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## Appeal Decision

Site visit made on 26 May 2020

**by Benjamin Webb BA(Hons) MA MA MSc PGDip(UD) MRTPI IHBC**

**an Inspector appointed by the Secretary of State**

**Decision date: 26 June 2020**

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**Appeal Ref: APP/A1720/W/18/3214358**

**Land to the rear of September Cottage, Brook Avenue, Warsash, Fareham  
SO31 9HR**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Reilly Developments Ltd against the decision of Fareham Borough Council.
  - The application Ref P/18/0376/FP, dated 10 April 2018, was refused by notice dated 19 July 2018.
  - The development proposed is described as demolition of existing industrial and storage buildings and construction of four detached dwellings with associated garages, parking and landscaping.
  - This Decision supersedes that issued on 23 August 2019 (the previous Decision). That Decision on the appeal was quashed by order of the High Court.
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### Decision

1. The appeal is dismissed.

### Procedural Matters

2. As outlined in the banner heading above, this Decision follows quashing of the previous Decision by the High Court. Whilst the previous Decision must therefore be treated as being incapable of ever having had any legal effect, I acknowledge that its contents are capable of being a material consideration. Where necessary I have therefore made reference to the previous Decision in my reasons below.
3. The application form names Reilly Developments Ltd as the applicant, whereas the appeal form names Mr Patrick Reilly. Confirmation has however been provided that Mr Patrick Reilly owns Reilly Developments Ltd. I have therefore treated the appeal as having been correctly made by Reilly Developments Ltd. On this basis I have not named Mr Patrick Reilly in the banner heading above, notwithstanding the fact that his name was included in the banner heading of the previous Decision.
4. Applications for costs were made by Mr Patrick Reilly of Reilly Developments Ltd against Fareham Borough Council, and by Mr James David Moir against Mr Patrick Reilly of Reilly Developments Ltd. Those applications are subject of a separate Decision which was issued on 23 August 2019. That Decision is not subject to redetermination.
5. Natural England (NE) has identified the potential for all new housing developments in the Solent region to have likely significant effects on the

integrity of the habitats sites it contains. This is as a result of nutrient discharge in wastewater. The identification of these likely significant effects post-dated both the submission and determination of the planning application subject of this appeal, but pre-dated issuing of the previous Decision. Whilst it was not addressed in that context, it nonetheless falls to be considered within this Decision. Both parties have had the opportunity to address the matter.

6. A number of Unilateral Undertakings (UUs) have been submitted in relation to this appeal. These are dated 18 Oct 2018, 4 March 2019, 9 March 2020 (UU1), and 5 May 2020 (UU2). UU1 and UU2 postdate the previous Decision, and UU1 is intended to supersede the two earlier UUs. I have therefore based my Decision on UU1 and UU2 and not taken into account the 2 previous UUs.
7. Both UU1 and UU2 make reference to a 'mortgagee' of the appeal site. However, the term is not included within the interpretative sections of either, and nor is the mortgagee identified. Based on the title details submitted I am however satisfied that no such party has been omitted.

### **Main Issues**

8. The main issues are:

- the effect of the development on nearby European sites and associated Ramsar sites, with regard to (a) nutrients, (b) recreational disturbance and (c) air pollution; and
- whether the site is a suitable location for development having regard to (a) the character and appearance of the area; and (b) the potential for future occupants to access services and facilities through means other than by use of cars; and
- the effect of the development on reptiles.

### **Reasons**

#### *European sites*

9. The Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations) states that before deciding to grant planning permission for a project which is likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and is not directly connected with or necessary to the management of that site, a competent authority, must make an Appropriate Assessment of the implications of the plan or project for that site in view of that site's conservation objectives. In this context, paragraph 176 of the National Planning Policy Framework (the Framework) states that listed Ramsar sites should be given the same protection as habitats sites.
10. The potential for the development to have likely significant effects on the integrity of European sites, including associated listed Ramsar sites, both alone, and in combination with other plans or projects, principally arises due to the increase in population. This is because the associated generation of wastewater, leisure activities, and vehicle movements, would result in increased discharge of nutrients, recreational disturbance, and air pollution, each of which could be ecologically harmful. An Appropriate Assessment is therefore required.

