

BARGATE HOMES

PROPOSED DEVELOPMENT OF LAND AT LOWER ROAD, BEDHAMPTON

VIRTUAL PUBLIC INQUIRY – 2-5 FEBRUARY 2021

THE OPENING SUBMISSIONS OF THE APPELLANT

1. These opening submissions are set out in the following seven sections:
 - 1.1. Section 1 – Introduction
 - 1.2. Section 2 – The urgent need for housing
 - 1.3. Section 3 – The Development Plan
 - 1.4. Section 4 – The Tilted Balance
 - 1.5. Section 5 – Heritage
 - 1.6. Section 6 – The benefits of the proposal
 - 1.7. Section 7 – The overall planning balance
2. The following documents are included as appendices:
 - 2.1. Appendix 1 – Chronology of key events in this matter.
 - 2.2. Appendix 2 - R v Hammersmith & Fullham LBC (ex parte People Before Profit) (1983) 45 P.&C.R. 364
 - 2.3. Appendix 3 - Monkhill Limited v SSHCLG [2019] EWHC 1993 (Admin); and [2021] EWCA Civ 74
 - 2.4. Appendix 4 – Monkhill Limited v SSHCLG [2021] EWCA Civ 74

Section 1- Introduction

3. The Appellant seeks to build 50 residential dwellings – including 30% affordable homes or 15 units – together with associated access, landscaping and Public Open Space. The site is currently used as farmland but has been considered a strong candidate for housing development for many years by the LPA
4. In fact, the site has now been assessed by expert planning officers as suitable for housing development on the scale currently proposed some seven times:
 - 4.1. The LPA's 2016 Housing Statement [**CD P10**];
 - 4.2. Policy H20 of the Pre-Submission Havant Borough Local Plan 2036 [**CD P11**];
 - 4.3. The Planning Officer's Report to Committee on this application in January 2020 [**CD P4**];
 - 4.4. The Planning Officer's Report to Committee on this application in March 2020 [**CB p5**];
 - 4.5. The LPA's Strategic Housing Land Availability Assessment (SHLAA) August 2020;
 - 4.6. The LPA's Housing Land Supply Update December 2020 [**CD P17**]; and
 - 4.7. The Planning Officer's Report to Committee on the revised application (APP/20/01031) in January 2021 [**CD P16**].
5. The LPA's case before this inquiry completely ignores this very significant history of planning judgments in favour of the suitability of this site for housing development.
6. Indeed, the formal position is that the officers of this LPA support its development for housing, both in development management as shown by the 3 officer recommendations, and in the policy team who are currently supporting its allocation and indeed relying on it to provide the supply for housing in this district.
7. That is the remarkable context to which this appeal now takes place.

8. The Appellant's case can be summarised as follows:
 - 8.1. There is very clearly an urgent national, regional and local need for housing and this site is eminently suited to meeting some of that critical need.
 - 8.2. The response of policy to a 5 year shortfall is to grant permission now if there be such a shortfall.
 - 8.3. The Havant Local Plan Core Strategy and Allocations Plan on which the LPA rely are considerably out-of-date because they do not reflect up-to-date guidance within the NPPF and because the LPA cannot demonstrate a 5 Year Housing Land Supply ("5YHLS").
 - 8.4. The "tilted balance" at para 11 NPPF is therefore engaged which sets a very high hurdle for refusing this application.
 - 8.5. The only reason for refusal which remains live before this inquiry is heritage. The Appellant will demonstrate through the evidence of Mr Trehy why there is no heritage harm here. Further, we will show that even if there were less than substantial harm as alleged by the LPA, it is clearly outweighed by the benefit of the scheme. The proposal very clearly passes the test imposed by para 196 NPPF, thus re-engaging the tilted balance in spite of the heritage RfR.
 - 8.6. The highways concerns raised by the Rule 6 party have been addressed in the expert report of Mr Jenkins and endorsed by the LHA after much consideration. The appellant's firm view is that they do not give rise to any material consideration weighing against the proposal.
 - 8.7. The overall planning balance very clearly weighs in favour of granting permission.
9. Finally by way of introduction, the Appellant's ownership structure would enable it to bring forward this housing very quickly following a grant of permission. Bargate Homes are owned by Vivid, one of the largest affordable housing providers in the south of England. This means that no bank funding is required to finance sites and that Bargate would be able to get on site and building as soon as

conditions were discharged. Further, everything that Bargate does as a business which generates profit is used by Vivid to re-invest in their own affordable housing programme.

