



Appeal Decision

Inquiry Held on 25 & 26 September 2018 and 26-28 February 2019

Site visits made on 24 & 26 September 2018 and 26 February 2019

by Nick Fagan BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 May 2019

Appeal Ref: APP/P1560/W/18/3196412

**Land west of Edenside, Bloomfield Avenue, Frinton-On-Sea, Essex
CO13 0UD**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by The Burghes Estate against the decision of Tendring District Council.
 - The application Ref 17/00836/OUT, dated 22 May 2017, was refused by notice dated 22 August 2017.
 - The development proposed is up to 85 dwellings and associated open space with access from Bloomfield Avenue.
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This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes the decision issued on 3 April 2019.

Decision

1. The appeal is dismissed.

Procedural Matters

2. I conducted three separate site visits. The first was unaccompanied on the day before the Inquiry commenced, which I undertook to familiarise myself with the site and wider area. The second was an accompanied visit to the site and surroundings on the afternoon of Day 2 of the Inquiry, including the location of the Fisher's Estuarine Moth immediately to the north of Walton Road showed to me by Cllr Everett. The third was unaccompanied on the afternoon of 26 February 2019, which I conducted to refamiliarize myself with the site and local area. It was fortuitous that this was in the winter, when the deciduous trees were bare of leaves, so I was able to observe the site and surroundings over two seasons.
3. The proposal is in outline with only the means of access into the site from Bloomfield Avenue, a cul-de-sac, to be determined at this stage. Nonetheless, I have assessed it on the basis of two illustrative layouts: first the original Concept Plan and secondly the alternative Key Design Parameters and Design Concept Plans submitted as an addendum to the Design and Access Statement¹.

¹ JE Appendix 5

4. A signed but undated S106 agreement between the owners of the land, the District Council and the County Council was submitted on the Inquiry's last sitting day. As agreed a signed certified copy, with some minor necessary changes, was submitted on and dated 14 March 2019. I address this in more detail below.
5. Evidence in respect of landscape and affordable housing matters was presented last year. But it was agreed that evidence on ecology and housing land supply (HLS) would be adjourned until February this year, allowing the main parties the opportunity to minimise areas of dispute concerning these matters and to take account of recent and forthcoming likely changes to national policy and guidance including regarding the standard method for assessing local housing need and the publication of the first Housing Delivery Test (HDT) results.
6. As it happens, the latest changes to national policy/guidance and HDT results were released on the 19 and 20 February and the Inquiry heard updated evidence from the main parties, which took such changes into account. Specifically, in terms of HLS matters, the Council agrees² with the appellant that it cannot currently demonstrate a five-year housing land supply (5YHLS).
7. That is because the revised National Planning Policy Framework (NPPF) and Planning Practice Guidance (PPG) make clear that the Council's housing requirement must be based for planning decisions including S78 appeals on an assessment of local housing need, which means by applying the standard method. The recent HDT results confirm that since Tendring only delivered 78% of its housing requirement in the three years up to April 2018 a 20% buffer must be added to its 5YHLS requirement. As a result, it is agreed that, at best, there is no more than a 4.04YHLS in Tendring. The effect of this is that the tilted balance in NPPF paragraph 11 d) ii) is engaged.
8. In respect of ecology matters, the main parties agreed at the Inquiry that the prospective impact of the development on protected species and on the integrity of the Hamford Water Special Protection Area (SPA), Ramsar Site (RS) and Site of Special Scientific Interest (SSSI) would be acceptable. They agreed that the grounds for refusal in reason 3 had been overcome, albeit that I was required to carry out an appropriate assessment under the Habitats Regulations. However, Cllr Everett argued that the proposal would have an adverse effect on the Fisher's Estuarine Moth. I deal in more detail with these issues in Other Matters below.

