Ministry of Housing, Communities & Local Government

Our ref: APP/Z3825/W/23/3333968

Your ref: DC/23/0856

Mr Peter Warren
Savills
Mountbatten House
1 Grosvenor Square
Southampton
SQ15 2BZ

25 October 2024

Dear Peter Warren,

TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL MADE BY CREST NICHOLSON OPERATIONS LIMITED
KILNWOOD VALE SUB-PHASE 3DEFG, KILNWOOD VALE, CRAWLEY ROAD, FAYGATE, HORSHAM, WEST SUSSEX, RH12 0DB
APPLICATION REF: DC/23/0856

This decision was made by the Minister of State for Housing and Planning, Matthew Pennycook MP, on behalf of the Secretary of State

1. I am directed by the Secretary of State to say that consideration has been given to the report of Darren McCreery MA BA (Hons) MRTPI, who held a public local inquiry on 11-14 March 2024 and 18 March 2024 into your client's appeal against the failure of Horsham District Council to determine your client's application for reserved matters approval for layout, appearance, landscaping, and scale (in accordance with DC/15/2813) for Phase 3DEFG of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking, in accordance with application Ref. DC/23/0856, dated 28 April 2023.

2. On 8 April 2024, this appeal was recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act (TCPA) 1990.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the reserved matters should be approved.

4. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, and agrees with his recommendation. She has decided to approve the reserved matters. The Inspector's Report (IR) is attached. All references to paragraph numbers, unless otherwise stated, are to that report.

Ministry of Housing Communities & Local Government Email: PCC@communities.gov.uk
Laura Webster, Decision Officer
Planning Casework Unit
3rd Floor Fry Building
2 Marsham Street
London SW1P 4DF

Environmental Statement

5. An Environmental Statement (ES) was submitted with the outline application (DC/10/1612) under the Town and Country Planning (Environmental Impact Assessment) Regulations 1999, and an addendum to the ES was submitted in support of the S73 application (DC/15/2813) under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011(as amended). The Secretary of State is satisfied that the environmental information already before her is adequate to assess the significant effects of the development on the environment. In reaching her decision the Secretary of State has taken this information into consideration.

Matters arising since the close of the inquiry

6. A list of representations which have been received since the inquiry is at Annex A. The Secretary of State is satisfied that the issues raised do not affect her decision, and no other new issues were raised in this correspondence to warrant further investigation or necessitate additional referrals back to parties. Copies of these letters may be obtained on request to the email address at the foot of the first page of this letter.

7. On 30 July 2024, the Written Ministerial Statement (WMS) 'Building the Homes we Need' (UIN HCWS48) was published. On that same date, the government launched a consultation to reform the National Planning Policy Framework (the Framework). The Secretary of State does not consider that publication of the WMS and the consultation on the existing Framework raise any matters that would require her to refer back to the parties for further representations prior to reaching her decision on this appeal, and she is satisfied that no interests have thereby been prejudiced.

Policy and statutory considerations

8. In reaching her decision, the Secretary of State has considered this proposal within the context of the Outline Planning Permission that these reserved matters are pursuant to.

9. In this case a hybrid planning application, including a masterplan for the site, was approved in 2011 (DC/10/1612) for "Outline approval for the development of approximately 2500 dwellings, new access from A264 and a secondary access from A264, neighbourhood centre, comprising retail, community building with library facility, public house, primary care centre and care home, main pumping station, land for primary school and nursery, land for employment uses, new rail station, energy centre and associated amenity space. Full planning permission for engineering operations associated with landfill remediation and associated infrastructure including pumping station. Full permission for the development of Phase 1 of 291 dwellings, internal roads, garages, driveways, 756 parking spaces, pathways, sub-station, flood attenuation ponds and associated amenity space. Full permission for the construction of a 3 to 6 metre high (above ground level) noise attenuation landform for approximately 700 metres, associated landscaping, pedestrian/cycleway and service provision (land known as Kilnwood Vale)". The permission was varied in 2016 by application reference DC/15/2813 for the "Variation of conditions 3, 4, 7, 8, 9, and 10 of hybrid planning application DC/10/1612 to enable the reconfiguration of the neighbourhood centre, community facilities and open space".

10. The Secretary of State has had regard to the relevant policies within the development plan. In this case the development plan consists of Horsham District Planning Framework (HDPF) (27 November 2015), Horsham District Council Site Specific Allocations of Land

(November 2007) and Horsham District and Crawley Borough Local Development Frameworks West of Bewbush Joint Area Action Plan (JAAP) (July 2009).
The Secretary of State considers that relevant development plan policies include those set out at IR5.5-IR5.14.

11. Other material considerations which the Secretary of State has taken into account include the Framework and associated planning guidance ('the Guidance'), as well as the matters set out in IR5.25-IR5.26.

Emerging plan

12. The Horsham District Local Plan 2023-2040 was published for consultation under regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012 on 19 January 2024 and was formally submitted to the Planning Inspectorate on Friday 26 July 2024 after the close of the Inquiry. The Secretary of State notes the Inspector's comment at IR5.4 that the draft plan continues to rely on delivery at Kilnwood Vale as a source of housing supply.

13. Paragraph 48 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework. The Secretary of State notes that the Local Plan has been submitted for examination since the close of the Inquiry. The Inspector concludes at IR5.4 that the emerging Local Plan does not attract weight, however, having regard to the stage of preparation she considers that the emerging Local Plan should be given limited weight.

Main issues

Whether a Habitats Regulations compliant appropriate assessment can be concluded and, if so, on what basis.

14. The Secretary of State has taken into account the legal principles underpinning appropriate assessment summarised by the Inspector at IR10.3-IR10.10, the Inspector's conclusion in respect of Imperative Reasons of Overriding Public Benefit (IROPI) set out at IR10.11 and his consideration of proportionality in applying the precautionary principle set out at IR10.12-IR10.19 and agrees with the Inspector's approach.

15. For the reasons set out at IR10.20-IR10.90 the Secretary of State agrees with the Inspector's conclusions at IR10.85-IR10.90 that it cannot be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the Arun Valley Sites.

16. In relation to likely significant effects, she agrees that as the Water Supply Zone includes supplies from groundwater abstraction it cannot, with certainty, be concluded that there will be no adverse impact on the Arun Valley Sites for the reasons set out at IR10.24-IR10.27. For the reasons set out at IR10.28-IR10.32 she agrees that the concept of Water Neutrality is not of central relevance to the question of whether a favourable appropriate assessment can be concluded.

17. In relation to the effects on the site's nature conservation objectives, the Secretary of State agrees with the Inspector at IR10.37 that the qualifying interest affected by the issue in the NE Position Statement cannot be narrowed to the Lesser Ramshorn Whirlpool Snail, for the reasons set out at IR10.33-IR10.39.

18. The Secretary of State has considered matters arising in relation to reliance of other regulatory regimes (IR10.41-IR10.45); Southern Water Voluntary Minimisation and Environment Agency action following the Sustainability Review (IR10.46-IR10.57); The WRMP 2024 (IR10.58-IR10.69); Alternative Sources of Supply (IR10.70-IR10.75); and Demand Management Savings (IR10.76-IR10.84). For the reasons set out at IR10.40-IR10.91, she agrees with the Inspector's conclusions at IR10.85-IR10.91, and agrees that based on the Appellant's evidence of avoidance/mitigation it cannot be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the Arun Valley Sites (IR10.90).

19. In considering whether compliance with conditions or other restrictions enable it to be ascertained that the proposal would not adversely affect the integrity of the site, for the reasons set out at IR10.92-IR10.112 the Secretary of State agrees with the Inspector's proposed amendments to the Council's suggested Sussex North Offsetting Water Scheme (SNOWS) condition set out at IR10.111 and his conclusion at IR10.112 that compliance with conditions enables her to ascertain that the proposal would not adversely affect the integrity of the Arun Valley sites.

20. The Secretary of State agrees with the Inspector's conclusion at IR10.113 that subject to compliance with conditions, she is able to ascertain with reasonable certainty that the proposal would not adversely affect the integrity of the Arun Valley Sites. She further agrees that she is able to conclude a favourable appropriate assessment and discharge her duty under Regulation 63(5) of the Habitat Regulations. The Secretary of State adopts IR10.3-IR10.114 as the necessary Appropriate Assessment in her role as the Competent Authority on this matter.