11. With regard to nutrients, the sites potentially affected would be the Solent and Southampton Water Special Protection Area (SPA) and Ramsar site; the Portsmouth Harbour SPA and Ramsar site; the Chichester and Langstone Harbours SPA and Ramsar sites; the Solent Maritime Special Area of Conservation (SAC); and the Solent and Dorset Coast SPA (hereafter the 'nutrient sensitive sites'). With regard to recreational disturbance the sites potentially affected would be the Solent and Southampton Water SPA and Ramsar site, and the Solent Maritime SAC (hereafter the 'Solent sites'). With regard to air pollution, the sites potentially affected would be the nutrient sensitive sites, in addition to the New Forest SPA, SAC and Ramsar sites, The River Itchen SAC, and the Solent and Isle of Wight Lagoons SAC (hereafter the 'AQ sites').

(a) *Nutrients*

12. Wastewater from the development would be discharged via treatment works into the sea. This water would be enriched by nutrients, in particular nitrogen, which would, both alone and in combination with discharge from other developments, contribute towards harmful eutrophication. Likely significant effects on the integrity of the nutrient sensitive sites cannot therefore be ruled out.
13. The designation of the nutrient sensitive sites specifically relates to the range of natural features they contain, and the species of bird life that they support. Where available, the conservation objectives of these sites generally seek to maintain or restore their integrity, including that of their qualifying features. As increased eutrophication would be harmful, it would be clearly at odds with these conservation objectives.
14. NE's Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (the Advice Note), sets out measures and a methodology for avoiding and mitigating against likely significant effects on European sites as a result of nutrient discharge.
15. In this regard the appellant has proposed off-setting the additional nutrients that would be generated by the development through the purchase of nitrogen credits from a scheme recently opened by the Hampshire and Isle of Wight Wildlife Trust (the WT). The scheme involves changes in management of farmland (the offset site). This approach has been agreed in principle by Natural England (NE). Its potential has also been identified by the Partnership for South Hampshire Joint Committee, of which the Council is a member, albeit with further work recommended. A payment has already been made by the appellant in relation to an unidentified 0.11 Ha portion of the offset site to the WT. It is intended that use of the payment for mitigation would be secured by UU2. This supersedes provisions within UU1 to enter into substantially the same obligation, attached in draft form, at a later stage.
16. I acknowledge that NE has indicated that it has no 'further concerns' in relation to this matter following the WT scheme becoming operational, and the appellant's contribution being confirmed. However, NE's comments do not indicate that the terms of UU2, or for that matter UU1, would secure the necessary mitigation.
17. The nitrogen offset value of the offset site is based on calculations for current and future nutrient generation provided to the WT by NE. The figures are

averaged across the offset site, which contains a mix of land uses. NE indicated that it made some assumptions in undertaking these calculations, and highlighted the need for further evidencing of land use. The WT has utilised NE's figures as a basis for selling nitrogen credits, however it is not apparent from the material set before me whether the evidencing of current use of the offset site has occurred, or therefore whether the figures are reliable.