Main Issues

9. Consequently, the main issues are as follows:
 - (1) Whether the proposed development would harm the countryside and local landscape, in particular its effect on the Local or Strategic Green Gap in terms of Policy EN2 of the adopted Tendring District Local Plan 2007 (TDLP) or Policy PPL6 of the emerging Local Plan (eLP) respectively.
 - (2) The tilted planning balance: whether any adverse impacts identified would significantly and demonstrably outweigh the benefits of the development including taking into account the extent and validity of the

² As set out in ID1 & ID2 – Updated Housing Statement of Common Ground & Addendum

housing shortfall and its effect on the weight to be attached to development plan policies.

Reasons

Description of Site and Surroundings

10. The appeal site extends to 9.8 hectares. It comprises two arable fields immediately adjoining the western urban edge of Frinton-on-Sea, a northern field of 4.4ha and a southern field of 5.4ha separated by a tree belt approximately 7-10m high and 10m wide dividing the site in two. It is bounded to the north by a mature hedgerow, to the east by the urban edge of the town in the form of a residential estate known as Edenside, to the south by a strong hedgerow and to the west by a double hedgerow and tree belt next to a track known as Turpins Lane, which is annotated on the O.S Map as an Other Route with Public Access.
11. The site is largely level with a gentle downward slope to the south west. The Landscape and Visual Appraisals (LVAs) consider in detail the views and visibility of the site in the context of the surrounding development.³ Access to the site for agricultural purposes is gained by field gates to the north of the site off Walton Road. The original Concept Plan shows that the proposed development area would not extend over the entire site. In that Plan the western part of the site is to be retained as a public green open space and comprises 4.1ha. In the alternative illustrative layout the development area would be restricted to the southern field, leaving the whole of the 4.4ha northern field as open space.
12. Edenside is an estate of mixed housing from large detached properties to smaller terraced housing predominately two-storey in height. It dates from around the late 1970s and early 1980s and is designed as a series of curving culs-de-sac off a main curving spine road. Hamford Primary Academy lies to the east of the site some 600m away as the crow flies. The school site has room for expansion and is easily accessed by foot from the appeal site.
13. The proposed site lies west of Elm Tree Avenue which is one of the main routes into Frinton town centre. To the east of Elm Tree Avenue is the Triangle Shopping Centre which has a good range of shopping facilities including grocery stores, pharmacy, electrical goods, furniture etc. and services such as a community centre, vets, hairdressers etc. Tendring Technology College is located just to the east of the Triangle Shopping Centre and is about a 15-minute walk from the site. Frinton Railway Station and the town centre are approximately 20 minutes away on foot.
14. An hourly rail service is available from the Frinton-on-Sea rail station, with a range of direct and connecting services available to London taking in the order of 1 hour 30 minutes. Colchester and Chelmsford can also be reached on this service.
15. To the north east of the appeal site is the consented development known as Turpins Farm (application reference 16/00031/OUT approved 1 March 2017), also owned by the appellant. That development provides for up to 210 dwellings, open space and a drop off facility for Hamford Primary Academy. To the south west of the site is a recently consented development for 240

³ Both the original LVA by WSP Parsons Brinckerhoff and JE's LVA at appeal

dwelling known as The Willows, Halstead Road, Kirby Cross, currently under construction, which was allowed on appeal.