21. Like the Inspector at IR10.114 in fulfilling her duty, the Secretary of State has had regard to the representations made by Natural England, as the appropriate nature conservation body for the purposes of Regulation 63(3) of the Conservation of Habitats and Species Regulations 2017.

Whether the evidence otherwise indicates that the reserved matters should be approved

22. For the reasons set out at IR10.115, the Secretary of State agrees that the proposal accords with the parameter plans, the s.106 under the Outline Permission, and accords with the relevant policies identified in paragraph 10 of this decision letter.

23. For the reasons set out at IR 10.115-IR10.119, the Secretary of State agrees with the Inspector's conclusion at IR10.120 and agrees with the assessment of matters unrelated to habitat effects provided by the Council. She further agrees with the Inspector at IR10.127 that the benefits listed in the appellant's statement of case (housing, affordable housing, employment, economic benefits, provision of open space, remediation of landfill and biodiversity benefits), are collectively significant material considerations and she gives these benefits significant weight.

Planning conditions

24. The Secretary of State had regard to the Inspector's analysis at IR10.90-IR10.112 and IR11.1-IR11.4, the recommended conditions set out at the end of the IR and the reasons for them, and to national policy in paragraph 56 of the Framework and the relevant Guidance. She is satisfied that the conditions recommended by the Inspector, including Condition 6, comply with the policy test set out at paragraph 56 of the Framework and that the conditions set out at Annex B should form part of her decision.

Planning balance and overall conclusion

25. For the reasons given above, the Secretary of State considers that the appeal scheme is in accordance with the Outline Permission and the relevant policies of the HDPF and of the JAAP and is in accordance with the development plan as it relates to the reserved matters under consideration. She has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in line with the relevant development plan policies.

26. Weighing in favour of the proposal are housing, affordable housing, employment, economic benefits, provision of open space, remediation of landfill and biodiversity benefits. The Secretary of State gives these benefits significant weight.

27. Overall, the Secretary of State considers that the accordance with the outline planning permission and relevant development plan policies, and the material considerations in this case indicate that the reserved matters should be approved.

28. The Secretary of State therefore concludes that the reserved matters should be approved subject to the conditions set out in Annex B.

Formal decision

29. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. She hereby allows your client's appeal and approves the reserved matters subject to the conditions set out in Annex B of this decision letter for reserved matters approval for layout, appearance, landscaping, and scale (in accordance with DC/15/2813) for Phase 3DEFG of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking, in accordance with application Ref. DC/23/0856, dated 28 April 2023.

30. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than the approval of reserved matters subsequent to outline planning permission granted under section 57 of the TCPA 1990.

Right to challenge the decision

31. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within 6 weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the TCPA 1990.

32. A copy of this letter has been sent to Horsham District Council and notification has been sent to others who asked to be informed of the decision.

Yours faithfully,

Laura Webster

Laura Webster
Decision officer

This decision was made by the Minister of State for Housing and Planning, Matthew Pennycook MP, on behalf of the Secretary of State, and signed on his behalf

Annex A Schedule of representations

General representations

Party	Date
Kevin Curd	3 September 2024

Annex B List of conditions

1. The development hereby permitted shall be carried out in accordance with the approved plans listed in Appendix 1 of the Statement of Common Ground between Horsham District Council and Crest Nicholson Operations Limited dated 18 March 2024.

2. No development above ground floor-slab level shall commence until a schedule of materials, finishes and colours to be utilised for the external walls, windows and roofs of the approved buildings, has been submitted to and approved by the Local Planning Authority in writing. All materials to be utilised in the construction of the approved buildings shall, thereafter, conform to those approved.

3. No development shall commence above ground floor-slab level, until full details of underground services, including locations, dimensions and depths of all service facilities and required ground excavations, have been submitted to and approved by the Local Planning Authority in writing. The development shall be carried out as per the approved details and coordinated with the approved Residential Landscape Masterplan (ref: 30125-5 DR-5000 S4-P12), Softworks Proposals (3015-5-DR-5001-P9, 3015-5-DR-5002-P9, 3015-5-DR-5003-P6, 3015-5-DR-5004-P6, 3015-5-DR-5005-P6, 3015-5-DR-5006-P10, 3015-5-DR-5007-P10, 3015-5-DR-5007-P10 and 3015-5-DR-5008-P9) and Preliminary Surface and Foul Water Drainage Strategy (refs: 2107120-002 G and 2107120-003 G).

4. No development shall commence above ground floor-slab level, until full details of any street-furniture to be installed, which can include any lighting columns, public cycle stands and bollards have been submitted to and approved by the Local Planning Authority in writing. The development shall be implemented in accordance with the approved details.

5. No development above ground floor slab level shall commence until full details of the water efficiency measures required to achieve a maximum of 91.4 l/p/d have been submitted to and approved in writing by the Local Planning Authority. The submitted details shall include the specification of all fixtures and fittings to be included in all dwellings, and a completed Part G calculator confirming the targeted water consumption is achieved.

    i) No dwelling hereby permitted shall be occupied until the approved water efficiency measures to serve that dwelling have been installed and made available for use in accordance with approved details, with evidence of installation submitted to an approved in the writing by the Local Planning Authority.
    ii) The installed water efficiency measures, or any subsequent replacement of measures over the lifetime of the development, shall achieve equivalent or higher standards of water efficiency to those approved unless otherwise agreed in writing with the Local Planning Authority.

6. No dwelling hereby permitted shall be first occupied until written agreement from the Local Planning Authority has been provided that either:
    i) A water neutrality mitigation scheme has been secured via Horsham District Council's adopted Offsetting Scheme (in line with the recommendations of

the Sussex North Water Neutrality Study: Part C – Mitigation Strategy, Final Report, December 2022). OR

ii) A site-specific water neutrality mitigation scheme has been (a) agreed in writing with the Local Planning Authority as being equivalent to Horsham District Council's adopted Offsetting Scheme AND (b) implemented in full.

7. All approved soft/ hard landscaping and boundary treatments within the curtilage of an approved building shall be implemented prior to the first occupation of that dwelling, in accordance with the approved soft/hard landscaping drawings, unless alternative hard and soft landscaping details and/or boundary treatments are submitted to and been approved in writing by the Local Planning Authority prior to the commencement of development above ground-floor slab level.

8. All soft landscaping outside of the curtilage of an approved dwelling shall be carried out in the first planting and seeding season, following the first occupation of the relevant buildings or the completion of the development, whichever is the sooner. Any trees or plants detailed on the approved landscaping strategy which die, are removed, become seriously damaged or diseased, within a period of five years following the completion of the development shall be replaced with new planting of a similar size and species.

9. Prior to the first occupation of any part of the development, a landscape management responsibilities plan (delineating areas of ownership and maintenance responsibility) for all communal landscape areas shall be submitted to and approved in writing by the Local Planning Authority. The landscape areas shall be managed and maintained in accordance with the approved details.

10. No dwelling hereby permitted shall be occupied until secure covered cycle parking facilities to serve that dwelling have been constructed and made available for use in accordance with approved drawings. The cycle parking facilities shall thereafter be retained as such for their designated use.

11. No dwelling hereby permitted shall be occupied until the car parking spaces serving the respective dwellings have been constructed and made available for use in perpetuity. All unallocated (visitor) parking spaces shall be completed and made available for use prior to the completion of the development and shall, thereafter, remain available only for use as visitor parking.

12. No part of the development shall be occupied until details of the proposed solar PV apparatus, including locations and amounts, have been submitted to and approved in writing by the Local Planning Authority. The equipment shall, be installed prior to the first occupation of each respective dwelling in accordance with the approved details.

13. No dwelling shall be first occupied until secure covered provision for the storage of refuse and recycling has been made for that dwelling in accordance with the submitted plans. The refuse and facilities shall thereafter be retained for use at all times.

14. No dwelling shall be first occupied until confirmation has been provided to the Local Planning Authority that either:- 1. All foul water network upgrades required to accommodate the additional flows from the development have been completed; or- 2. A development and infrastructure phasing plan has been agreed with the Local Authority in consultation with Thames Water to allow development to be occupied. Where a

development and infrastructure phasing plan is agreed, no occupation shall take place other than in accordance with the agreed development and infrastructure phasing plan.

15. No dwelling shall be first occupied until details showing the location of fire hydrants and method of installation and maintenance in perpetuity have been submitted to and approved in writing by the Local Planning Authority, in consultation with West Sussex County Council's Fire and Rescue Service. The development shall be carried out in accordance with the approved details and retained as such, unless a variation is agreed with the Local Planning Authority.

16. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), no roof extensions falling within Class B, Part 1, Schedule 2 of the Order shall be erected, constructed and/or installed to any dwelling hereby approved without express planning permission from the Local Planning Authority first being obtained.

17. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), all garages hereby permitted shall be used only as private domestic garages for the parking of vehicles incidental to the use of the properties as dwellings and for no other purpose.

The Planning Inspectorate

Report to the Secretary of State for Housing, Communities and Local Government

by Darren McCreery MA BA (Hons) MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Date 30 July 2024

TOWN AND COUNTRY PLANNING ACT

Horsham District Council

APPEAL BY

Crest Nicholson Operations Limited

Inquiry opened on 11 March 2024

Kilnwood Vale Sub-Phase 3DEFG, Kilnwood Vale, Crawley Road, Faygate, Horsham, West Sussex, RH12 0DB

File Ref: APP/Z3825/W/23/3333968

Contents

		Page
1.0	Preliminary matters	3
2.0	The site and planning history	4
3.0	The proposal	5
4.0	Agreed matters and extent of dispute	6
5.0	Planning policy and guidance	7
6.0	Background to water neutrality and legal principles	10
7.0	The case for the Appellant (Crest Nicholson Operations Limited)	12
8.0	The case for the Council	26
9.0	Written representations	39
10.0	Inspector's assessment	44
11.0	Conditions	68
12.0	Recommendation	68
	Annex 1: Appearances	69
	Annex 2: Core Documents	70
	Annex 3: Inquiry documents	76
	Annex 4: Recommended conditions	77

Abbreviations

1990 Act	Town and Country Planning Act 1990 (as amended)
LLFA	Lead Local Flood Authority
The Habitats Regulations	The Conservation of Habitats and Species Regulations 2017
HDPF	Horsham District Planning Framework (2015)
HRA	Habitats Regulations Assessment
JAAP	West of Bewbush Joint Area Action Plan (2009)
l/p/d	Litres per person per day
ml/d	Millions of litres per day
NE Advice Note	Natural England's Advice Note dated February 2022
NE Position Statement	Natural England's Position Statement dated September 2021
The Outline Permission	Permission reference DC/10/1612, as varied by DC/15/2813
SAC	Special Areas of Conservation
SOCG	Statement of Common Ground
SPA	Special Protection Areas
SSSI	Sites of Special Scientific Interest
WSZ	Southern Water's Sussex North Water Resource/ Supply Zones
WRMP	Southern Water's Water Resource Management Plan

File Ref: APP/Z3825/W/23/3333968
Kilnwood Vale Sub-Phase 3DEFG, Kilnwood Vale, Crawley Road, Faygate, Horsham, West Sussex, RH12 0DB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for reserved matters attached to an outline planning permission.
- The appeal is made by Crest Nicholson Operations Limited against Horsham District Council.
- The application Ref DC/23/0856, dated 28 April 2023, sought approval pursuant to condition No 5 of permission Ref DC/15/2813 granted on 28 April 2016 (related to original outline planning permission Ref DC/10/1612 granted on 17 October 2011).
- The development proposed is reserved matters approval sought for layout, appearance, landscaping, and scale (in accordance with DC/15/2813) for Phase 3DEFG of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking.

Summary of recommendation: the reserved matters should be APPROVED.

1 Preliminary matters

1.1 I held a case management conference virtually on 30 January 2024 with the Appellant and the Council. No other party joined the conference. An agreed note was published shortly after[1] which at paragraph 3.1.1 included what the parties felt was the main issue of the appeal, which has not changed, namely:

'The effect of the proposed development on the integrity of the Arun Valley Special Conservation Area, Special Protection Area and Ramsar sites, with particular reference to water abstraction.'

1.2 The inquiry webpage[2] includes the Core Documents [prefix CD], agreed between the parties ahead of opening, and Inquiry Documents [prefix ID] added after opening. The list of documents is at Annex 2 and Annex 3 and I use the referencing throughout (i.e. [CDXX] or [IDXX]).

1.3 With the agreement of the Appellant, the description of development has been amended from what was on the application form to remove reference to access. This reflects the position that access was approved as part of earlier consents and corrects what appears to be an error in the interests of clarity. [ID12] explains the position.

1.4 The Inquiry opened on 11 March 2024 and sat in person for 4 days, before adjourning. We resumed virtually on 18 March 2024 to hear closing submissions and closed the same day. I carried out an unaccompanied site visit on 14 March 2024. Other than the Appellant and the Council, no party gave oral evidence during the Inquiry. No applications for costs were made.

[1] https://docs.google.com/document/d/1sJSJgW2T2KHb69bhM3XSXWqYAiVCNdvw/edit
[2] https://drive.google.com/drive/folders/1zhZRfzTYH0MgSjv2mkThvgWKibRmBx0t?usp=sharing

1.5 The Statement of Common Ground (SOCG) between the Appellant and the Council was signed on 18 March 2024 [ID11]. It was updated prior to the close of the Inquiry to reflect an agreed position on drainage and conditions.

1.6 On 28 March 2024, following the close of the Inquiry, I wrote to Natural England. The need to do so was agreed by all parties at the Inquiry in light of the relevant legal duties[3]. Natural England's response dated 19 April 2024 [ID13] is summarised in section 9 of this report. The Appellant's comments on the Natural England response are dated 3 May 2024 [ID14].

1.7 By notification dated 8 April 2024, the direction under section 79 and paragraph 3 of Schedule 6 of the Town and Country Planning Act 1990 (1990 Act) recovers the appeal for the Secretary of State's own determination. The reason given is that the appeal involves proposals for residential development of over 150 units or on sites of over 5 hectares, which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities.

2 The site and planning history

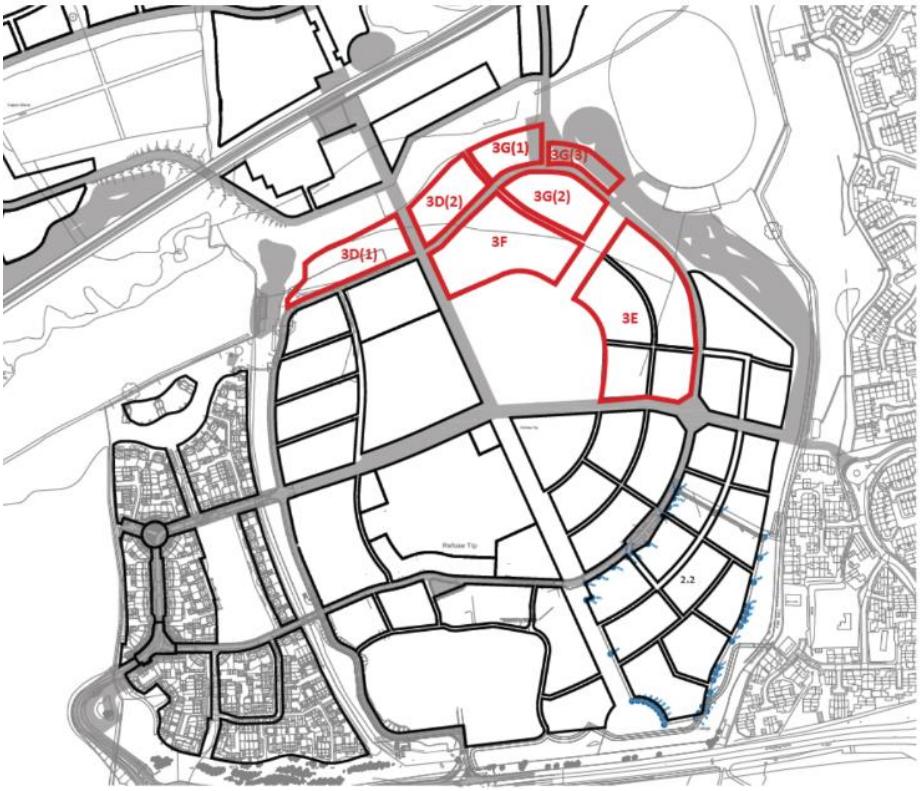
2.1 The site, surroundings, and detailed planning history are at sections 2 and 3 of the SOCG [ID11]. In summary, Kilnwood Vale is a strategic development located on the western edge of Crawley to the north of the A264, west of Bewbush and east of Faygate. It is identified in the West of Bewbush Joint Area Action Plan (2009)[4] (JAAP) to create a new neighbourhood of around 2500 homes with associated social, environmental, and transport infrastructure. It was subsequently taken forward in the Horsham District Planning Framework (HDPF), adopted in 2015 [CD4 1.01].

