

Persimmon Homes South Coast response to Havant Borough Local Plan matters and issues for examination

MATTER 4: HABITAT REGULATIONS AND MITIGATION STRATEGY

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Q4.15: Is Campdown's (site H40) function as a 'primary support area' and 'secondary support area' for Solent Waders / Brent Geese capable of being adequately mitigated?

1. Persimmon Homes South Coast (PHSC) believes that, through the policy framework set out in the Plan (notably H40, EX2 and E17), the impacts can be mitigated. Although discussions are ongoing, Natural England's statement of common ground with the Council (SCG15) provides enough comfort that a mitigation package is possible. Otherwise, Natural England would have voiced an outright objection and would not have said:

'policies in the Local Plan set out the strategic framework for the mitigation and it is fully accepted that the site cannot be lawfully granted planning permission unless a Habitats Regulations Assessment is undertaken which concludes that there is no adverse effect on the integrity of any internationally designated nature conservation sites'.

2. Natural England goes on to say that it supports the biodiversity strategy in relation to brent geese and believes a position statement to outline the detailed requirements to address curlews may be possible.
3. PHSC also notes from the Habitats Regulations and Biodiversity Net Gain Topic Paper (TP03) that the Council has sought counsel opinion (CR10 appendix 3) as to whether a replacement refuge for the site must support the exact same population of birds on the allocation site and where the mitigation should be. The advice received says that the refuge should be designed so that the SPA's population of the species is maintained or restored. The test of mitigating the likely significant effect caused by the development is that the mitigation scheme should maintain or restore the qualifying species, but it is not necessary for it to be the exact bird population currently using the site to reach a conclusion of no likely significant effect.
4. Modifications are proposed to the plan (CD27a) to ensure additional flexibility, including removing wording that specifically links the role of Warblington Farm in mitigating Campdown. The plan now sets out that Campdown will need to provide a replacement habitat in perpetuity, which will necessarily have to pass an HRA if it is to be granted planning permission. PHSC finds this a pragmatic stance by Natural England and the Council and supports this position. It provides the development industry and community with a clear way forward, along with a message that development will not proceed without mitigation agreed.
5. PHSC is aware that the Council and NE have agreed a similar approach in respect of allocation ref. H27 at Rook Farm for 390 homes, requiring a project-level HRA at the planning application stage to inform a package of avoidance and mitigation measures. Again, PHSC supports this pragmatic stance.
6. PHSC has sought counsel opinion, which can be viewed in appendix A of this statement. The opinion confirms that it is lawful for the Council to allocate the Campdown site in the absence of an identified compensation site for the protected birds.
7. In order to support the residential planning application at Campdown, the landowners have commissioned a professional team to provide wintering bird mitigation land. The team has

identified suitable land, reinforced with strong survey evidence on Hayling Island, with a supporting strategy that will deliver the mitigation land required. Commercial negotiations have commenced between both parties and it is intended that the formal arrangement will be concluded in the summer of 2021. As indicated in the legal opinion provided by Mr T. Leader (CR10), council officers are aware of the proposal. When commercial terms have been agreed with the landowner, Natural England will be consulted on the proposal, which will include the survey work concluded to date; a strategy for delivery and a masterplan that identifies the specific location of the site; and any works required in supporting the strategy.

8. As part of this work, the landowners and PHSC have sought advice from an independent wintering and wading bird expert to identify potential suitable compensation sites for the proposed development, specifically in respect of Eurasian Curlew and Brent Goose.
9. The advice provided a set of initial criteria of suitability for potential alternative compensation sites and also identified several areas that satisfy all, or most, of the identified criteria. The advice was issued by a prominent expert in the field who is known as such by Natural England.

Q4.17 Is the 'Review of the Warblington Farm Mitigation Option for Nutrient Neutral Development in the Havant Borough' by Ricardo Energy and Environment robust?

10. PHSC believes that the review (EB12) is robust. It notes how the land is currently in intensive agricultural use, which is an existing source of nitrogen to the system. The review sets out at section 6.3 how it has followed the method of the nutrient budget calculator (including a 20% buffer) and how taking Warblington Farm out of intensive agricultural use would provide 1,872kg/TN/yr. This can be used to mitigate new residential development. As the review followed the process set out in the nutrient budget calculator and Natural England's advice¹, it should be considered robust.