Effect on the Local Landscape, Countryside and Green Gap

16. The landscape character context for the District is set out in the Tendring District Landscape Character Assessment (2001).⁴ Within this, all of the southern field and the eastern part of the northern field falls within landscape character area (LCA) 8B: *Clacton and the Sokens Clay Plateau*. The western part of the northern field lies within LCA 3A: *Hamford Coastal Slopes*. There is broad agreement between the parties that the proposed development, certainly as regards the alternative layout which precludes built development on the northern field, would have no significant effect on the landscape character of either of these LCAs. The site does not form part of a nationally designated landscape and is not a 'valued landscape' in terms of NPPF paragraph 170 a).
17. Given the site's location on the plateau the parties agree that it is not generally prominent in the local landscape. If the development was located entirely on the southern field it would not be seen, even in winter, in views from Walton Road and the SPA. Even if the original layout was to go ahead it is very unlikely that dwellings would be visible from there especially after additional planting on the site's northern boundary had matured.
18. The housing would be visible, particularly in the winter, from public Footpath 24 to the west of the site but given the flatness of the topography and the intervening trees and hedges it would not be particularly prominent, especially after additional planting had grown. But it would be prominent from the footway that runs alongside the backs of the houses at Edenside, especially at the access point on Bloomfield Avenue.
19. It would also be visible from Turpin's Lane especially in the winter, given the site's proximity to this public right of way, notwithstanding the proposed strengthened western boundary planting to the site. The appellant questioned the use of this path at the Inquiry but it is clearly accessible to and used by the public as I was able to observe during my site visits, and the illustrative layout plans link the site onto it via new footpaths. It is inevitable and unsurprising that the proposed scheme's visual impact from such near viewpoints would be significant and adverse since a large proportion of this site in the open countryside would become a housing estate.
20. However, the impact on the Green Gap is of far greater concern. If the development was to go ahead there would only remain one agricultural field between the site and the edge of Kirby-le-Soken. From Turpin's Lane at the north west corner of the site it would be possible to see existing housing at the south eastern corner of the village as well as the new dwellings on the appeal site, particularly given the height and prominent location of the development at Chartfield Drive currently nearing the end of construction. This would be the case even if development on the appeal site is confined to the southern field.
21. TDLP Policy EN2 states:

⁴ CD 9.2

During the Plan period, land within Local Green Gaps, as defined on the Proposals Map, will be kept open, and essentially free of development. This is to prevent the coalescence of settlements, and to protect their rural settings. Minor development proposals may be permitted if they do no harm, individually or collectively, to the purposes of a Local Green Gap or to its open character. These may include the improvement of existing leisure and recreational facilities, and development for agricultural purposes. In Local Green gaps, where resources and opportunities permit the Council will encourage the improvement of public rights of way.

22. Paragraphs 6.9 and 6.10 of the TDLP expand on the purposes of the Local Green Gaps (LGGs). In particular one of their purposes is to maintain separation between urban areas and free-standing smaller settlements that surround them and by conserving the countryside between residential settlements to preserve the open character of these important breaks between settlements. In respect of the Frinton/Walton/Kirby Cross/Great Holland/Kirby-le-Soken/Holland-on-Sea LGG its most relevant function in the context of this appeal is to safeguard the identity, character and rural setting of Kirby-le-Soken as a free-standing village in the countryside.
23. The proposal is not a minor development and would bring new dwellings, assuming they were to be located entirely on the southern field, to within 270m of the edge of the Chartfield Drive development.⁵ The northern field would remain as open space but it would be used by residents of the new development and the general public and would not have the same character as an agricultural field. In any case the proposal would clearly not keep this important part of the Green Gap open and free of development.
24. Development of the site would significantly compromise the function of the LGG by eroding it at a point where it is already very narrow. It would consequently be a significant breach of Policy EN2. I am conscious that the development of the Turpin's Farm site to the north east has already impinged on the gap, but nowhere near the extent that the development of this site would, because there remains a gap of 440m between the edge of that site and the edge of Kirby-le-Soken. I acknowledge the appellant's point that the site was originally part and parcel of the envisaged outline permission for Edenside in the 1970s. But that is a long time ago, prior to the existence of Policy EN2 or the TDLP, so has very little relevance.
25. I also note that the Green Gap in this location has been revised in the eLP in that it has been reduced in size to take account of the Turpin's Farm and Halstead Road permissions and to ensure it is fit for purpose. But I also note that the purpose of Strategic Green Gaps (SGGs), as they are now referred to in eLP Policy PPL6, remains to maintain clear gaps and open settings between settlements and that, critically in regard to this proposal, the site remains within this SGG. Whilst I attach little weight to the breach of Policy PPL6 itself, owing to the limited stage that the eLP has reached, I consider it significant that the proposal would significantly breach both the LGG and the reduced size SGG.