2.2 A hybrid planning application, including a masterplan for the site, was approved in 2011 (DC/10/1612) and varied in 2016 (DC/15/2813), resulting in an amended parameter plan. I refer to these consent's collectively as the Outline Permission. Of the four parts in the Outline Permission, Parts C and D are complete (which included 291 homes). For Parts A and B, 1318 homes have detailed consent and are either occupied/complete or under construction. This sits alongside infrastructure investment, including a new primary school which opened in 2019.

2.3 Sub phase 3DEFG, the subject of this appeal, is located towards the eastern section of Kilnwood Vale. It sits within the wider development context described above and within Part A of the Outline Permission. It includes an area of land identified for a leisure park (secured separately through S106 agreement attached to the Outline Permission) and is to the northeast of the new primary school.

[3] Regulation 63(3), The Conservation of Habitats and Species Regulations 2017 (Habitats Regulations)
[4] https://www.horsham.gov.uk/__data/assets/pdf_file/0010/69526/West-of-Bewbush-Joint-Area-Action-Plan.pdf

2.4 The drawing below is from the Council's Statement of Case [CD7 1.02a]. It shows the site in context. Sub phase 3DEFG can be seen in red alongside the wider strategic site in bold black. The A264 is in the bottom right corner and the railway line is towards the top. On the right of the drawing is the residential area of Bewbush, which is at the edge of Crawley.



3 The proposal

3.1 The application is for reserved matters approval, described as:

'Reserved matters approval sought for Layout, Appearance, Landscaping, and Scale (in accordance with DC/15/2813) for Phase 3 D, E, F and G of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking'.

3.2 Section 5 of the Appellant's Statement of Case [CD7 1.01] sets out the appeal proposals in detail. Condition 3 of the Outline Permission (specifically DC/15/2813) requires the reserved matters to be in substantial compliance with the parameter plans specified in the condition. Namely the:

a. Land use plan

b. Residential density plan

c. Buildings height plan

d. Pedestrian and cycle movement plan

e. Vehicular movement plan

f. Landscape and open space plan

3.3 The parameter plans can be seen at Appendix 2 of the Council's Statement of Case [**CD7 1.02a**].

3.4 There is a Section 106 agreement governing the wider development that was not before the Inquiry. Section 5 of the Appellant's Statement of Case [CD7 1.01] explains how the proposal is said to accord with both the Section 106 agreement and the parameter plans.

3.5 The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) (1990 Act) as the Council did not give notice of their decision on the application within the prescribed period.

4 Agreed matters and extent of dispute

4.1 The SOCG [ID11] agrees between the Appellant and the Council that:

a. the information before the Council was sufficient to enable each of the reserved matters to be determined, in accordance with validation requirements and the relevant conditions of the Outline Permission.

b. the reserved matters are in substantial accordance with the parameter plans agreed in the Outline Permission (as required by condition 3 of DC/15/2813).

c. the other matters agreed as being material to the reserved matters detailed at paragraphs 6.11-6.26 of the SOCG are acceptable.

d. the issue of drainage capacity that led to a holding objection from the Lead Local Flood Authority (LLFA) has been addressed.

4.2 The extent of dispute is on a single matter relating to water neutrality. It is set out at paragraph 7.1 of the SOCG:

'Whether a further condition is necessary to restrict development to ensure compliance with Regulations 63(5) and 70(3) of the Conservation of Habitats and Species Regulations 2017 (The Habitats Regulations) and, if so, whether it is necessary for the condition to restrict development until such time that access into the Council's Water Offsetting Scheme (SNOWS) has been secured'.

5 Planning policy and guidance

5.1 The agreed development plan position is at Section 4 of the SOCG [ID11]. It comprises:

a. Horsham District Planning Framework (HDPF) (27 November 2015)

b. Horsham District Council Site Specific Allocations of Land (November 2007)

c. Horsham District and Crawley Borough Local Development Frameworks West of Bewbush Joint Area Action Plan (JAAP) (July 2009)

5.2 The Outline Permission was decided against the now superseded Horsham District Council Core Strategy (2 February 2007) and General Development Control Policies (21 December 2007). They identified Kilnwood Vale as a key strategic site and a major contributor to Horsham's planned housing delivery.

5.3 The JAAP remains extant and relevant.

5.4 The Horsham District Local Plan 2023-2040 was published for Regulation 19 consultation on 19 January 2024. It does not attract weight in planning decisions due to its infancy. However, it is noteworthy that the draft plan continues to rely on delivery at Kilnwood Vale as a source of housing supply.

Horsham District Planning Framework (HDPF) [CD4 1.01]

5.5 Policy 31 (Green Infrastructure and Biodiversity) says that development proposals will be required to contribute to the enhancement of existing biodiversity and should create and manage new habitats where appropriate (Policy 31(2)). Under 31(4)(a) and (b), particular consideration will be given to the hierarchy of sites and habitats in the district as follows:

a. Special Protection Areas (SPA) and Special Areas of Conservation (SAC)

b. Sites of Special Scientific Interest (SSSIs) and National Nature Reserves

c. Sites of Nature Conservation Importance, Local Nature Reserves and any areas of ancient woodland, local geodiversity

5.6 Policy 31(4) goes on to say that development anticipated to have a direct or indirect adverse impact on sites or features will be refused unless it can be demonstrated that the reason for the development clearly outweighs the need to protect the value of the site and appropriate mitigation and compensation measures are provided. Policy 31(5) says that any development with the potential to impact the Arun Valley SPA will be subject to a Habitats Regulations Assessment to determine the need for an appropriate assessment.

5.7 Policies 32 (Quality of New Development) and 33 (Development Principles) require development to be of a high standard of design and layout. They must be locally distinctive in character and respect the surroundings. Where relevant, the scale, massing and appearance of development is required to relate sympathetically with its built-surroundings, landscape, open spaces and to consider any impact on the skyline and important views.

5.8 Policy 37 (Sustainable Construction) requires proposals to seek to improve the sustainability of development and incorporate measures that includes limiting water use to 110 l/p/d.

5.9 Policy 40 (Sustainable Transport) says that proposals promoting an improved and integrated transport network, with a re-balancing in favour of non-car modes as a means of access to jobs, homes, services, and facilities, will be encouraged and supported. Policy 40 (1-10) sets out the detailed policy criteria for achieving this, including being integrated with the wider network of routes, including public rights of way and cycle paths, and minimising the distance people need to travel and conflicts between traffic, cyclists and pedestrians.

5.10 Policy 41 (Parking) says that adequate parking and facilities must be provided within developments to meet the needs of anticipated users. Consideration should be given to the needs of cycle parking, motorcycle parking, charging plug-in or other low emission vehicles and the mobility impaired.

West of Bewbush Joint Area Action Plan (JAAP)[5]

5.11 The separate adopted core strategies for Horsham and Crawley in force at the time set out the key principles for the development of 2,500 homes and other uses to the west and north-west of Crawley. The JAAP allocates the land (under Policy WB1) and expands on the principles to provide a detailed policy framework for the development that would become known as Kilnwood Vale.

5.12 Policy WB4 (Design) establishes the design principles. It says that design and layout should reflect design principles for the new neighbourhood detailed within a design and access statement, achieve high-quality, inclusive, and safe design. It says that development should address the street, create streetscape variety and interest with natural surveillance of open-spaces, paths, and communal areas.

5.13 In relation to market housing, Policy WB10 (Dwelling Mix) says that there should be a mix of dwelling sizes and types within each core phase of the development and that, for each core phase, it should be demonstrated how a mix is to be delivered.

5.14 For affordable housing, Policy WB10 (Affordable Housing) sets a target of 40% for the whole neighbourhood. Each phase should contain between 30% and 50% affordable housing, with the precise proportion determining individually. A tenure split of 70% social rented and 30% intermediate tenure should be provided across the whole neighbourhood.

The National Planning Policy Framework, December 2023 (the Framework)

5.15 The Framework aims to achieve locally prepared plans that provide for sufficient housing and other development in a sustainable manner. It outlines a presumption in favour of sustainable development. It also identifies that achieving sustainable development means that the planning system has three overarching objectives – economic, social, and environmental.

