

IN THE MATTER OF LAND TO THE SOUTH OF FUNTLEY ROAD, FAREHAM

**AND IN THE MATTER OF APPEALS
BY RESIDE DEVELOPMENTS LTD AND ATHERFOLD INVESTMENTS LTD
UNDER SECTION 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990**

PINS REFS: APP/A1720/W/21/3283643 & 3284532

LPA REFS: P/20/1168/OA & P/20/1166/CU

**OPENING SUBMISSIONS
ON BEHALF OF FAREHAM BOROUGH COUNCIL**

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

A. INTRODUCTION

1. These Opening Submissions are made on behalf of Fareham Borough Council ("the Council") in the above Inquiry proceedings into two proposals ("the Proposals") by Reside Developments Ltd and Atherfold Investments Ltd ("the Appellants") for developments on contiguous land parcels at land to the south of Funtley Road ("the Appeal Sites").
2. The first appeal ("Appeal 1"²) is for an outline residential scheme for up to 125 dwellings including 6 self or custom build plots and a community building or local shop, plus associated development following demolition of existing buildings. The second ("Appeal 2"³) is for a change of use of land to a community park, also following demolition of existing buildings. The Appeal 2 proposal is not intended to be freestanding⁴, but secured as a benefit of the Appeal 1 scheme through the Section 106⁵.

¹ <https://moderngov.fareham.gov.uk/ieListDocuments.aspx?Cid=363&Mid=4098&Ver=4>

² APP/A1720/W/21/3283643

³ APP/A1720/W/21/3284532

⁴ Main SOCG (CDD.1) §3.3

⁵ The draft Section 106 is a unilateral undertaking to the Council, though Hampshire County Council is intended to be a party to it, and it is therefore entitled Planning Obligation by Agreement and Unilateral Undertaking.

3. These are not the first proposals from the Appellants on the Appeal Sites. On 2nd September 2020, the Council granted permission for a 55-unit scheme on part of the Appeal 1 site⁶ having earlier granted permission⁷ for a community park highly similar to (though slightly larger than) the Appeal 2 proposal. Part of the Appeal 1 Site is also proposed to be allocated for housing (with an indicative yield of 55 dwellings) under the Council's Emerging Local Plan⁸.
4. The 55-unit scheme (plus associated country park) forms a clear fallback position and all units are included in the Council's current Five Year Housing Land Supply Position statement⁹. The principle of residential development on part of the Appeal 1 site is therefore established, but for 55 dwellings, not for the more than double that now proposed.
5. As already noted, the Appeal 2 proposal is slightly smaller than the previous community park scheme. The reduction is required to accommodate the expanded Appeal 1 site, and as a result the Appeal 2 proposal is a little less beneficial than the previous scheme, but the Council has no objection to it¹⁰, and it resolved on 2 November 2021 that, had it not already been appealed for non-determination, it would have granted conditional permission¹¹.
6. However, the Council remains fundamentally opposed to Appeal 1, which would have been refused for 8 reasons had it not already been appealed for non-determination¹². It is to be hoped that six of these (as well as a further issue concerning habitats impacts to the New Forest which has arisen since the resolution was made) will be resolved on execution of a draft Section 106 which is well advanced. However, the first two reasons remain, and they provide a firm basis for dismissing Appeal 1.