¹ <https://www.push.gov.uk/2020/06/11/natural-england-published-nutrient-calculator-and-updated-guidance-on-achieving-nutrient-neutral-housing-development/>

Appendix A: counsel opinion dated 18th June 2021

**IN THE MATTER OF
HAVANT LOCAL PLAN EXAMINATION**

**AND IN THE MATTER OF
POLICY H40 ‘CAMPDOWN’**

OPINION

1. I am asked to advise Persimmon Homes, which has contractual control of a site at Campdown, Portsdown Hill, proposed to be allocated for mixed use development including around 650 dwellings under policy H40 of the emerging Havant Local Plan (‘the site’). The site is designated as part Primary and part Secondary Support Areas under the Solent Waders and Brent Goose Strategy 2020, indicating a functional link with the Solent SPA, particularly for its usage by curlew. In the Reg 19 Local Plan, policies H40, EX2 and E17 explicitly linked the development of H40 to the provision of bird mitigation habitat at a Council-owned site at Warblington Farm, allocated for that purpose (among others) by policy EX2. Following the consultation responses of Natural England, the Council has published draft modifications for the purpose of the Examination which preserves H40, EX2 and E17 but deletes that explicit link. I am asked whether it is lawful for the Council to proceed with a Local Plan which does not identify the specific location of the bird mitigation proposals.
2. Subject to the observations below, and for the reasons I set out, it is my opinion that it is lawful for the Council to proceed in this manner.
3. Emerging Policy H40 (Campdown) allocates 21.4 ha of pasture for mixed use development. The Reg 19 version required:

‘c. A project-level Habitats Regulations Assessment is carried out to inform the package of avoidance and mitigation measures for Solent Waders and Brent Geese that will be necessary in line with policy E17;

d. Measures to avoid and mitigate the impact of residential development on the Solent European Sites is expected to include securing part of Warblington Farm (EX2) as a Brent Goose and Wader refuge or alternative provision agreed in consultation with the local planning authority. The refuge area provided should be suitable for at least the number and species of birds recorded on the site in terms of habitat and area, timing and availability of habitat and quality of habitat.’

4. Emerging Policy EX2 (Warblington Farm) allocates 81 ha of a former dairy farm for water quality mitigation and as a bird refuge. Reg 19 criterion ‘b’ required *‘the refuge is designed in accordance with Policy E17’*. Reg 19 supporting paragraph 8.10 stated:

‘Campdown (H40) is a Primary Support Area and Secondary Support Area. To enable its development, a replacement habitat will need to be created at Warblington Farm in order to mitigate the established direct significant effect on the Chichester and Langstone SPA.’

5. Reg 19 emerging Policy E17 provided:

‘Development proposals on, or adjacent to, sites which are used by Solent waders and/or Brent Geese will be assessed in line with the appropriate regulations. These proposals will, therefore, require a project-level Habitats Regulations Assessment and, if necessary, an Appropriate Assessment. The Council will consider the Solent Waders and Brent Goose (SWBG) Strategy and the latest survey data when making such an assessment.

...

Campdown (H40)

Development proposals at Campdown (H40), which is located on a Primary Support Area and a Secondary Support Area, will only be permitted where suitable replacement habitat is provided in perpetuity as part of Warblington

Farm (EX2), or alternative provision agreed in consultation with the local planning authority which:

d. Contributes to a biodiversity net gain to the SWBG network;

e. Is suitable in terms of habitat type and quality for at least the number of SWBG recorded on the site being lost; and

f. Is secured through a costed Habitat Management and Monitoring Plan.'

6. It may be observed, therefore, that the three policies, working together, provided: (i) a requirement that adequate bird mitigation be secured in accordance with the Habitat Regulations before Campdown was granted planning permission; and also (ii) a potential identified location for that mitigation.
7. There is a drafting confusion in that the Reg 19 upper-case policy text of H40 and E17 allowed bird mitigation for Campdown to be provided on either Warblington Farm *or* somewhere else that could be shown to be suitable, whereas the lower-case supporting text of Policy EX2 at para. 8.10 introduced an ambiguity in that it appeared to *require* this to be at Warblington Farm.
8. What is clear, however, is that development at Campdown could not come forward absent a suitable bird mitigation, to be assessed in accordance with the Habitats Regulations and in the light of the agreed SWBG Strategy. This is further reinforced by the general policy E14, which states that schemes with potential impacts on European sites will be subject to HRA/AA and will be refused permission unless avoidance or mitigation is secured (or there are no alternatives sites, there are reasons of overriding public benefit and compensatory provision is secured)¹.
9. The emerging local plan was subject of a Habitats Regulations Assessment dated May 2021, which at Table 10 and para. 6.10 identified policy H40 as having the likelihood of significant effects on the SPA absent mitigation. 'Habitat Loss' was therefore 'screened-in' at Table 12 in respect of policy H40. Under table 13, 'Proposed Mitigation