[5] https://www.horsham.gov.uk/__data/assets/pdf_file/0010/69526/West-of-Bewbush-Joint-Area-Action-Plan.pdf

5.16 At Paragraph 11, the Framework sets out how the presumption is to be applied. It indicates that development proposals that accord with an up-to-date development plan should be approved without delay. It goes on to say that where no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, permission should be granted unless the application of policies in the Framework that protect areas or assets of particular importance, (including those relating to habitats sites and/or designated as Sites of Special Scientific Interest) provides a clear reason for refusing the development proposed or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

5.17 The Framework indicates that, for applications which involve the provision of housing where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites, as is the case in this instance, the policies which are most important for determining the application are out-of-date for Para 11 purposes. In this case it is common ground that the Council cannot demonstrate a five-year supply, with the latest Authority Monitoring Report data equating to a 2.9 year supply of new homes [CD4 1.04a].

5.18 In relation to delivering a sufficient supply of homes (Framework, Section 5) Paragraph 60 says that it is important that a sufficient amount and variety of land can come forward where it is needed. This is to support the Government's objective of significantly boosting the supply of homes. Paragraph 74 highlights that a supply of large numbers of new homes can often be best achieved through planning for larger scale development, such as significant extensions to existing villages and towns. At Paragraph 74(c) it supports setting clear expectations for the quality of places.

5.19 Turning to conserving and enhancing the natural environment (Framework, Section 15), Paragraph 180 says that planning policies and decisions should contribute to and enhance the natural and local environment by protecting and enhancing sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan).

5.20 The Framework defines a habitats site as any site which would be included within the definition at Regulation 8 of the Habitats Regulations for the purpose of those regulations. Paragraph 187 says that listed Ramsar sites should be given the same protection as habitats sites. Paragraph 188 says that the presumption in favour of sustainable development does not apply where project is likely to have a significant effect on a habitats site (either alone or in combination) unless an appropriate assessment has concluded that the project will not adversely affect the integrity of the habitats site.

5.21 Whilst not falling within the definition of habitats sites (or the extension provided by Paragraph 187), Paragraph 186 includes separate policy for development on land within or outside a Site of Special Scientific Interest, and which is likely to have an adverse effect on it (either individually or in combination).

5.22 Such development should not normally be permitted. The only exception being where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network.

5.23 Although I have considered the Framework in its entirety, the following sections are also relevant to this case:

- 4 - Decision-making
- 8 – Promoting healthy and safe communities
- 9 – Promoting sustainable transport
- 11 - Making effective use of land
- 12 - Achieving well-designed and beautiful places
- 14 – Meeting the challenge of climate change, flooding, and coastal change.

5.24 Although a weighty material consideration, the Framework does not change the statutory status of the development plan. Nor does it override other legal duties, including those imposed by the Habitats Regulations.

National Planning Guidance and other guidance

5.25 National Planning Guidance on appropriate assessment[6] provides advice for those required to undertake Habitats Regulations Assessment (HRA) in accordance with the Habitats Regulations. Defra's guidance[7] (Habitats Regulations Assessments: Protecting a European Site) gives more information on carrying out an HRA.

5.26 The main source of evidence relating to the HRA originates from the Appellant's Shadow HRA [CD1 1.01] and HRA Addendum [CD1 1.02]. In addition to the guidance set out above, at paragraph 2.2.1 the Shadow HRA refers to ODPM/DEFRA Circular (ODPM 06/2005, DEFRA 01/2005)[8]. Whilst of some vintage, this document appears to be extant and includes a helpful flowchart that summarises the HRA process that is also included at Appendix 5 of the Appellant's Shadow HRA.

6 Background to water neutrality

Water neutrality

6.1 Horsham is within Southern Water's Sussex North Water Resource Zone and includes supply from groundwater abstraction on the river Arun, close to Pulborough (referred interchangeably throughout the evidence as 'Hardham' or 'Pulborough').

6.2 The abstraction site is located close to a group of nature conservation sites known as the Arun Valley Sites, that are nationally or internationally designated for their rare and protected habitats. The sites are The Arun Valley SPA, SAC, and Ramsar site. Overlapping is the Pulborough Brooks and Amberley Wild Brooks SSSI.

[6] https://www.gov.uk/guidance/appropriate-assessment
[7] https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site
[8] https://www.gov.uk/government/publications/biodiversity-and-geological-conservation-circular-06-2005

6.3 In September 2021, Natural England published a Position Statement giving advice for all applications falling within the Water Supply Zone (WSZ[9]) [CD8 1.15] (NE Position Statement). It advises that that as the WSZ includes supplies from groundwater abstraction which cannot, with certainty, conclude no adverse effect on the integrity of the Arun Valley Sites. As existing abstraction cannot be concluded as not having an impact on the sites, they advise that developments within the WSZ must not add to it. One way of achieving this is to demonstrate water neutrality.

6.4 The NE Position Statement advises resolving the matter through a strategic approach delivered through the Local Plans of the relevant Local Planning Authorities (including Horsham) with engagement from Natural England. Ahead of the strategic approach it is advised that any application needs to demonstrate water neutrality in line with the interim approach set out.

6.5 Natural England published an Advice Note in February 2022 (NE Advice Note) [CD8 1.16] to expand on the NE Position Statement. The note continues to refer to the strategic approach as being a longer-term strategy to integrate water neutrality into the relevant Local Plans, working closely with the relevant local authorities, the Environment Agency and Southern Water. While the strategic approach remains in development, Natural England propose integrating the concept of water neutrality into individual planning decisions to ensure that future development can proceed and not further adversely affect the Arun Valley Sites.

6.6 The strategic approach of relevance to Horsham includes the mitigation strategy described in detail in the Sussex North Water Neutrality Study: Part C – Mitigation Strategy (Part C report) [CD8 1.14c]. It is endorsed by Natural England [CD8 1.22]. The proposals in the mitigation strategy are threefold; (1) reducing water demand through defined water efficiency requirements for new development, (2) water company demand management delivery, and (3) a Local Planning Authority led offsetting scheme. The offsetting scheme known as SNOWS will, according to the Council, become operational later in 2024.

[9] the evidence refers to both the Water Resource Zone (WRZ) and the Water Supply Zone (WSZ). They are technically different things but may be the same, or similar, areas. In this report I have consistently used WSZ for ease of reference and as distinguishing between them makes no difference to my findings.

7. The case for the Appellant (Crest Nicholson Operations Limited)

7.1 The case for the Appellant is set out in the evidence before the Inquiry[10]. It is important that the evidence, together with the application and supplementary material, is considered in full to gain a proper understanding of the case. To assist, what follows is a summary based on the case presented in closing [ID10].

Introduction

7.2 The site comprises part of the land benefiting from the Outline Permission, originally granted in 2011, that will deliver the Kilnwood Vale strategic allocation. To date, some 1318 dwellings have been consented under earlier phases, which are now either occupied or under construction. The appeal proposal is a sub phase of 280 dwellings as part of the balance of 1182 dwellings, with the local centre awaiting separate determination to complete the strategic development as planned.

7.3 The SOCG [ID11] records that there are no matters in dispute on the planning merits of the application, it accords with the Outline Permission and the development plan. The only issue relates to the outstanding concern by Natural England in respect of the impact on a protected site. Had the Council been able to undertake a favourable appropriate assessment under Regulation 63 of the Habitats Regulations it would have granted approval. This is evidenced by the SOCG and was confirmed by Mr Smith for the Council under cross examination at the Inquiry.

7.4 The Appellant characterises the Council's position as being that acceptable determination of the appeal rests on the imposition of a Grampian condition to ensure that the proposal is water neutral. This is necessary to reach a favourable appropriate assessment under Regulation 63 of the Habitats Regulations.

7.5 The Appellants position, by contrast, is that such a condition would fail the test of necessity as there is no need for the development to demonstrate water neutrality to conclude a favourable appropriate assessment.

Background to water neutrality

7.6 The NE Position Statement [CD8 1.15] says it is Natural England's view that it cannot be concluded with sufficient certainty that groundwater abstraction in the WSZ is not having an adverse effect on the integrity of the Arun Valley sites. The Appellant highlights that the statement says that new development 'must not add to this impact' and that 'one way' of doing so is to show water neutrality. Water neutrality is defined in the NE Position Statement as '*the use of water in the supply area before the development is the same or lower after the development is in place'*. The Appellant places emphasis on the word 'use'.