⁵ Revised figure to that in JE Appendix 3, Drawing 03 - set out in EiC of AH and as agreed with appellant

26. Policies EN2 and PPL6 both seek to protect important open areas of open countryside from development in order to prevent coalescence of settlements and loss of their open settings. I conclude that for the above reasons the proposed development would be inimical to these Policies.

The Tilted Balance

The Housing Shortfall

27. As set out above, the Council accepts that it cannot demonstrate a 5YHLS, according to the standard method by which local housing need must be calculated for the purposes of this appeal. This is because it must deliver 857 dwellings per annum (dpa) and it only has the supply to meet, by its best case, 4.04YHLS. The appellant considers that it only has a 3.25YHLS. The absence of a 5YHLS means that the tilted balance applies.
28. However, the Council disputes that this figure represents the true housing need of the District because the 2014 population and household formation projections are seriously flawed for Tendring as a result of acknowledged issues of Unattributable Population Change (UPC). UPC is the term given to the fact that the accumulated annual mid-year estimates (MYEs) of population in Tendring between 2001 and 2011 suggested the population would grow by 9,793 people, but the 2001 Census showed that it had in fact fallen by 740 people. In other words, these MYEs had suggested 10,533 more people in the District than the Census showed there to be. These figures are undisputed by the appellant, as is the principle cause of the errors in the MYEs, namely that 55% of the UPC error was attributable to over-estimates of internal migration. Tendring is one of three local authority areas where UPC has made a huge difference in population growth (+1500% in Tendring).
29. The Council states that the true housing requirement is 541dpa, although it accepts that figure has been derived through a different methodology and has not been tested by the eLP examining Inspector, nor has it been subject to a determination by any other Inspector.
30. The examining Inspector has found that a housing requirement figure of 550dpa is sound in principle for the duration of the eLP period (2013-2033) based on the extent of UPC in Tendring.⁶ The Council acknowledges that this figure was developed through the former NPPF, which adopted a different methodology including how the backlog is accounted for and in terms of the uplift for affordability. The Inspector may modify his views in the light of further evidence, although the eLP housing requirement falls to be examined under the previous NPPF and PPG guidance rather than the standard method in the new guidance.
31. But the Council maintains that the requirement is 541dpa (not 857dpa) because the effect of UPC is continuing. This is because the standard method uses the official 2014-based official projections, which take a base period of 2009-2014 and roll forward the trends in that period into the future. I agree with the Council that because the base period included two inter-Censal years, which were affected by UPC, the resultant projection itself is likely to be affected by those errors. If these errors in the MYEs continued after 2011