18. NE's calculations also employ a nitrogen output figure of 5kg/ha for future use across the offset site. The Advice Note indicates that this should be employed for a limited range of non-agricultural uses. These include SANGs on which very light grazing is nonetheless permissible. The details of future land management provided within UU2 are however vague. No limit is placed on future grazing, and though application/use of fertiliser and feed would be restricted, unspecified agricultural activities would continue to be allowed. Moreover, future agricultural activities would be governed on the basis of achieving a net decrease in nitrogen, as opposed to an absolute reduction at the level required in order to achieve mitigation.
19. Provisions for future management set out within Schedule 2 of UU2 furthermore relate only to the 0.11 Ha portion of the offset site deemed necessary to achieve the offset, as opposed to the offset site as a whole. This is problematic given that no plan which specifically identifies the 0.11 Ha of offset land is either referenced within or attached to UU2, and because the figure of 0.11 Ha has been calculated on a proportionate basis, using the nitrogen offset value achievable across the whole of the offset site as a starting point. In this regard the offsetting potential of any given 0.11 Ha parcel within the offsite site would be likely to differ from that of the average depending on its current use.
20. Crucially, the duration of the commitments set out in Schedule 2 of UU2 would be capped at 80 years. Here I accept that the Advice Note states that 'mitigation measures will need to be secured for the duration over which the development is causing the effects, generally 80-125 years'. However, the rationale underpinning the Advice Note's identification of an 80-125 year timeframe is unclear, whilst none is provided for the 80 year period identified within Schedule 2. As phrased, Schedule 2 would also allow mitigation measures to be discontinued after 80 years even if they continued to be required. This is at odds with the requirement to secure mitigation in perpetuity, clearly stated as a requirement by NE.
21. In view of the above reasons, significant uncertainty exists as to whether nutrient discharge would be offset at the required level, and for the required period; the enforceability of UU2; and the broader capacity of the WT scheme to provide mitigation in perpetuity. In the event that superseded provisions within UU1 relating to mitigation were capable of having legal effect in themselves, the same concerns would apply.
22. As an alternative to mitigation, the appellant has proposed a package of avoidance measures. These consist of the installation of incineration toilets and sealed tanks for wastewater, with include additional provisions covering management, monitoring, disposal and connection to the main network. These would be secured by the Schedule attached to UU1. NE has raised doubt over the long-term practicality of enforcing and monitoring such measures, and, contrary to advice, no clear strategy or timetable for transition from this to a more permanent and practical avoidance/mitigation solution is provided for. I

share NE's concerns. Considerable uncertainty thus exists over whether such avoidance measures would endure in perpetuity.

23. UU1 additionally makes provision for mains water use to be capped at 110 litres per person per day, the provision of a sustainable urban drainage system, and agreement of a construction environment method statement (CEMS). As components of an overall avoidance/mitigation strategy, these measures would be an essential means of reducing the potential for nutrient discharge and pollution from the site during and after construction. All could however be ordinarily secured by condition, and these measures remain insufficient to avoid significant effects.
24. For the above reasons, based on the available information and having regard to the manner in which UU1 and UU2 are drafted neither provide certainty that the required level of avoidance/mitigation would be delivered or properly secured. Consequently, neither UU2 nor the relevant provisions of UU1 pass the tests set out paragraph 56 of the Framework, and Regulation 122 of the Community Infrastructure Levy Regulation 2010 (as amended) (hereafter 'the relevant tests'), and therefore cannot be taken into account. Moreover, the copy of UU2 with which I have been presented is incomplete given that the plans it references are missing.
25. The use of a Grampian condition to secure mitigation in relation to the WT scheme has been proposed by the appellant. I note the lack of in principle objection from NE, and support offered within a legal opinion submitted by the appellant. The latter contests advice in the Planning Practice Guidance indicates that the use of a negatively worded condition to require an applicant to enter into a planning obligation or other agreement is unlikely to be appropriate except in exceptional circumstances. Even were I to agree with the appellant's legal opinion however, the existence of uncertainty as to whether the WT scheme was capable of providing the required mitigation indicates that the imposition of a Grampian condition would be inappropriate in this case.
26. Alternative solutions which would have lesser impact on the integrity of the nutrient sensitive sites clearly exist. It may be that the provision of appropriately evidenced, scaled, and secured avoidance/mitigation could potentially address likely significant effects. As such, and given the failure of the appeal scheme in this regard, allowing the appeal would be contrary to the Habitats Regulations. It would also be contrary to advice in paragraph 175(a) of the Framework, which states that planning permission should be refused if significant harm to biodiversity cannot be avoided, mitigated, or as a last resort, compensated for.
27. In view of my reasons above, I conclude that the development would have a likely adverse effect on the integrity of the nutrient sensitive sites due to the additional discharge of nutrients, and the lack of both appropriate and appropriately secured avoidance/mitigation measures. The development would therefore be contrary to Policy CS4 of the Fareham Local Development Framework Core Strategy Adopted August 2011 (the CS), which seeks to protect habitats important to the biodiversity of the Borough; and Policy DSP13 of the Fareham Local Plan Part 2: Development Sites and Policies June 2015 (the LP), which requires that sites of nature conservation value are protected; and Policy DSP40 of the Local Plan, insofar as in this particular regard the development would have unacceptable environmental implications.