Section 2 – The urgent need for housing

10. The context to this appeal is the critical and urgent need for housing that currently exists at a national, regional and local level. The Government’s objective, as set out in paragraph 59 NPPF, is to significantly boost the supply of homes in order to meet this need and ameliorate the current housing crisis.
11. The LPA is clearly failing to meet this objective and has accepted that it is not currently able to demonstrate a five-year supply of deliverable housing sites [**SoCG on 5YHLS, para 2.1**]. With the agreed supply position at between 3 and 4.1 years, the shortfall is clearly significant [**para 2.3-2.4**] and significant weight needs to be given to that shortfall in the planning balance.
12. The “high level of housing need that exists” at a local level was recognised in the 2016 Housing Statement [**para 3.14**] leading the LPA to conclude that it should take drastic action to meet the short term compelling need for housing in the light of the increased requirement and support the principle of residential development on the site through the emerging Local Plan 2036 [**Table 2 – site UE30**].
13. That support for development on the site to meet local need has been carried forward into the current draft Local Plan 2036 [**Policy H20**] which has been endorsed by Full Council for submission to the Secretary of State and has completed its final consultation.
14. The provision of 50 residential dwellings on the site is therefore a very important benefit of the proposal. Mr Jobbins has referred to two appeal decisions which illustrate the weight to be applied to the provision of housing and affordable housing in the current climate [**DJ Proof, para 4.30**].

Section 3 – The Development Plan

15. Having established that important context, the starting point for the determination of this appeal is of course to consider whether or not the proposal

complies with the development plan [s.38(6), **Planning and Compulsory Purchase Act 2004**].

16. The Development Plan for the purposes of this application comprises: (1) the Core Strategy adopted in March 2011 [CD P8]; and (2) the Site Allocations Plan adopted in 2014 [CD P9]. The RfR alleges breaches of Policies CS11 and CS16 of the Core Strategy and Policy DM20 of the Site Allocations Plan. Mr Wood has alleged further breaches of CS17 and AL2 [SW Proof, para 5.12 and 5.13] despite their total absence from the RfR, the Statement of case of the LPA and the SoCG [para 5.1].
17. The Appellant makes the following points regarding compliance with the Development Plan:
18. **First**, the Core Strategy pre-dates the 2012 NPPF and therefore the weight to be accorded to any policy in that plan needs to be assessed in accordance with its degree of consistency with the current Framework [para 213 NPPF]. As Mr Jobbins will explain in his evidence, Policies CS11, CS16 and DM20 can only be given very limited weight when applying this test [DJ Proof, paras 4.1, 4.3 and 4.5]. Those policies simply do not comply with the National Guidance now in force.
19. One of the few policies in the existing plan which can be considered up-to-date is Policy AL1 – the Presumption in Favour of Sustainable Development. This clearly supports the proposal which is for development in a highly sustainable location. It is notably absent from Mr Wood’s consideration of the proposal’s compliance with the Development Plan.
20. **Second**, the LPA has accepted that it cannot demonstrate a 5YHLS and therefore – this being an application involving the provision of housing – the policies which are most important for determining the application are automatically out-of-date [para 11 and fn 7 NPPF].
21. The justification for this approach is highlighted by the LPA’s most recent Housing Land Supply Update from December 2020 [CD P17] which sets the annual housing need figure at 504 dwellings per annum. This represents a 60% increase on the 315 dwelling per annum figure in Policy CS9 of the existing Development Plan.