⁶ CD 3.2

- then the effect of the infection of the 2014-based projections by UPC is greater. I also agree with the Council that the 2016-based household projections imply an even greater population in Tendring than the 2014-based projections, which suggests to me that the UPC errors have not been fixed, contrary to the appellant's evidence.
32. The appellant did not substantively challenge the Council's evidence in this regard; indeed it chose not to cross-examine Ms Howick, the Council's witness, whose above evidence consequently went unchallenged. No substantive evidence was produced by Mr Tiley, the appellant's witness, to confirm that the errors in future population and household arising from UPC are not continuing.
33. In particular his assertion that the Office for National Statistics (ONS) has addressed the problems of UPC via its Migration Statistics Improvement Programme⁷ is speculative because it simply repeats the aim of the Programme to address past anomalies in migration estimates. There is no evidence produced to confirm that it has actually done so nationally, let alone addressed the future situation in Tendring, where UPC has had such a huge effect in the past. The eLP examining Inspector and the Inspectors in the recent Great Bentley and Ardleigh decisions⁸ have all concluded that the UPC errors have not been eradicated and are therefore continuing. No appeal decisions have concluded the contrary.
34. This is not the place to rule on whether the figure of 541dpa is the true housing requirement for Tendring. That is for the eLP examination. The examination Inspector may decide to consider that figure and how the Council arrived at it, rather than stick to the original figure of 550dpa, which he had previously found sound. It is also possible that additional evidence showing that UPC has been satisfactorily addressed will be presented to the eLP examination. But given that the appellant has provided no substantive evidence in this appeal that the UPC errors have been addressed, it currently appears that the figure of 857dpa is a considerable over-estimate of the true extent of the District's housing need.
35. In summary, the parties agree that there is no 5YHLS because the revised NPPF and PPG state that the standard method must be used for planning decisions. An alternative method can only be used in plan examinations. Whether or not the Council can demonstrate a 5+YHLS based on a figure of 541 or 550dpa is therefore irrelevant.
36. But I agree that the continuing errors in the population projections arising from UPC raise significant questions about the validity of the local housing need figure of 857dpa. I consider it likely that this figure is an overestimate of the true housing need in the District. It also seems likely that the figure of 550dpa will be the basis on which the first five years of the new Local Plan will be calculated, given that the examining Inspector has already found this figure sound because the eLP's housing requirement is to be assessed under the previous NPPF/PPG versions.

⁷ NT paragraphs 7.38 & 7.39

⁸ CDs 9.3 & 9.9 respectively

37. Whilst this does not negate the lack of a 5YHLS it does reflect the primacy of the plan-led approach in determining this appeal unless material considerations indicate otherwise⁹, albeit in terms of the tilted balance.

Development Plan (TDLP) Policies

Policy EN2

38. I have concluded above that the proposed development would be a significant breach of Policy EN2. The appellant says I should reduce the weight given to this Policy, because of the lack of a 5YHLS and because other appeal decisions have said that it is not in full compliance with the NPPF.
39. There is no 5YHLS and so the weight I attach to conflict with Policy EN2 must be reduced as per NPPF Footnote 7. However, for the above reasons, I have significant doubts about the validity or extent of any housing supply 'deficit'.
40. In terms of compliance with the NPPF, the appellant draws my attention to two recent appeal decisions, the Mistley and Centenary Way decisions.¹⁰ Paragraph 33 of the Mistley decision found that Policy EN2, by reference to its third sentence, was wholly preclusive, inflexible and inhibiting of development. The third sentence of the Policy states: *Minor development proposals may be permitted if they do no harm, individually or collectively, to the purposes of a Local Green Gap or to its open character.* I do not quite follow the Inspector's reasoning, because he acknowledged the NPPF (former paragraph 17) stating that decisions should take account of the different roles and character of different areas and recognise the intrinsic character and beauty of the countryside. In my judgement that is exactly what Policy EN2 does.
41. The revised NPPF has retained a similar emphasis although the wording has partially changed. In particular paragraph 127 states that developments should be sympathetic to local character including in terms of landscape setting and paragraph 170 b) repeats that the intrinsic character and beauty of the countryside should be recognised. Policy EN2 specifically recognises the importance of retaining the open countryside in this Green Gap. There is therefore no conflict with the NPPF. The Policy restricts development, but it is not preclusive or inflexible because it allows minor development that would not harm the function of the LGG. Nowhere in the NPPF does it state that policies that restrict development for specific reasons or in the open countryside are unacceptable.
42. Paragraph 44 of the Centenary Way decision accepted that Policy EN2 was out of date (by reference to the Mistley decision and others) and should be afforded only moderate weight although it remains partly consistent with the NPPF (as set out in paragraph 42 of that decision). Nonetheless it concluded that the introduction of built harm into an otherwise open area would be harmful to the function of the LGG. That would also be the case here. My rebuttal of the Mistley decision on this point applies here as well. I also note

⁹ NPPF, paragraph 47

¹⁰ CDs 9.8 & 9.10 respectively

that paragraph 43 of the Centenary Way decision effectively rebuts the appellant's point regarding the first sentence of the Policy: "*During the Plan period...*" i.e. that Policy EN2 only applies up to 2011, the end of the TDLP period.