¹ This wording explicitly adopts the wording of the EU Habitats Regulations/Directive, although it is known that in practice for a housing site the 'no alternatives/IROPI' approach derived from the Habitats Directive is never actually triggered as there are always alternatives (including just not building up to local plan housing numbers); thus, it is the 'no harm to integrity' limb which operates in practice.

Measures’, for ‘Habitat Loss’, the mitigation is stated to be policies EX2, E14, E16, E17, KP3 and E25. The conclusion is ‘NO’ impact to site integrity. The narrative text at 7.5-7.29 justifies that conclusion by reference to those policies. In particular, it notes that policies E14 and E17 would prevent development from being permitted absent appropriate mitigation to avoid impacts on site integrity (see paragraphs 7.9 and 7.16)

10. Consistent with the above, the Habitats Regulations and Biodiversity Net Gain Topic Paper, dated March 2021 records, in respect of proposed allocation H40:

’33. The Council is committed to working with Natural England to ensure a suitable mitigation package is brought forward with any planning application and that a Habitats Regulations Assessment is undertaken which concludes that there is no likely significant effect on any internationally designated nature conservation sites. If a suitable mitigation package is not brought forward, there are safeguards in place within the policy allocation which would ensure that planning permission is refused and the site could not be permitted until a suitable mitigation package is submitted.’

11. Natural England’s objection at Reg.19 stage was to the uncertainty, at this stage, of the suitability of Warblington Farm as mitigation for the impact on curlew at Campdown. It expressly supported the inclusion of criteria d, e and f into policy E17 in respect of guiding mitigation proposals for Campdown, which it stated should be a ‘bespoke approach’.

12. Following discussion between NE and the Council on wording changes to remove the express link between development at Campdown and mitigation at Warblington Farm, NE and the Council have produced a ‘Statement of Common Ground’ dated March 2021. At para 17, it records that NE is ‘very supportive’ of the provision of an SWBG refuge at Warblington Farm, but until further work is done, cannot confirm that it would be suitable as mitigation for development at Campdown. It therefore objects to para 8.10 as originally drafted and supports its proposed amendment by the Council. Similarly at para’s 25-29, the SoCG records that NE has no objection to H40 (Campdown), subject to its bird mitigation being a bespoke package, not necessarily tied to Warblington Farm. NE notes a preference for allocations to be preceded by

agreement on the mitigation, but ‘fully accepts’ that the suite of policies ensure that Campdown cannot proceed to development without the necessary mitigation.

13. It is apparent from the review above that the delivery of development at Campdown can only occur in accordance with the policies as drafted or as proposed to be amended if it is accompanied by SWBG mitigation that can be assessed under the Habitats Regulations in a manner that concludes no effect on the integrity of the SPA. Although there is no sufficient certainty at present that that mitigation will be located at Warblington Farm, there *is* sufficient certainty that the H40 development cannot proceed without a suitable mitigation scheme. As such, NE is right, in my opinion, to advise the Inspector through the SoCG to that effect.
14. It follows that for Habitats Regs purposes, there is no requirement for the local plan to identify where the bird mitigation for H40 will be, it merely needs to ensure that the development cannot proceed unless a Habitats Regs compliant mitigation scheme is secured. As such, there is no failure of procedure or legal compliance by removing the referenced links between H40 and Warblington Farm.
15. Indeed, I go further. If and to the extent that NE is correct that current information does not establish with sufficient scientific certainty that Warblington Farm is suitable, it would be a failure of legal compliance to continue to have policies which indicated that a mitigation scheme at that site would be sufficient – let alone the terms of 8.10 which indicate that the mitigation for H40 *must* be at Warblington. I have no information as to whether NE is correct on that point, and am not asked to advise on the merits of any particular mitigation proposal or location, but an express link to a given site would need to be justified by the certainty which NE say is currently lacking.
16. As a consequence, it is my opinion that it is not only lawful to delete the policy links to Warblington, it is my opinion that it is likely to be unlawful to continue to keep them.

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18th June 2021

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