⁶ CDH.1

⁷ CDH.2

⁸ CDF.5 page 70

⁹ FBC.28

¹⁰ Main SOCG (CDD.1) §3.4; Jupp Proof §1.7

¹¹ FBC.6 page 7

¹² FBC.6 pages 6-7

B. APPEAL PROPOSALS, SITES AND SURROUNDINGS

7. The Appeal Proposals, Sites and surroundings are addressed in detail in the main SOCG¹³ and in the evidence of the Council's witnesses. A couple of points should be noted in opening.
8. First, although the Appeal 1 proposal is in outline with all matters reserved except access, various drawings and documents are offered for approval, including three parameter plans¹⁴. The Appellants have also provided an Illustrative Masterplan to give an indicative sense of the Appeal 1 proposal¹⁵.
9. Second, the Appeal 1 proposal is for "up to 125" dwellings (plus other development). Mr Burden considers that this gives flexibility to the Council to insist on a smaller number of dwellings at reserved matters stage if necessary to ensure compliance with development management policy¹⁶, but that is not consistent with Court of Appeal authority¹⁷. Contrary to Mr Burden's position, the principle of anything up to 125 dwellings would be established if outline permission were to be granted, and that principle could not be revisited at reserved matters stage. If 125 dwellings is more than can be accommodated without unacceptable harms (as the Council considers to be the case) outline permission must therefore be refused.

C. POLICY FRAMEWORK

The Development Plan

10. 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 level¹⁸ comprises¹⁹:
 - a. Local Plan Part 1: Fareham Borough Core Strategy (adopted August 2011) ("the Core Strategy");

¹³ CDD.1

¹⁴ CDA.18, 20 and 21

¹⁵ CDA.19

¹⁶ Proof §3.84

¹⁷ *R (Harvey) v Mendip District Council* [2017] EWCA Civ 1784 at §41-3 *per* Sales LJ

¹⁸ The Hampshire Minerals and Waste Plan is also part of the development plan, but is not relevant to this Appeal

¹⁹ Main SOCG (CDD.1) §4.2

- 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”).

11. 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 Welborne²⁰.
12. A range of policies from the Core Strategy and DSP are agreed to be relevant to this Appeal²¹, and the relevant provisions of these are helpfully summarised in §§5.4 to 5.21 of Mr Jupp’s Proof. Chief among these is Policy DSP40²², which expressly addresses the manner in which applications (such as this one) on countryside sites should be decided where (as here) a five-year housing land supply cannot be demonstrated. This policy should be given very substantial weight in the planning balance and conflict with it should be a matter of the greatest consideration²³. Anything less would fail to respect the primacy given by statute to the development plan²⁴. DSP40 is therefore fundamental, but other policies are also relevant and should be given weight, as Mr Jupp describes²⁵.

The Emerging Local Plan

13. 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. On 30th September 2021 it was submitted to the Secretary of State for independent examination, in accordance with the timetable under the Council’s Local Development Scheme²⁶ (“LDS”). Under the LDS the Emerging Local Plan is expected to be adopted in Autumn/Winter 2022 and, consistent with this, the examination hearings are scheduled from 8th March to 5th April 2022²⁷.

²⁰ Main SOCG (CDD.1) §4.2

²¹ Main SOCG (CDD.1) §§4.4 and 4.5

²² 5YHLS SOCG (CDD.2) §2.4

²³ Jupp Proof §6.39

²⁴ CDK.4 *Hopkins Homes v SSCLG* [2017] 1 WLR 1865 at [21] *per* Lord Carnwath

²⁵ Jupp Proof §§6.40 to 6.41

²⁶ CDF.6 at §3.8 Table 1

²⁷ https://www.fareham.gov.uk/planning/local_plan/examination/examinationlibrary.aspx

14. The parties disagree as to the level of weight to be attached to the Emerging Local Plan (with the Appellants suggesting “very limited weight”²⁸ and the Council “some weight”²⁹). The Council’s position should be preferred (on application of the tests under §48 of the NPPF), but in any event, on either position, it is important to consider its policies, as Mr Jupp does in his evidence.
15. The majority of the Appeal 1 site comes within the emerging HA10 allocation under the Emerging Local Plan, but the redline area extends further to the south³⁰ into land designated as countryside (DS1), strategic gap (DS2), area of special landscape quality (DS3), and public open space (NE10) under the Emerging Local Plan³¹, with built form jutting right up against the HA10 allocation boundary (something plainly not intended for the emerging allocation). The Appeal 2 Site is also countryside, strategic gap, ASLQ and (in part) open space under the Emerging Local Plan.