22. Clearly, Policies CS17 and AL2 can be given exceptionally little, if any weight, in these circumstances.
23. **Third**, the emerging Havant Local Plan 2036 has reached a stage in its preparation where it can be given significant weight, particularly in view of the consistency of the relevant policies with the Framework [**para 48(c) NPPF**]. The Proposal would very clearly accord with this Emerging Plan and, in particular:
 - 23.1. Policy H3 – which requires residential development to “maximise its contribution to housing need...”;
 - 23.2. Policy E13 – which requires the decision-maker to balance any less than substantial harm to heritage assets against the public benefits of the proposal; and
 - 23.3. Policy H20 – which allocates the appeal site for residential development of about 50 dwellings.
24. Contrary to what Mr Wood says in his evidence [**para 5.19**], the fact that Policy H20 is subject to objections and is going through the plan-making process does not preclude you, Sir, from making a decision on this appeal applying your own planning judgment: **R v Hammersmith & Fullham LBC (ex parte People Before Profit)** (1983) 45 P.&C.R. 364, at 367-8 [**Appendix 2**].
25. Additionally whatever weight you chose to give to the plan does not preclude you giving additional weight to the evidence base that supports that plan. The simple point is that the plan has been subject to very significant evidential scrutiny up to now through SHLAAs, SAs, AMRs, and the choosing of sites by the LPA and the firm view is this site should be developed in the next 5 years for housing.
26. The LPA – quite rightly – do not seek to argue that approval of the appeal proposals would be premature as defined in para 49 NPPF.
27. In sum, any conflict with the policies in the existing Core Strategy or Site Allocations Plan relied upon by the LPA can only be given very limited weight. These are plans which are antique and out of date. They bear simply no

relationship to the agreed housing requirement which is now 60% greater than when those plans were formulated.

28. By contrast, significant weight ought to be given to the proposal's compliance with the emerging Plan.

Section 4 – The Tilted Balance

29. Paragraph 11 NPPF sets out the presumption in favour of sustainable development with sub-paragraph (d) setting out when so-called the “tilted” balance will be engaged:

“(d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date (fn 7), granting permission unless:

- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed (fn 6); or
- ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.”

30. Footnote 7 provides that the policies which are most important for determining the application will be out-of-date where, “for applications involving the provision of housing, ... the local planning authority cannot demonstrate a five year supply of deliverable housing sites”.
31. Footnote 6 provides that the “policies in this Framework that protect areas or assets of particular importance” includes those which relate to “designated heritage assets”.
32. The tilted balance is intentionally high to ensure where either or both those situations arise the presumption is that pp should be granted for housing development in sustainable locations.

33. In this case, it is common ground that the LPA cannot demonstrate a 5-year supply of deliverable housing sites, therefore the tilted balance is *prima facie* triggered and one has to go on to consider sub-paragraphs (i) and (ii).
34. The LPA seeks to argue that the tilted balance is disengaged as a result of paragraph 11(d)(i) and Footnote 6 simply because heritage, and specifically the protection of the setting alone of the Old Bedhampton Conservation Area (“OBCA”), is the key issue in this appeal [SW Proof, para 5.17].
35. This approach is far too simplistic and inconsistent with case law on the topic.
36. The leading decision is **Monkhill Limited v SSHCLG** [2019] EWHC 1993 (Admin) [Appendix 3], in which Holgate J considered the application of paragraph 11(d)(i) and footnote 6 in detail:

“39. (10) Under limb (i) the test is whether the *application* of one or more "footnote 6 policies" provides a clear reason for refusing planning permission. **The mere fact that such a policy is engaged is insufficient to satisfy limb (i).** Whether or not limb (i) is met depends upon the outcome of applying the relevant "footnote 6" policies (addressing the issue on paragraph 14 of NPPF 2012 which was left open in R (Watermead Parish Council) v Aylesbury Vale District Council [2018] PTSR 43 , para 45 and subsequently resolved in East Staffordshire [2018] PTSR 88 , para 22(2)).