43. In any case policies are not out of date simply because the plan period has expired – otherwise no 'saved' policies would attract full weight, which would negate the reason for saving them. NPPF paragraph 213 states that due weight should be given to policies adopted prior to its publication according to their degree of consistency with policies in the NPPF. Policy EN2 is consistent with the NPPF, for the reasons above.
44. For all the above reasons I attach significant weight, albeit not full weight, to the conflict of the proposed development with Policy EN2.

Policy QL1

45. TDLP Policy QL1 sets out the development plan's spatial strategy, which restricts development outside settlement boundaries. The main parties agree that the proposal would breach it because the site lies in the open countryside outside Frinton's settlement boundary. The Council rightly acknowledge that it is out of date because it is not based on an up-to-date assessment of local housing need.
46. However, that does not mean it carries no weight. I have indicated above that I have significant doubts about the validity or extent of any housing supply 'deficit', albeit the tilted balance applies. That conclusion minimises the reduction in weight to conflict with Policy QL1, as per the *Hallam Land* judgement¹¹, especially in view of the fact that the Council has considerably upped its housing delivery figures in recent years and is likely to continue to do so.
47. I have also already addressed above the point raised by the appellant that the TDLP is time-expired and restrictive. Policy QL1 states that it provides the spatial strategy for Tendring to 2011, hence the appellant's point that it is time-limited in a similar manner to the wording of Policy EN2 and it restricts development outside settlement boundaries. But such policies are not proscribed by the NPPF nor by the simple passage of time, especially given that they have been 'saved'. Although I attach little weight to the eLP I also note that eLP Policy SPL2 is a similarly restrictive policy.
48. I note that the recent Ardleigh appeal decision (paragraphs 26-28) agreed with this, albeit in cross-referring to the Mistley decision concluded that only moderate weight should be attached to the conflict with Policy QL1. I agree with that conclusion.

The Proposed Benefits

49. The appellant argues that the proposed dwellings could be built out quickly, hence its offer of a condition requiring the submission of reserved matters in two years rather than the default 3-year period. I acknowledge the offer but note that the Turpin's Farm site, granted outline permission on 1 March 2017,

¹¹ *Hallam Land Management v SSCLG [2018] EWCA Civ 1808*, paragraph 51

has still not been sold to a housebuilder. That does not bode well for delivery of those 210 dwellings within 5 years and does not provide me with any confidence that the 85 dwellings on this site would be delivered in the next 5 years, given that the appellant owns and controls both sites. That obviously reduces the weight I can give to these units in reducing the lack of a 5YHLS. Nonetheless, I attach at least moderate weight to the delivery of market housing on this site because of the NPPF's aim to boost the supply of new homes nationally.

50. The development would deliver 25 affordable housing units (30% of the total units). The Council has delivered a net loss of 1 affordable home over the last 5 years, which by any description is an inadequate delivery rate. Hence, I attach very significant weight to the delivery of these 25 new affordable homes, albeit they may not come forward within the next 5 years.
51. I agree that the development would deliver ecological benefits and a significant amount of public open space, all of which could, and no doubt would be a benefit not just to residents of the scheme but to neighbouring existing residents in the town. But I only attach moderate weight to such benefits because they would come at a cost of loss of open countryside in a key location within the Green Gap where the preservation of such openness and separation between settlements is vital.
52. I acknowledge that the development would be in a location that would allow residents to easily walk or cycle to Frinton's nearby facilities, minimising additional vehicle-borne trips and I give this benefit significant weight. I also note that there would be economic benefits through local spend and construction jobs, both during and after construction, but I attach only moderate benefits to these because they apply to any development anywhere.