[10] Including CD7 1.01, CD10 1.01-4, ID1, ID10

7.7 Although the statement expressly states that demonstrating water neutrality is 'one way' of not adding to the potential impact, it then focuses only on what Council's need to do to secure water neutrality, i.e. joint working at a strategic level and integrating water neutrality in to Local Plans. It also expressly states that '*Natural England advises that any application needs to demonstrate water neutrality'.*

7.8 Turning to the NE Advice Note [CD8 1.16], the Appellant highlights the following paragraphs (with their emphasis underlined):

'Natural England is also concerned that the Sussex North Water Supply Zone is likely to be subject to significant future development pressures. These will <u>necessitate increased abstraction</u> within the region and are likely to further exacerbate any existing impacts on the Habitats Sites'.

'…. if further development were to be consented in this region (<u>with the requirement for additional abstraction</u>) such development [would be] likely to have an adverse effect on the Habitats Sites.'

Natural England is closely involved with the relevant local authorities, the Environment Agency and Southern Water in developing a longer-term strategy <u>to integrate Water Neutrality into the relevant Local Plans</u>. However, while this broader strategy remains in development, Natural England are seeking to propose mechanisms whereby the concept of Water Neutrality can be integrated into individual planning decisions to ensure that future development can proceed in a manner that does not further adversely affect the Habitats Sites, notwithstanding these pressures'.

7.9 It is the Appellant's view that, as groundwater abstraction at Hardham cannot be excluded from harm, development not adding to it is an uncontroversial stance for the NE Position Statement to take. However, page 2 of the statement and NE Advice Note focuses on demonstrating water neutrality in the sense of not increasing water usage in the WSZ. No increase in use is a mischaracterisation of the issue. The crucial matter is, instead, about not increasing ground water abstraction at Hardham. The mischaracterisation seems to be unrecognised by Natural England.

7.10 The Council's response to the NE Position Statement, encouraged by Natural England, has been to develop a water neutrality mitigation strategy accompanied by policies requiring compliance with it (or an equivalent scheme) in their emerging Local Plans (i.e. SNOWS). In the meantime, the Council's approach has been to refuse (or, in this case fail to determine) permission unless the development can demonstrate water neutrality either through application of the still emerging SNOWS or bespoke means.

7.11 SNOWS is being developed in the context of the jointly commissioned Part C Report [CD8 1.14c]. The report is expressly concerned with informing the evidence base in emerging Local Plans[11] and establishing a strategy to achieve water neutrality. It uses a definition of water neutrality consistent with the one utilised by Natural England, (i.e. concerning total water use in the WSZ)[12].

7.12 The Appellant notes the responsibilities and action of other bodies in the wider process beyond planning. The Environment Agency is the regulator for potable water supply and the licencing of water abstraction. Southern Water is the statutory undertaker for potable water supply in the WSZ and the licence holder for Hardham.

7.13 The Environment Agency and Southern Water are subject to their own Habitats Regulations duties, both under Regulation 9 when exercising their statutory functions and under Regulation 63 as competent authorities when approving plans or projects. There is no allegation from any party that either body is in breach of their statutory obligations.

7.14 In response to Natural England's concerns about potential effects of groundwater abstraction at Hardham, the Appellant notes that the Environment Agency is undertaking a Sustainability Review of the licence. The aim of this is to establish what, if any, groundwater abstraction can be excluded from a likelihood of adverse effects on the integrity of the sites. The Sustainability Review will report in 2025 and inform what, if any, exercise of powers under s.52 of the Water Resources Act 1991 is required in relation to the abstraction licence at Hardham. Possible outcomes are revocation of the licence, amendment of it, of that it will remain unamended.

7.15 Until the outcome of the Sustainability Review is known, the Environment Agency and Southern Water accept that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having an effect. This is evidenced by the Environment Agency and Southern Water correspondence at Appendix B and C of Mr Aitkins proof for the Appellant [CD10.1 02a]. Consequently, at least until the review reports, the Environment Agency has secured a voluntary commitment from Southern Water to reduce the groundwater abstraction at Hardham from around 12 ml/d (millions of litres per day) average to 5M l/d, extending to at least the completion of the Sustainability Review in 2025[13].

Law and policy

7.16 It is the Appellant's view that the correct application of the law and policy is not materially in dispute. A summary of the key legislation is at Section 2 of the Shadow HRA Addendum [CD1 1.03] and at Section 4 of their witness, Mr Aitkins's proof [CD10.1 02].

[11] page v, Part C Report
[12] page iv, Ibid
[13] see Southern Water's letter of 7 July 2023, at Appendix C of [CD10 1.02a]

7.17 In relation to Regulation 63 of the Habitats Regulations, where an appropriate assessment is required, it must be undertaken in respect of the development's impacts both alone and in combination with other plans and projects. For the assessment to be favourable, adverse impacts on the integrity of the protected site must be able to be excluded on a test of certainty 'beyond reasonable scientific doubt'. A competent authority can only approve a plan or project where that test is met. This is in the absence of an overriding public interest argument (IROPI), which the Appellant says is not applicable here as it only applies in the absence of alternatives.

7.18 In relation to supply of potable water, s.37 of the Water Industry Act 1991 places Southern Water under a duty to supply water to the level demanded, regulated by bodies that include the Environment Agency. Sections 37A-37D of the same Act requires Southern Water to prepare and maintain a Water Resource Management Plan (WRMP) on a rolling 5 year basis to show how supply will be maintained. The current WRMP is from 2019 and the next will be in 2024.

7.19 Paragraph 6.3 of the Water Resources Planning Guidance [CD8 1.08] says that WRMP must not constrain planned growth. The Council's witness, Mr Kleiman, agreed in cross examination that the proposal constitutes planned growth.

7.20 Regulation 9 of the Habitats Regulations places Southern Water under a duty not to harm protected sites in the exercise of its statutory functions and the WRMP is itself subject to appropriate assessment under Regulation 63. Southern Water would be the competent authority for the WRMP 2024. It is the Appellant's case that this means that the supply of water identified to maintain projected supply must be from sources that can be excluded as having an adverse effect on protected sites.

7.21 In addition to being a regulator of the WRMP, the Environment Agency also grants abstraction licences under the Water Resources Act 1991. It may amend or revoke such licences under s.52 of that Act and such decisions are in themselves plans or projects and therefore subject to Reg 63 of the Habitats Regulations.

7.22 To summarise the position regarding the relevant 'competent authority' in different Regulation 63, Habitats Regulations situations. It is the Secretary of State in relation to the determination of this appeal, Southern Water for the consideration of the WRMP 2024, and the Environment Agency when deciding whether to grant, amend, or revoke the abstraction licence at Hardham.

7.23 Accordance with the development plan is an agreed matter in the SOCG [ID11] and the proposal benefits from the statutory presumption at S38(6) of the 1990 Act. Additionally, the proposal would promote water efficiency at 91 or 92 l/p/d. This could be secured by condition and accord with Policy 37 of the HDPF, which is 110 l/p/d. Emerging Local Plan policy does not attract material weight due to its early stage of preparation.

7.24 Subject to a favourable 'appropriate assessment', paragraph 188 of the Framework does not apply and the presumption in para. 11(c) would indicate that permission should be granted without delay.

7.25 Paragraph 20(b) of the Framework states that strategic policies should make sufficient provision for water supply. Paragraph 016 of the PPG[14] states that planning for the necessary water supply would normally be addressed through the authorities' strategic policies, which can be reflected in water companies' WRMPs and that water supply is therefore unlikely to be a consideration for most planning applications. It goes on to say that exceptions to this include large developments not identified in plans that are likely to require a large amount of water. Kilnwood Vale has been identified in the development plan since 2009 and assumed in the WRMP 2019. So it would not be an exception and water supply should not be a general consideration in this appeal.

7.26 Para 194 of the Framework reflects a well established principle that decision makers are entitled to assume that other regulatory regimes are operated appropriately in accordance with the statutory duties. *R (An Taisce)* [CD5 1.01] is advanced as authority for this point. The observation at paragraph 91 of *Sizewell C* [CD5 1.02] is said to provide back up for the proposition that, without doing so, the planning system would be reduced to a state of sclerosis.

7.27 In the Appellant's view, it is material in this case that the Environment Agency are under an obligation to consider Amendment or revocation of abstraction licences under Regulation 63 of the Habitats Regulations. It is also material that Southern Water are under an obligation to produce a WRMP which 'must not constrain growth' and be from sources that must be able to be excluded from causing harm in order to favourably conclude an appropriate assessment under Regulation 63. At all times both the Environment Agency and Southern Water must exercise their powers in accordance with the general duty under Regulation 9 of the Habitats Regulations.