D. 5-YEAR HOUSING LAND SUPPLY

16. Since the Appeal 1 Proposal is residential-led, it is important to understand the housing land supply position in the Borough. Happily, as set out in the 5YHLS SOCG³², the parties have reached considerable agreement on five-year housing land supply issues, as a result of which you have indicated that it will not be necessary to call witnesses on housing land supply issues. In particular:

- a. It is agreed that the Council is unable to demonstrate a five-year supply of housing for the period 1st January 2022 to 31st December 2026³³. The Council considers the 5YHLS position to be 4.31 years while the Appellant considers it to be 1.62 years³⁴.

²⁸ Burden Proof §4.87

²⁹ Jupp Proof §5.27 and Main SOCG (CDD.1) §4.10

³⁰ See Rummey Main Proof Appendices 5.2 and 5.3; Rebuttal Appendix 1

³¹ Jupp Proof §2.11

³² CDD.2

³³ CDD.2 §2.1

³⁴ CDD.2 §§5.1 and 5.2

b. 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 significant³⁵; and as such (on principles established by the Court of Appeal in *Hallam Land Management Ltd v SSCLG* [2018] EWCA Civ 1808³⁶) it is not considered necessary for you to conclude on the precise extent of the shortfall³⁷. Nonetheless, Mr Jupp provides substantial detail in section 7 of his Proof, explaining recent improvements in the Council's five-year housing land supply position, why the 4.31 year figure on which it relies is robust, and why it is likely to continue to improve in the future through plan-led delivery.

17. It is also common ground that there is a significant unmet affordable need within the Borough³⁸, something which Mr Jupp explores in section 7 of his Proof.

E. MAIN ISSUES

18. In your post-Case Management Conference Note of 14th December 2021, you characterised the main issues as follows:

- (1) Whether or not the proposed development would be in a suitable location, with particular regard to the spatial strategy for the location of new housing and the accessibility of services and facilities for future occupiers; and
- (2) The effect the proposed development would have on the character and appearance of the area, with particular regard to whether or not it would enable a detailed scheme to come forward that would reflect the character of the neighbouring settlement and minimise any adverse impact on the countryside.

19. On Main Issue 1, the Council will show that the Appeal 1 proposal is contrary to the spatial strategies under both the adopted and emerging Local Plans as well as having limited

³⁵ CDD.2 §6.3

³⁶ CDK.8

³⁷ CDD.2 §6.3

³⁸ Main SOCG (CDD.1) Section 5 line 9

accessibility. The Appellants proceed on the basis that accessibility issues have been settled by the granting of permission for the 55-unit scheme, but that is to confuse the proposal with the site. On that earlier application, Officers found the location to be “*relatively poor in terms of its accessibility*”³⁹ but considered that the measures proposed would address accessibility issues sufficiently for permission to be granted on that proposal. It does not follow that a proposal for more than double the number of dwellings is accessible since, as Mr Jupp notes, the assessment of whether a proposal is sustainably located must be informed by its scale⁴⁰. As Mr Jupp shows, the Appeal 1 site is not an accessible location for up to 125 dwellings, which brings Appeal 1 into conflict with Local Plan Policies CS5 and DSP40 and the NPPF. As Mr Jupp accepts⁴¹, the degree of conflict is not by itself (i.e. if there were no other harms) sufficient to justify the dismissal of Appeal 1, but it does put the Appeal 1 proposal in breach of the development plan and is a clear negative in the planning balance.

20. On Main Issue 2, the Council will show that the Appeal 1 proposal will harm the character and appearance of the area, failing to enable a detailed scheme to come forward that would reflect the character of Funtley, and failing to minimise adverse impacts on the countryside. The Appellants’ suggestion that a scheme for over twice the number of dwellings can come forward with less harm than the previous scheme (indeed with overall landscape and visual benefits) should be rejected. In reality, the Appeal 1 Scheme would cause significant landscape and visual harms, which have not been minimised, and which would harm a valued landscape, as Mr Dudley will demonstrate. Moreover, as Mr Russell-Vick will show, the design is fundamentally flawed on a number of levels, including: the approach to the edges; the design layout in respect of the view corridors; and the unsympathetic approach to local character.

