managed under the unilateral in exactly the same manner as were it not to be POS. It would certainly not be the urban ‘pocket park’ or amenity grassland envisaged by Ms Markham, and Mr Croot acknowledged that, subject to details, it could be dedicated as POS without causing landscape impact.

40. However, the Council's own evidence base¹⁴ is that on-site POS is *not* needed. CS21 provides for situations where there is an insufficiency of provision. In this case, there is a *surplus* in both categories of open space considered, and the site lies in the 'green' zone for both categories. The seeking of additional on-site open space is not, therefore justified.
41. What is provided is a LEAP at the play area to the north at Bellfield. This is a positive improvement and will assist in integrating the new development with the existing settlement in an obviously beneficial way.

Main Issue 4(b) impact on European Protected Sites:

42. This is the subject of a separate agreed Note.
43. Suffice to say, here, that the Council and Appellants are agreed that the Inspector can undertake a favourable appropriate assessment, given the mitigation proposed, in terms of bird interest, nutrient neutrality and recreation on the nearby EPS's other than the New Forest.
44. As regards the New Forest, the Appellant's advice is that cumulative recreational impact can be screened out, on the scientific evidence available to Natural England, given the actual travel distances and the declining propensity to visit the New Forest with distance.
45. Natural England's position, as we understand it, is likely to be that such impacts cannot be screened out with sufficient certainty and that some mitigation will need to be assessed through an appropriate assessment. Such mitigation may acceptably be a contribution to the NFNPA's Mitigation Strategy, as recently secured at the Crofton Cemetery inquiry. The Council has, recently, resolved to adopt NE's approach.
46. What is agreed between the Appellants and the Council, however, is that *if* impacts cannot be screened out, the mitigation offered by the Appellants through the NF unilateral undertaking would allow the sufficient degree of certainty for the Inspector

¹⁴ CDE.7

to conclude a favourable appropriate assessment. Again, this follows the consultation response from NE to the Crofton Cemetery case.

47. As such, however the matter is resolved, neither impacts on the New Forest SPA nor on the other EPSs will act as a statutory bar to the grant of permission.

Planning Balance & Conclusions:

48. As noted above, this is an authority that has failed in its ability to demonstrate the required 5-year housing land supply (the figures lie between 3.57 years and 0.93 years), and as such footnote 8 of the NPPF applies to deem the ‘most important policies’ out of date. It is also an authority whose spatial strategy, dating from 2011, is itself out of date as being predicated on non-NPPF-complaint assessments of housing need, such that its settlement boundaries are to be considered out of date regardless of the operation of footnote 8 [see Lord Carnwath in Supreme Court, *Hopkins Homes*, at para 63]. They may be given reduced weight accordingly. Further, the Council has a woeful and worsening record in the delivery of affordable housing in its area.
49. In addition to the above, this is a development plan which has a ‘contingency’ or ‘exceptions’ policy in the terms of DSP40, precisely in order to permit development outside the out-of-date settlement boundaries in the absence of a 5-year housing land supply. This policy is subject to its own five criteria, which are recognised by the Council to operate as exceptions to (ie more generously than) the tests in the otherwise restrictive policies in the development plan. This must be right, or else the policy would be self-defeating, although recent inspectors at Newgate Lane North/South and Newgate Lane East have both found that, notwithstanding this, the criteria may still be too restrictive, given that the 5-year land supply shortfall continues to subsist.
50. With the 5 criteria met, policy DSP40 is satisfied and a scheme, under those circumstances falls to be considered in accordance with the development plan ‘taken as a whole’ and para. 11(c) of the NPPF applies. However, were any one of the criteria not to be complied with, it is agreed by the parties that policy DSP40 is itself a (arguably *the*) ‘most important policy’ for the determination of the appeal and so is caught by para. 11(d), and footnote 8.

51. In this case, only criteria (iii) [for landscape] and (v) [for heritage] are said to be in issue. As has now been explored in evidence, it is the Appellant's case that neither is breached by the scheme proposals.
52. In respect of criterion (iii), policy does not require 'no' harm to landscape, it recognises that there will be harm by developing outside settlement boundaries, and requires that that harm be 'minimised'. There is no allegation of harm to the strategic gap.
53. In respect of criterion (v), the scheme has no unacceptable impact on the historic environment (either by having no harm, or in that any such harm is outweighed by the public benefits of the proposals under paragraph 202 of the NPPF).
54. These benefits, in terms of the provision of housing and of affordable housing are accepted as being significant. They should be given substantial weight. In addition, there is significant economic benefit, accorded significant weight by other inspectors. There will be biodiversity net gain. There will also be an improvement in the relationship of the settlement edge to the valued landscape of the Lower Meon Valley, and an enhancement of the setting and appreciation of the Grade II* listed buildings from the south (the most important part of the compass). There will be a LEAP beside the adjacent play area. If additional public open space needs to be provided, there is a mechanism for doing so in an acceptable manner.
55. It is agreed that loss of BMV agricultural land should not stand in the way of the grant of permission, neither should open space provision and nor should impact on EPSs.
56. As such, as the evidence has shown, this is a scheme which accords with policy DSP40 and, hence, the development plan taken as a whole, but if and insofar as there is a breach of the criteria as alleged, the appeal scheme still needs to be determined within the prism of para. 11(d)(ii) of the NPPF; the manifest benefits more than adequately outweigh such harms as might be said to arise, and permission should be granted in the public interest¹⁵.

¹⁵ Which is precisely the route of reasoning followed by the Inspector in the Newgate Lane East appeal (CDJ.14), which was allowed on the tilted balance, in the context of the absence of a 5 year HLS, but significant breaches of DSP40 criteria (ii) and (iii). The harms to landscape and strategic gap and hence the development

57. As a consequence, for all the above reasons, the Inspector is respectfully urged to allow this appeal and grant the permission here sought.

CHRISTOPHER BOYLE QC

16th December 2021

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plan, none-the-less, did not outweigh the benefits of housing and affordable housing and permission was granted in accordance with para. 11(d)(ii) of the NPPF.