(11) Limb (i) is applied by taking into account only those factors which fall within the ambit of the relevant "footnote 6" policy. Development plan policies and other policies of the NPPF are not to be taken into account in the application of limb (i): see footnote 6. (I note that this is a narrower approach than under the corresponding limb in paragraph 14 of the NPPF 2012: see e g Lord Gill in Hopkins [2017] PTSR 623 , para 85).

(12) The application of some "footnote 6" policies (e g Green Belt) requires all relevant planning considerations to be weighed in the balance. In those cases because the outcome of that assessment determines whether

planning should be granted or refused, there is no justification for applying limb (ii) in addition to limb (i). The same applies where the application of a legal code for the protection of a particular area or asset determines the outcome of a planning application (see, for example, the Conservation of Habitats and Species Regulations 2010 (SI 2010/490) in relation to European protected sites).

(13) In other cases under limb (ii), the relevant "footnote 6" policy may not require all relevant considerations to be taken into account. For example, paragraph 196 of the NPPF requires the decision-maker to weigh only the "less than substantial harm" to a heritage asset against the "public benefits" of the proposal. Where the application of such a policy provides a clear reason for refusing planning permission, it is still necessary for the decision-maker to have regard to all other relevant considerations before determining the application or appeal: section 70(2) of the 1990 Act, as amended, and section 38(6) of the 2004 Act. But that exercise must be carried out without applying the tilted balance in limb (ii), because the presumption in favour of granting permission has already been disapplied by the outcome of applying limb (i). That is the consequence of the decision-making structure laid down in paragraph 11(d) of the NPPF.

(14) There remains the situation where the application of limb (i) to a policy of the kind referred to in (13) does not provide a clear reason for refusal. The presumption in favour of sustainable development will not so far have been disapplied under limb (i) and it remains necessary to strike an overall planning balance (applying also section 38(6)). Because the presumption in favour of granting planning permission still remains in play, it is relevant, indeed necessary, to apply the alternative means of overcoming that presumption, namely limb (ii). This is one situation where the applicant for permission is entitled to rely upon the "tilted balance".

...

40. Applicants for planning permission may object that under this analysis of paragraph 11(d), the availability of the tilted balance is asymmetric. Where a proposal fails the test in limb (i), the tilted balance in limb (ii) is not applied at all. **In other words, the tilted balance in limb (ii) may only be applied where the proposal either passes the test in limb (i) (and there still remain other considerations to be taken into account), or where limb (i) is not engaged at all.** This analysis is wholly unobjectionable as a matter of law. It is simply the ineluctable consequence of the Secretary of State's policy expressed through the language and structure of paragraph 11(d)."

37. Holgate J's judgment was upheld by the Court of Appeal just last week: [2021] EWCA Civ 74 [Appendix 4]. His 15 point summary on the interpretation of paragraph 11(d) at paragraph [39] was common ground between the parties on appeal and was endorsed by Lindblom LJ at [18] of the appeal judgment.
38. In short, the Appellant submits that the correct approach is as follows:
 - 38.1. **Stage 1:** identify that paragraph 11(d) is engaged as a result of footnote 7 because of the lack of 5YHLS;
 - 38.2. **Stage 2:** identify whether there are footnote 6 policies relevant to the determination of the appeal, namely, whether paragraph 196 NPPF (less than substantial harm to designated heritage assets) applies;
 - 38.3. **Stage 3:** if so, apply the relevant footnote 6 policy to determine whether or not it provides a clear reason for refusing permission; and
 - 38.4. **Stage 4:** if it does not, apply the tilted balance in paragraph 11(d)(ii) i.e. assess whether any adverse effects of granting permission would significantly and demonstrably outweigh the benefits of doing so.
39. The evidence before this inquiry will show that paragraph 196 NPPF does **not** provide a clear reason for refusing planning permission in this case (for the reasons summarised below). Therefore, the tilted balance is still engaged and the test in paragraph 11(d)(ii) must be applied in assessing the overall planning balance.