7.28 The Secretary of State, in conducting an appropriate assessment on this case, both can and should assume the separate regulatory regimes are operated in accordance with their statutory duties.

7.29 The Appellant also advances that the precautionary principle incorporates the principle of proportionality. The EU guidance on the application of the precautionary principle in decision-making is relevant here, stating that '*Proportionality means tailoring measures to the chosen level of protection. Risk can rarely be reduced to zero'.* Further, *'Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists.'*[15]

[14] PPG - Water supply, wastewater and water quality - Paragraph: 016 Reference ID: 34-016-20140306
[15] see paragraphs 2.4.2-2.4.5 of [CD1 1.01]

The need for water neutrality

7.30 The Appellants position, which they say is agreed with the Council at the Inquiry and apparent from the correspondence with the Environment Agency and Southern Water, is that the pathway for potential harm to the Arun Valley site from a given development (alone or in combination) is an increase in groundwater abstraction at Hardham. Paragraph 11 of the Council's opening confirms this point [ID2] which says, *'Unless it can be demonstrated, with certainty, that occupations in 2025 (or at an earlier point in time) will not increase groundwater abstraction at Hardham, approval may not lawfully be granted.'*

7.31 Without this, there is no pathway and therefore no risk of development adding to the adverse impacts on the protected site. Natural England's insistence on demonstrating water neutrality (defined as no increase in water use) is a mischaracterisation of the issue. Instead, it should be sufficient to show that the development (alone and in combination) will not require an increase in groundwater abstraction from Hardham.

7.32 However, Natural England continue to base their position on an assumption that new development (this proposal included) with additional demand for potable water will lead to an increase in groundwater abstraction at Hardham. This assumption would only be correct if there were no alternative to serving new development other than from additional groundwater abstraction from Hardham. This is not the case in this appeal.

7.33 Consideration of the need for water neutrality can be divided into five sections.

- Whether demanding 'water neutrality' for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest.
- Whether groundwater abstraction at Hardham has increased since September 2021 in response to additional development.
- The extent of demand management savings programmed by Southern Water to reduce demand.
- Whether supply sources in the WRMP 2024 include groundwater abstraction at Hardham, at levels that cannot be excluded from the potential of harm to the integrity of the protected site.
- Whether there is evidence of adequate alternative sources which do not rely on increased groundwater abstraction at Hardham.

<u>Whether demanding 'water neutrality' for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest.</u>

7.34 The Appellant's answer to this is 'No'.

7.35 In support, they draw principally on evidence from their ecological expert, Mr Baxter. In the Appellant's view, the qualifying interest in the protected site is the Lesser Ramshorn Whirlpool Snail. This is a view that was not challenged by

anyone with any ecological expertise at the Inquiry.

7.36 The evidence supporting this is summarised from paragraph 3.2.5 in Mr Baxter's proof [CD10 1.04b], with a series of FAQs from Natural England from 2022 being a key document[16]. Specifically, the answer to question 4 "What evidence is there that wildlife in the Arun Valley is declining". The answer to this question in the FAQs is:

The SAC feature (Anisus vorticulus) has been reduced to a small population around a single ditch (in Oct 2021 survey) in Amberley Wild Brooks having been moderately widespread previously and has gone entirely from south of Pulborough Brooks where it was present, if uncommon, previously. This is a loss of up to three quarters of its former range within the SAC. This former range was a quarter of the species UK population. The SAC is therefore failing its conservation objectives for range and distribution and the species is at risk of going extinct on the site.

7.37 Mr Baxter's evidence sets out that the snail is dependent on ditches with good water quality and at Amberly Wild Brooks distribution of the snail is limited to one ditch on the eastern side of the site. Reporting work undertaken by Natural England from 2023[17] indicates that there are a range of other factors that might affect the snail and its distribution.

7.38 The conclusion the Appellant draws from the reporting work is that the overwhelming issues are ones of site management, water level management and the maintenance of sluice features, and water quality, including salinity, disturbance, and combined sewer overflow. These issues are all within the control either the landowner (the RSPB) or the Environment Agency.

7.39 Considering the issues at hand and given the costs of requiring water neutrality through SNOWS, in the view of the Appellant, a range of more proportionate responses may have been open to Natural England.

7.40 Firstly, they could have pressed for or even assisted the landowner and the Environment Agency to improve site management for the snails at Amberley Wild Brooks. The costs to developers associated with SNOWS cannot be said to be a proportionate response to mending the sluices.

7.41 Secondly, as the outflow of the sewerage treatment works is an issue for water quality, they could have pressed the Environment Agency to resolve that issue through the means of the discharge licence.

7.42 Finally, Natural England could have pressed the Environment Agency to order the temporary cessation of groundwater abstraction until a query over transmissibility rates had been resolved (i.e. March 2025).

[16] included at Appendix 9 of the Shadow HRA [CD1 1.01]
[17] extracts included in Appendix 2 of [CD10 1.04c] and referred to in paragraph 69- 74 of Appellant's closing [ID10]

7.43 The action that Natural England has taken on any of these perceived proportionate responses is unclear. In the Appellant's view, what is clearly not a proportionate response is what Natural England have done. The direct effect of the NE Position Statement has been to halt the grant of planning permission for new development across the whole WSZ, affecting three local authority areas. The consequences been devastating for the delivery of housing in an area of growth.

7.44 The Council can now only demonstrate a 2.9 year housing land supply, based on figures in their latest Authority Monitoring Report [CD4 1.04]. Mr Smith for the Council gave evidence at the Inquiry that some 2,400 dwellings are currently held up by this issue in Horsham alone. Kilnwood Vale is expected to continue to make an important contribution to housing supply in Horsham between 2023 and 2028, equating to 396 dwellings or 15% of housing land supply.

7.45 Based on current best knowledge using the assumptions in the Part C Report, the estimated cost of SNOWS is likely to be in the region of £2000 per dwelling, as set out by Mr Kleiman for the Council at the Inquiry in cross examination. The Appellant says that is a cost to affected developers in Horsham equating to circa £17 million to 2030. This figure will grow if Southern Water's demand management measures are not as effective as anticipated, and a greater deficit needs to be made up through offsetting.

7.46 Natural England's assumption is that increased development will necessitate increased groundwater abstraction at Hardham and that, until the sustainability review concludes in 2025, adverse impacts of groundwater abstraction at Hardham cannot be excluded. The Environment Agency considers that a proportionate response is to minimise groundwater abstraction at Hardham. Natural England's action is not proportionate, given what the Environment Agency has done and the alternative sources of water supply available.

<u>Whether groundwater abstraction at Hardham has increased since September 2021 in response to additional development.</u>

7.47 The Appellant's answer to this is 'No'.

7.48 In response to the concerns raised by Natural England, the Environment Agency commissioned the Sustainability Review of the Hardham licence that will report in March 2025. It also secured a commitment from Southern Water to minimise abstraction under the existing licence. This voluntary reduction has resulted in abstraction at Hardham falling to 40% of its September 2021 levels (i.e. circa 5 ml/d compared with circa 12 ml/d).

7.49 Correspondence from both the Environment Agency and Southern Water indicates that both parties are alive to possibility of the Sustainability Review concluding that the groundwater abstraction for Hardham needs to be revoked. The evidence for this can be found in the Environment Agency's letter of 13 January 2023 in Appendix B of Mr Aitken's proof for the Appellant [CD10 1.02a].

7.50 So there is currently, and will be, no link between increased development demand and increased groundwater abstraction at Hardham. It has already been reduced voluntarily and, it will be reduced further if necessary (potentially to zero). This is the case regardless of demand from development.

7.51 As such, there is no causal relationship between increased development and increased groundwater abstraction at Hardham. There is, therefore, no need for water neutrality across the WSZ.

7.52 Natural England's response to the Appeal is to decline to recognise Southern Water's minimisation commitment as mitigation as it is voluntary and not, therefore, secured [CD8 1.18]. The Council have adopted the same argument.

7.53 The Appellant's argument is that, if the voluntary undertaking were to be breached, the Environment Agency can use powers under s52 of the Water Resources Act 1991 to vary the abstraction licence at Hardham. Southern Water's letter of 7 July 2023[18] clearly recognising this by committing to minimise ground water abstraction at Hardham until at least the Sustainability Review of the licence.