*(b) Recreational disturbance*

28. Future occupants of the development would be likely to access areas included within the Solent sites for leisure purposes. These activities would, in combination with those engaged in by visitors from other developments, result in harmful disturbance of natural habitats within the Solent sites and the bird life they support. Likely significant effects on the integrity of the Solent sites cannot therefore be ruled out.
29. The reasons for designation and conservation objectives of the Solent sites are covered above. As increased disturbance would be harmful, it would be clearly at odds with these conservation objectives.
30. The Solent Recreation Mitigation Strategy 2017 (the SRMS), which has been adopted by a number of Councils in the area, sets out an approach to mitigate and avoid the recreational disturbance of European sites around the Solent. It specifies contributions based on bedroom numbers per dwelling, which are used to fund a range of site access management and monitoring measures. In this context, NE has raised no objection subject to contributions being secured in line with the SRMS.
31. A payment has been made, and its use for the above purpose secured within an agreement under Section 111 of the Local Government Act 1972. The agreement's wording was subject of the High Court challenge of the previous Decision, and its adequacy was confirmed in this context. I am therefore satisfied that, subject to these mitigation measures, the development, considered both alone and in combination with other plans and projects, would not adversely affect the integrity of the Solent sites as a result of recreational disturbance.

*(c) Air pollution*

32. The development would lead to an increase in vehicle movements along roads which pass within 200 metres of the AQ sites. Traffic generated by the development, in combination with that generated by other sites, would thus result in deposition of harmful pollutants upon them.
33. This was a matter recently addressed at appeal in relation to a nearby development of up to 100 dwellings, ref APP/A1720/W/19/3225866, whose occupants would have been likely to utilise the same roads as those in the proposed scheme. In this case significant effects on the integrity of applicable AQ sites were ruled out.
34. In consultation with NE, the Council has subsequently undertaken an Air Quality Habitat Regulations Assessment (HRA) for Short-Term Development in Fareham Borough, which considers a range of development scenarios. Whilst the need for some further work is identified, the overall conclusion this draws is that development within the Borough can take place up until 2023 without having an adverse effect on the integrity of the AQ sites. As any permission granted in relation to the appeal scheme would expire in 2023, I am satisfied that likely significant effects on the integrity of the AQ sites can be ruled out.

*Location*

35. Policies CS2 and CS6 of the CS seek to prioritise development of previously developed land in urban areas for housing, albeit neither expressly prohibits

development elsewhere. In this regard Policies CS14 of the CS, and DSP6 of the LP seek to restrict the types of development which can occur outside settlement boundaries. The proposed development would be located outside the Western Wards Urban Settlement Boundary, and would not comply with any of the exceptions the above policies outline. Policy DSP40 of the LP nonetheless provides that in instances where the Council does not have a 5-year supply of housing land, development outside settlement boundaries will be permitted. As these circumstances apply, I agree with the Council that Policy DSP40 has precedence over Policies CS14 and DSP6 when taking the development plan as a whole.

36. The Council has confirmed that its concerns in relation to location are twofold: firstly relating to the impact the development would have on the character and appearance of the area, and secondly the level of access that future occupants would have to services and facilities by means other than the car.

*(a) Character and appearance*

37. Brook Avenue is a single track road which forms a long loop with 2 points of access on Brook Lane. Along some parts of Brook Avenue the dimensions of the road and the proximity of open space, hedging and trees provide hints of rural character. However, Brook Avenue serves a large number of dwellings, and given the clear and regular visibility of dwellings and gardens from the road, together with the high incidence of domestic boundary treatments, driveways and other domestic paraphernalia, I consider that the prevailing character of the area is more suburban than rural. This is the case notwithstanding the spacious setting of many of the larger dwellings along Brook Avenue, and the richness of planting, and despite the obvious contrast which exists with the more densely developed frontage along Brook Lane. Indeed, despite these differences, and the fact that the site lies outside the Western Wards Urban Settlement Boundary, there is little sense that housing along Brook Avenue falls outside the established developed area of the settlement.
38. Each of the proposed dwellings would be sensitively designed and positioned within reasonably spacious plots. Protected trees have been taken into account, and ample potential would exist for further planting, assisting harmonisation with the broader setting. The 2 proposed dwellings facing Brook Lane would occupy a similar position to existing dwellings on adjacent plots either side. Though they would fill a 'gap' in the frontage, and would therefore give rise to some perceived sense of intensification, this could be suitably mitigated by planting. The 2 proposed dwellings at the back of the site would be located to the rear of both existing and proposed dwellings on the frontage. This would not be typical of the area, however the dwellings would replace an existing group of structures which contribute little to the character of the area.
39. The development would give rise to some increase in vehicle movements along Brook Avenue, however it is unlikely this would be of a magnitude sufficient to cause any harm to the character or appearance of the area.
40. The decision notice cites paragraph 55 of the 2012 Framework, the relevant part of which is carried forward in paragraph 79 of the 2019 Framework. This paragraph addresses the provision of isolated homes in the countryside. In view of my findings above however, regardless of how the term 'countryside' is interpreted, the development would not involve the provision of isolated homes. Consequently, there would be no conflict with paragraph 79.