F. BENEFITS OF THE APPEAL 1 PROPOSAL

21. In recommending refusal, Officers (and in accepting that recommendation, Members) had proper regard to the benefits of the Appeal 1 Proposal⁴² and Mr Jupp very fairly does the same in section 10 of his Proof. The main benefits of the Proposal are the provision of market and

³⁹ CDH.3 at page 17

⁴⁰ Jupp Proof §9.56

⁴¹ Jupp Proof §9.60

⁴² CDC.1 at §8.108-9

affordable housing and associated economic benefits, as well as (albeit limited) environmental benefits. Such benefits deserve significant weight, but many of the benefits of the Appeal 1 Proposal would come forward in any event under the 55-unit scheme, but with lesser harm. This includes the connection to the M27 bridge, which is now open on a permissive basis in any event; and the community park, which is better under the 55-unit scheme. True it is that more housing, more affordable housing, more self-build units and more economic benefits would flow from the Appeal 1 scheme, but these do not justify the additional harm.

G. PLANNING BALANCE ON APPEAL 1

22. Mr Jupp addresses the planning balance on Appeal 1 in section 10 of his Proof, finding that planning permission should be refused. As he explains, he proceeds on the assumption (which is likely but not certain) that a Section 106 resolving the habitats issues and securing the open space, affordable housing, education and highways obligations will be executed. If the open space, affordable housing, education and highways issues are not resolved, his conclusion that the planning permission should be refused will be further reinforced. And if the habitats obligations are not secured⁴³ (so as to provide you, as competent authority, with certainty beyond a reasonable scientific doubt⁴⁴ that any adverse effects on the integrity of any European Sites will be avoided), there would be a statutory bar to granting permission and so a planning balance would not arise (since there is no suggestion that the derogation tests under Regulation 64 of the Conservation of Habitats and Species Regulations 2017 could be met).

23. As in all cases, the Appeal 1 Proposal must be determined in accordance with the development plan unless material considerations indicate otherwise (as set out in section 38(6) of the PCPA). The NPPF is a material consideration in the section 38(6) test, but does not displace the primacy given to the development plan. The Council considers that the Appeal 1 Proposal breaches a number of development plan policies and the development plan as a whole. This includes Policy DSP40, to which the “greatest weight” must be given, since it sets a plan-led and fully NPPF-compliant approach to circumstances in which (as is currently the case) the Council cannot

⁴³ Or if you disagree with the parties as to the avoidance of an adverse effect on the integrity of any European Sites

⁴⁴ The requisite standard – see *Mynydd* (CDK.9) at [8(5)-(6)] and *An Taisce* (CDK.14) at [17]-[18]

demonstrate a five-year housing land supply. The question, then, is whether there should be a decision otherwise than in accordance with the development plan.

24. As a result of the absence of a five-year housing land supply, paragraph 11(d) of the NPPF is engaged, and the Council accepts that (assuming the habitats issues are resolved) there would be no “clear reason” for refusing the development under paragraph 11(d)(i). The tilted balance under paragraph 11(d)(ii) therefore applies, but as Mr Jupp sets out, it falls firmly against the Appeal 1 Proposal. The harms (including the policy harms from breach of policy, the harms from the limited accessibility, the landscape and visual harms to a valued landscape, and the harms from a flawed design) are very significant, and they significantly and demonstrably outweigh the benefits.

H. OVERALL CONCLUSIONS

25. For these reasons, which will be explored in evidence, I will in due course invite you to dismiss Appeal 1. As already noted, the Council does not object to Appeal 2.

NED HELME
39 ESSEX CHAMBERS
81 Chancery Lane, London, WC2A 1DD
8th February 2022