The Tilted Balance - Conclusion

53. The adverse impacts of the proposed development would be a significant breach of the Green Gap in this location, which would physically and visually bring the built edge of Frinton too close to the built edge of Kirby-le-Soken. That would give rise to a serious conflict with TDLP Policy EN2, which for the above reasons I consider should carry substantial weight.
54. The development would also result in conflict with the TDLP's spatial strategy as expressed in Policy QL1. I attach only moderate weight to this conflict in view of the lack of a 5YHLS. But the NPPF does not preclude such restrictive policies and I have set out above that the true housing need of the District is likely to be substantially lower than the figure derived by the standard method.
55. Against this significant harm to the Green Gap and failure to accord with the development plan must be weighed: the at least moderate benefits of the additional market housing; the very significant benefits of the 25 affordable housing units; the significant benefits of the site's sustainable location; and the moderate benefits of the new open space, ecological enhancements and economic benefits of the proposal to the local area.

56. However, for the reasons set out above, I conclude that the adverse impacts of the proposed development would significantly and demonstrably outweigh these benefits, when assessed against the policies in the NPPF taken as a whole.

Other Matters

Ecology Issues

57. Refusal reason 3 highlighted two potential adverse impacts on ecology. The first was in relation to protected species, specifically the absence of appropriate surveys for bats, Great Crested Newts and reptiles. The Council confirmed at the Inquiry that it was satisfied that the additional surveys of this fauna had been successfully carried out by the appellant¹² and that satisfactory mitigation and enhancement could be delivered by a suitably worded condition ensuring that impacts on such fauna would be acceptable¹³.
58. Cllr Everett is concerned that the proposal would have a significant adverse impact on the Fisher's Estuarine Moth (a protected species) because this species has been identified by the appellant as occurring within 2km of the site: an area immediately north of the Walton Road adjacent to the Hamford Special Area of Conservation (SAC) 1.6km from the site's northern boundary. The Moth is rare and lives in only two places within the UK – Hamford Water and Kent. He argues that the development may itself affect the species or its habitat or that its construction could do so by reason of dust or construction traffic etc.
59. However, I am unclear how or why the presence of dwellings within 2km of the nearest location of the Moth or any construction traffic or dust from construction would adversely affect this nearby population of the Moth. Similarly I do not see how any dust from construction at least 1.6km away would be likely to affect the Moth or its habitat. Lorry traffic in respect of the construction may well use the Walton Road for access but such traffic already uses this road with no apparent ill effect on the Moth; I do not understand how the additional HGV traffic would affect it. I also note that neither the Council's ecologist nor Natural England raise any concerns in this regard.
60. Cllr Everett also argues that the initial site surveys were done at the wrong time of year (November) and that Hog's Fennel, on which the Moth feeds and where it lives and breeds, is in fact present on the site itself. But there is no evidence for this. The appellant's most recent surveys took place in June when any presence of Hog's Fennel would have been apparent, but none was found.
61. In respect of Cllr Everett's concerns, I conclude that there is no evidence that the nearest population of the Fisher's Estuarine Moth would be harmed or that the protected species is present on the site.
62. The second potential adverse impact identified in refusal reason 3 was whether the proposed development would satisfy the Habitats Regulations in relation to

¹² Set out in DF's evidence

¹³ NH evidence, paragraph 4.2

its potential impact alone or in combination with other nearby development on the Hamford Water SPA, RS and SSSI.

63. At the eleventh hour the appellant agreed that an appropriate financial contribution is necessary in order to prevent increased recreational pressure on the Hamford Water Natura 2000 sites by new residents either from the site alone or in combination with residents from other recently consented sites. This contribution would be spent on wardening of the SPA/RS, on the provision of lockable gates to restrict access, or on interpretation boards along footpaths leading to it. The final sum to be paid would be in accordance with the soon-to-be adopted Essex Coastal Recreational Disturbance Avoidance and Mitigation Strategy (Essex Coast RAMS) and delivered through the S106 agreement. I agree that such a contribution would be necessary in order to preserve the integrity of the European sites.
64. The main parties agree, following the *People Over Wind* judgement¹⁴, that I should carry out an appropriate assessment (AA) under the Habitats Regulations if I was considering allowing the appeal. However, for the above reasons this is not the case, so there is no need for me to carry out an AA. I do however acknowledge that the main parties and Natural England agree that the proposed on-site and off-site measures as set out in the appellant's Habitats Regulations Assessment¹⁵ would be sufficient to prevent an adverse effect on the integrity of the European sites, when considered both alone and in combination with other plans and projects. I have no reason to disagree with that conclusion.