41. For the reasons outlined above I conclude that the development would not have an unacceptable impact on the character and appearance of the area, and that the site represents a suitable location for development in this regard. Thus, notwithstanding conflict with Policies CS14 of the CS, and DSP6 of the LP, the development would comply with Policy DSP40 of the LP insofar as this requires integration with the neighbouring settlement, sensitive design, and minimisation of any adverse effect on the countryside. It would additionally comply with Policy CS17 of the CS which seeks to secure high quality design.

*(b) Access to services and facilities*

42. Policy DSP40 of the LP does not explicitly set out a requirement for development to be accessible by sustainable means of travel. The broad reference it makes to the requirement for development to be sustainably located adjacent to, and well related to, the existing urban settlement boundaries, can however be reasonably interpreted as embracing this.

43. The site is located within short walking distance of Brook Lane which has lit pavements, and along which are located easily accessible bus stops which run a regular service to adjacent urban centres. Though there is no dedicated pavement along Brook Avenue, it does not appear to be heavily trafficked, and space is available to allow pedestrians to stand in. Street lighting is sporadic, but, contrary to the situation described in the previous Decision, it nonetheless exists. Two lampposts are indeed located between the site and the access on Brook Lane. Though some dark patches are still likely to occur at certain times of the day/year, in my view this would not act as a significant deterrent to use of the bus service when considered on a year-round basis.

44. Access to other services and facilities on foot would involve longer distances, and this might well be expected to reduce the likelihood that they would be accessed in this way. Travel by bicycle would however be a viable option, and would provide a credible means of accessing the nearest railway station.

45. Even if future occupants were to favour use of the car over the alternative travel options which clearly exist, the additional distance travelled would be little different to that of occupants of developments located within the settlement boundary given its close proximity to the site. Thus there would be little difference in the level of any environmental harm that would be caused.

46. For the reasons outlined above I conclude that the site would be a suitable location for development with regard to the level of access future occupants would have to services and facilities by means other than the car. Thus, notwithstanding conflict with Policies CS14 of the CS, and DSP6 of the LP as again outlined above, the development would comply with Policy DSP40 of the LP insofar as this requires development to be sustainably located adjacent to, and well related to, the existing urban settlement boundaries.

*Reptiles*

47. A high population of slow worms and low population of common lizards has been identified on the site. These are protected species under the Wildlife and Countryside Act 1981, and would be subject to disturbance and some loss of habitat as a result of the development.

48. The appellant has produced a Reptile Survey & Mitigation Strategy Report (Reptile Report) which sets out a mitigation strategy, which would include both

on-site measures and translocation of reptiles to another site. The latter is in the control of Mr Patrick Reilly, and considered to be fit for purpose.

49. UU1 is intended to secure the mitigation works set out within the Reptile Report. This is specifically in view of the fact that translocation would take place to a location outside the site area, and would need to be made subject to a further management and monitoring agreement, as is outlined in the Reptile Report. The Council has indicated its general acceptance of this approach, and concerns raised by the Council with regard to previous iterations of UU1 have been addressed. I therefore find that the provisions UU1 which relate to reptile mitigation pass the relevant tests.
50. For the reasons outlined above I conclude that the development would not have an unacceptable impact upon reptiles. In this specific regard the development would thus comply with Policy DSP40 the LP, which amongst other things requires that development outside urban settlement boundaries to have no unacceptable environmental implications.