Section 5 – Heritage

40. Turning then to the LPA’s only allegation of harm against the development, namely, that it would adversely affect the **setting** of the OBCA. The significance of the conservation area and its setting are described in the Old Bedhampton Conservation Area Appraisal (“the CAA”) [CD H3].
41. The principal dispute between the two heritage experts (Mr Trehy for the Appellant and Mr Hanson for the LPA) is as to whether the development would cause any material harm to the setting alone of the OBCA and if there be such harm what is the effect on the significance of the OBCA.
42. The key issue as recognised in the NPPF is the effect on the significance of the OBCA of which setting is one part.
43. It is also noteworthy therefore that the battleground is not direct effects on the CA but purely the setting of the OBCA.
44. Mr Trehy forms the view that there would be **no material harm** to the conservation area or its setting and consequently its significance for several reasons which will be explored in detail in his evidence:
 - 44.1. The appeal site is situated immediately adjacent to the urban settlement boundary of Bedhampton, which itself forms a large suburb of the substantial town of Havant. The extensive development of Bedhampton over the years can be seen from the historic OS Maps [JT Proof, **Appendix 1**]. The proposed development is of a comparable scale to the existing adjacent residences.
 - 44.2. The appeal site itself does not lie within any area designated for its landscape or heritage significance. Part of the site simply lies adjacent to an outlying, “satellite” area of the OBCA, known as Character Area 5 – Old Manor Farm. The existence of this “satellite” area is itself an unusual feature of this particular conservation area. Indeed inclusion of this site was repeatedly rejected through the conservation area review process in 2019 because the LPA concluded it did not have the requisite special interest to be part of the CA.

- 44.3. No physical works or changes are proposed to the designated heritage asset itself, only to its setting. This requires an assessment of the significance of the setting and its contribution to the significance of the asset itself. Further, paragraph 201 NPPF notes that “Not all elements of a...conservation area...will necessarily contribute to its significance”.
- 44.4. The appeal site is not identified in the CAA, nor indeed anywhere else, as contributing to the setting of the OBCA [see CAA, para 7.8] despite significant lengths taken by those who now appear as the Rule 6 party to include it within a revised conservation area boundary [JT Proof, paras 2.3-2.8]. Through that process several LPA conservation officers, together with Historic England failed to identify the site as it did not have the requisite special interest worthy of inclusion within the revision of the OBCA boundary nor as an area that contributes positively to its setting.
- 44.5. Only two of the five identified character areas in the OBCA are potentially affected by the development (Character Areas 1 and 5). No effects are predicted on the Historic Core (CA1) and only a minor visual change will occur to the setting of Old Manor Farm (CA5). Therefore, the effect on the character and appearance of the OBCA **as a whole** is neutral.
45. By contrast, Mr Hanson is able to reach a conclusion of less than substantial harm to the OBCA via an unwarranted inflation of the importance of its setting and role of the appeal site as a contributing factor to that significance.
46. He in essence utterly ignores the OBCAA because it simply does not support his fundamental contention to this inquiry that the proposal will harm materially the significance of the OBCA.
47. Therefore, what he effectively does is start again and magic up six elements of the setting that contribute to significance that he seeks to justify make the development of this land harmful.
48. However, the six elements of significance that he identifies [JH Proof, para 3.24] are completely without foundation or authority. Further, they entirely fail to

acknowledge the fact that the appeal site lies adjacent to and would assimilate into the existing suburban edge.

49. Further, Mr Hanson's view is contrary to that of the LPA's own planning officers as set out in the three comprehensive reports to the planning committee [CD P4, P5 and P16]. Yet his evidence fails to even engage with any of these reports.
50. Even taking the LPA's case at its highest, the parties are agreed that the harm is less than substantial and that therefore the relevant test is that set out at paragraph 196 NPPF:

“Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.”