S106 Agreement (S106)

65. The S106 also delivers contributions towards the provision of educational facilities (early years/childcare, primary and secondary education) in the local area, on-site open space management and maintenance and healthcare in the local area, and the provision of not less than 30% of the dwellings to be used as affordable housing.
66. These obligations all meet the legal tests in Regulation 122 of the *Community Infrastructure Levy Regulations* (CIL Regs): necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development. As set out in the Council's CIL Compliance Statement¹⁶ there have been no more than 4 obligations for financial contributions towards relevant infrastructure, and in the absence of any evidence to the contrary I conclude that Regulation 123 of the CIL Regs is also complied with.
67. However, the delivery of these planning obligations is academic in view of my above conclusion on the tilted balance.

Conclusion

68. Notwithstanding that the Other Matters have satisfactorily addressed the Council's third and fourth refusal reasons, for the reasons given above I conclude that the appeal should be dismissed.

¹⁴ ECJ case C-323/17 12 April 2018

¹⁵ DF Appendix 3

¹⁶ ID3

Nick Fagan

INSPECTOR

APPEARANCES

*Note that references to witness's evidence in footnotes above is to the first letters of their first names and surnames – e.g. JE=Joanna Ede

FOR THE LOCAL PLANNING AUTHORITY: Josef Cannon, Counsel, Cornerstone Barristers, London

He called	Alison Hutchinson Cristina Howick, PBA
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FOR THE APPELLANT: Killian Garvey, Counsel, Kings Chambers, Manchester

He called	Joanna Ede, Turley James Stacey, Tetlow King Dominic Farmer, Ecology Solutions Neil Tiley, Pegasus Group Val Coleby, Berrys
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INTERESTED PERSONS:

Cllr Richard Everett	Member of TDC Planning Committee
Cllr Anne Davis	TDC Ward Member
She also read a statement by Cllr Mark Platt	Chairman of TDC & member of Local Plan Committee
Cllr Robert Bucke	TDC Ward Member for Clacton/Weeley & Member of Planning Committee
Cllr Jeff Bray	Local resident
Jonathan Wright	Local resident
James Smith	Local resident
Christine Pain	Local resident
Joyce Ingram	Local resident

End of Appearances

DOCUMENTS

Below are listed the documents submitted at the Inquiry. Reference to CDs in the footnotes above are to Core Documents as per the appellant's list of CDs.

- 1 Updated Statement of Common Ground (SoCG) – Housing, February 2019
- 2 Housing SoCG Addendum, 27/02/19
- 3 CIL Regs Compliance Statement
- 4 List of agreed Conditions including appellant's acceptance of pre-commencement Conditions
- 5 Objection by Cllr Anne Davis
- 6 Objection by Jonathan Wright
- 7 Objection by James Smith
- 8 PPG – Housing need
- 9 eLP Examination – Update letters from the Examining Inspector to the North Essex Authorities, dated 21/11/18, 30/11/18 & 10/12/18
- 10 Signed & sealed S106 dated 14/3/19
- 11 Council's opening statement for resumed Inquiry, dated 26/2/19
- 12 Appellant's opening statement, dated 26/2/19
- 13 Council's closing submissions, dated 28/2/19 with *Daventry [2015]* & *Hallam Land [2018]* judgements attached
- 14 Appellant's closing submissions, dated 28/2/19 with *Telford and Wrekin [2016]* judgement attached

End of Documents List