## **Other Matters**

### *Bats*

51. Three of the existing buildings on site provide roosts for bats. Bats are protected under the Wildlife and Countryside Act 1981, and are a European Protected Species (EPS) under the Habitats Regulations. The submitted Ecological Appraisal Report (EAR) has identified a range of required mitigation measures.
52. A commitment to undertake safeguarding measures in relation to bats occurs within UU1, however the Reptile Report attached to UU1 does not detail these measures. These are outlined within the EAR. UU1 would not therefore be effective in securing necessary bat-related mitigation works. Consequently, this obligation cannot be taken into account. The mitigation and enhancement measures set out in the EAR could however be secured by condition instead.
53. Given the effect on an EPS, I am required to have regard to the 3 tests set out for EPS Licensing, which are: whether the development is necessary for preserving public health or public safety or other imperative reasons of overriding public interest; there is no satisfactory alternative; and, the action will not be detrimental to maintaining the population of the species concerned at a favourable conservation status in its natural range.
54. In the above regards, the scheme would entail replacement of 3 dilapidated asbestos structures with a development that would be more complementary to, and less hazardous within, its setting; no satisfactory alternative to removal of these structures would exist in this context; and a scheme of mitigation could be applied that would ensure no detriment to the species concerned. As such, were the appeal to have been allowed, I can see no reason why a license would not have been subsequently granted. For this and the above reasons I am satisfied that the proposed development would not have an unacceptable impact on bats.

### *Other concerns*

55. Interested parties have raised a number of additional concerns. These include highway safety, pressure on local facilities and rights of access. The Highways

Authority has however not objected to the scheme on grounds of road safety, and on the basis of the submitted evidence, I see no reason to disagree. Local facilities would be subject to little additional use as a result of the development, and such use would cause no obvious harm, and the right of access to the site is a private matter which can be dealt with separately.

56. Whilst concern has also been raised in relation to precedent, development proposals at other sites would require their own site-specific assessment. Finally, I note the legal opinion submitted by interested parties, however, this has not been produced in response to the appeal scheme, and has little direct relevance to its assessment.

### *Existing use*

57. My attention has been drawn to the potential benefits of removing existing commercial uses from the site. I acknowledge the importance attached to this in the previous Decision. The lawfulness of these uses has however been questioned by the Council, and notwithstanding the submission of statutory declarations and the comments of interested parties, this is not a matter that falls to be resolved in the context of the current appeal. No harm has in any case been identified by the Council in relation to these uses, and in the absence of any confirmation of lawfulness and/or evidence to the contrary, I see no reason to believe that more harmful commercial uses are likely to be undertaken on the site in the future. I therefore attach little weight to the removal of commercial uses as a benefit of the development, and this would not in any case outweigh the potential harm caused to the integrity of the nutrient sensitive sites.

### *Housing*

58. In the absence of appropriate avoidance and/or mitigation measures for likely significant effects on the integrity of the nutrient sensitive sites, paragraph 175(a) of the Framework provides a clear reason for refusal of planning permission. Given the consequent adverse effect on the integrity of these sites, paragraph 177 of the Framework furthermore indicates that the presumption in favour of sustainable development does not apply. Thus, notwithstanding the fact that the Council accepts that it does not have a 5-year supply of deliverable housing sites, the 'tilted balance', and advice to grant planning permission found in paragraph 11 of the Framework, also does not apply.
59. The particular benefits of housing provision would in this case be minimal regardless of the extent of any shortfall. This is due to the small number of units involved. Again, these benefits would not outweigh the potential harm caused to the integrity of the nutrient sensitive sites.

### **Conclusion**

60. The location of the development would be acceptable with regard to the character and appearance of the area, and the potential for future occupants to access services and facilities through means other than by use of cars. It would also be acceptable in relation to reptiles. The likely adverse effect of the development on the integrity of the nutrient sensitive sites would however be unacceptable, and in conflict with the development plan as a whole, the Habitats Regulations and the Framework. There are no other considerations

which alter or outweigh this finding. For the reasons set out above I therefore conclude that the appeal should be dismissed.

*Benjamin Webb*

INSPECTOR