Section 6 – The benefits of the proposal

51. There are ten public benefits of the proposal that need to be weighed against any less than substantial harm to the OBCA:
 - 51.1. **Benefit 1 – Market housing.** The proposal comprises an appropriate mix of terraced, semi-detached and detached, 2-4 bed market homes to meet the needs of a wide range of residents.
 - 51.2. **Benefit 2 – Affordable housing.** The scheme would provide 15 much-needed affordable homes, again of mixed sizes and forms of tenure.
 - 51.3. **Benefit 3 – Public Open Space.** The proposal will provide circa 2 hectares of public open space, well in excess of the LPA's required standards and including a community orchard and children's allotments.
 - 51.4. **Benefit 4 – Sustainable location.** The development would be in a highly sustainable location in close proximity to local shops, services, green spaces, educational and sports facilities. This is not disputed by the LPA and is in line with the objectives of the existing and emerging local plans together with paragraphs 100, 103 and 108 NPPF.

- 51.5. **Benefit 5 – Excellent Design.** The scheme will be highly attractive, respect the context of the site and will form a successful addition to the surrounding urban development.
- 51.6. **Benefit 6 – Low carbon emissions.** The development will be highly energy and water efficient, in full accordance with Building Regulations Part L.
- 51.7. **Benefit 7 – Biodiversity net gain.** The proposed landscaping will provide open greenspace, species-rich grassland, native hedgerow, trees scrub and wetland features which will provide a valuable range of habitats.
- 51.8. **Benefit 8 – Replacement of coniferous tree belt.** This intrusive and alien species will be replaced with an indigenous tree shelter belt.
- 51.9. **Benefit 9 – Economic.** The development will result in local employment opportunities during the construction period and support for the local economy by residents following completion.
- 51.10. **Benefit 10 – Highway improvements.** The appellant has agreed to fund a scheme of highway improvements at Bidbury Lan, Brookside Road, Kings Croft Land and Bedhampton Road which will provide significant benefits to pedestrians using these routes [SJ Proof, para 3.4.16-18].
52. These are all significant public benefits which must on any view outweigh any less than substantial harm to the OBCA. The paragraph 196 test is therefore overcome.

Section 7 – Overall planning balance

53. As paragraph 196 does **not** provide a clear basis for refusing the application, the tilted balance is engaged and the question for you, Sir, in considering the overall planning balance is whether any harms arising from the proposal **significantly and demonstrably** outweigh all of the aforementioned benefits.
54. Mr Jobbins helpfully sets out in tabular form the weight which in his view should be given to the first nine of the benefits listed above together with the only two harms identified by the LPA (impact on the setting of the OBCA and impact on

landscape) [DJ Proof, para 5.11]. This clearly illustrates how the balance – even un-tilted – weighs very clearly in the appellant’s favour.

55. The Rule 6 Party alleges highway and safety concerns as a distinct harm which would arise from the proposed development and which they say is a material consideration to be weighed in the overall planning balance. The appellant rejects this proposition for the following reasons:

55.1. There were no objections to the proposal from the Highway Authority (Hampshire County Council) and there is agreement between that Authority and the Appellant that there will be **no material highways impact** (let alone a severe impact) [SoCG on Highway Matters, 17 December 2020].

55.2. A further proof of evidence has been provided by Mr Jenkins (the Appellant’s Highway Consultant) in response to the Rule 6 Party’s evidence on this matter. Mr Jenkins will be providing live evidence before the inquiry.

55.3. In face of this significant body of expert views on the matter, the Rule 6 Party has not provided and will not be calling any expert evidence in support of its allegation.

56. However, even if, contrary to the Appellant’s case, some limited weight is given to this allegation of harm as a material consideration weighing against the scheme, it cannot be such as to significantly and demonstrably outweigh the ten significant benefits that have been identified and it simply does not come close to reaching the very significant policy hurdles set out in NPPF 109.

57. In sum, even taking the LPA and Rule 6 Party’s cases at their highest, the overall planning balance is very squarely in favour of the grant of permission for this highly sustainable development as will be shown in evidence.

2 February 2021

SASHA WHITE Q.C. AND KIMBERLEY ZIYA

LANDMARK CHAMBERS