7.54 As a result of the above, there is no need for water neutrality in addition.

<u>The extent of demand management savings programmed by Southern Water to reduce demand</u>

7.55 The Part C Report [CD8 1.14c] established water savings from demand management measures in the Southern Water WRMP 2019 (*referred to variably in the evidence as 'the Southern Water contribution')*. As a result, water demand of between around 6,000 and 8,000 dwellings could be offset by the measures to 2030. The basis for this calculation is summarised in the following paragraphs.

7.56 The Part C Report takes total projected growth across the WSZ to 2039[19] and translates that into additional water demand based on either a 110 litres per person per day (l/p/d) or 85 l/p/d assumption on water efficiency. It then represents that, over time, as a trajectory of predicted demand arising from projected new growth. This is represented graphically by the green and dotted red lines in Figure 5.1 (page 27) of the Part C Report (reproduced below).

[18] included at Appendix C of Mr Aiken's proof [CD10 1.02a]
[19] table 3.1, Part C Report

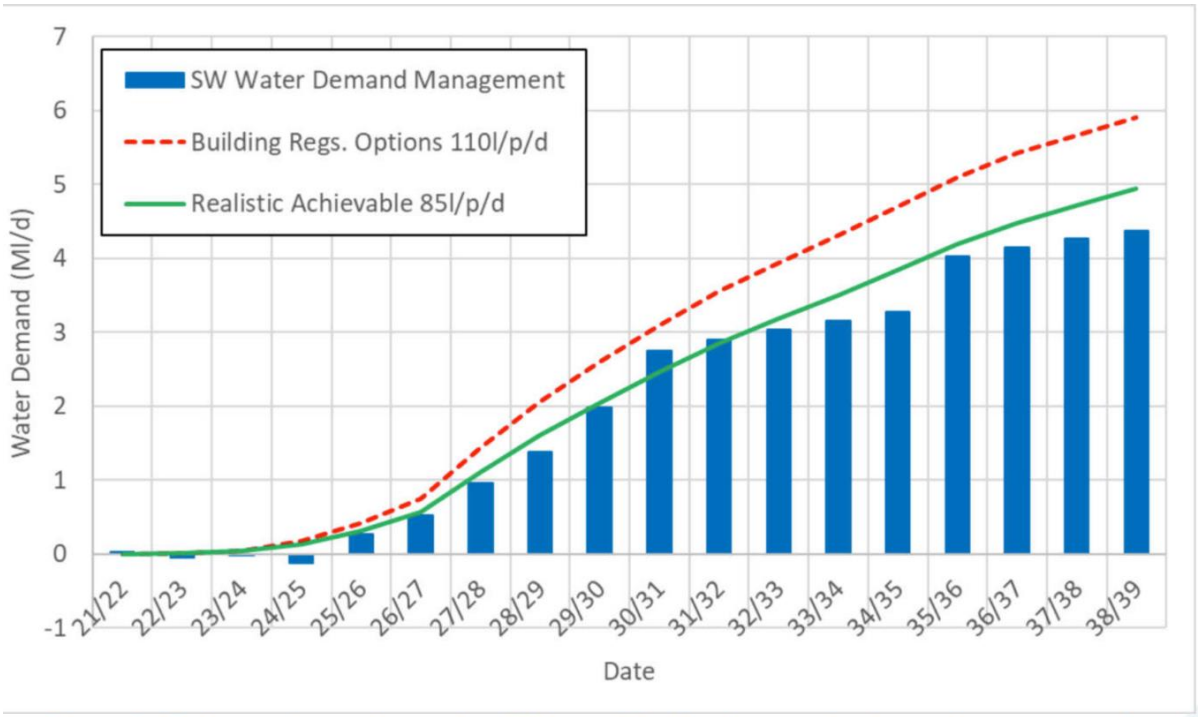


Figure 5.1 Balance of new demand vs SW's contribution from water demand management

7.57 The Part C Report then calculates savings in water demand that are derived from demand management measures set out in the WRMP 2019. This contribution is represented by the blue bars in Table 5.1. It produces an estimate that savings from demand management measures are equivalent to some 6,345-8,335 additional (i.e. not consented pre September 2021) dwellings capable of being delivered to 2030 before there is a need for off-setting[20].

7.58 Paragraph 180 of the Part C Report[21] is said to identify a 0.25 ml/d deficit between the demand arising in 2021-2030 and the projected savings from Southern Water's demand management measures.

7.59 As the 6,000 to 8,000 dwellings were additional to those with full planning permission prior to September 2021, the Appellant says that balance of the savings from the Southern Water contribution could be directed to need arising from as yet unconsented development (i.e. without full planning permission) in current local plans. The appeal scheme is one such development. Growth in emerging local plans would be additional to the Southern Water contribution and a matter for those plans and the emerging WRMP 2024.

7.60 The points above led the Appellant to make what they call a conceptual division of development needs into three categories, namely, (1) dwellings consented prior to September 2021; (2) dwellings planned for in the adopted local plans but without consent, which are planned for in the WRMP 2019; (3) additional emerging local plan allocations, to be planned for in the WRMP

[20] page viii, Ibid
[21] paragraph 180, Ibid

2024.

7.61 The Appellant's position is that the proposal firmly falls within the second category. As such, it can fairly utilise part of the 6,000-8,000 dwelling headroom identified in the Part C Report.

7.62 The Appellant notes that the Council sought to cast doubt in the Inquiry over the reliability of the predicted figures attributed to Southern Water's demand management measures in the Part C Report, and hence the 6,345-8,335 additional dwellings they would offset. They did so without bringing forward any alternative figures. Paying regard to the letter from the Environment Agency/Ofwat/Defra to Southern Water dated 20 October 2023[22], the Appellant accepts that it is not unreasonable to reduce the amount of savings assumed from demand management measures, although by how much is evidentially unclear.

7.63 Even if the 0.25 ml/d shortfall in the Part C Report turns out to be unrealistic, the total demand from new development without any savings from Southern Water savings is 0.42 ml/d at 2025 and 2.59 ml/d at 2030. These are figures that can be accommodated through alternative available sources of water supply, without having to resort to offsetting through water neutrality.

Whether supply sources in the WRMP 2024 include groundwater abstraction at Hardham, at levels that cannot be excluded from the potential of harm to the integrity of the protected site.

7.64 The Appellant's answer to this question is 'No'.

7.65 Groundwater abstraction currently accounts for some 14%[23] of total water supply in the WSZ, of which groundwater abstraction at Hardham is only a part. So around 86% of supply comes from sources other than groundwater abstraction.

7.66 Additional demand can, therefore, be met by demand management measures (including improving leakage rates) and/or greater utilisation of other sources, rather than increasing groundwater abstraction from Hardham. New development does not increase groundwater abstraction at Hardham.

7.67 The supply of potable water is a statutory undertaking, conducted by Southern Water and regulated by the Environment Agency. Southern Water is under a duty to supply the development needs projected by the local authorities and show how it will do that through its WRMP. The WRMP process is repeated on a five-yearly basis, with annual review, and an expectation that it 'must not constrain growth'.

[22] Appendix A of [CD10 1.02a]

7.68 Each WRMP must be accompanied by an HRA demonstrating that it would not harm protected sites. Only a favourable appropriate assessment establishing this would allow a WRMP to be published. So the forthcoming WRMP 2024 could not be published if it included supply from groundwater abstraction from Hardham that had not been subject to a favourable appropriate assessment.

7.69 The WRMP 2024, and accompanying HRA, is likely to be published ahead of the reporting of the Sustainability Review commissioned by the Environment Agency into the Hardham abstraction licence. The WRMP 2024 will need to account for a range of possibilities in relation Hardham. This includes how projected development needs can be accommodated if there is no groundwater abstraction from Hardham, as it the Sustainability Review has led to the abstraction licence being revoked.

7.70 The Appellant says that, as the outcome of the Sustainability Review will not be known until 2025, and adverse impacts cannot be excluded, the WRMP 2024 HRA would be unable to support a favourable outcome based on reliance on any groundwater abstraction from Hardham. Indeed, there is evidence within drafts of the WRMP 2024 confirming that alternative scenarios excluding Hardham abstraction are being looked at[24].

7.71 For these reasons, the presumed link between increased demand from development and increased groundwater abstraction at Hardham is a false one. Water neutrality is not required.

Whether there is evidence of adequate alternative sources which do not rely on increased groundwater abstraction at Hardham.

7.72 It is not necessary for the Appellants to provide evidence as to water supply sources which do not lead to risk to protected sites. The WRMP legislation is set up to prevent that and the Secretary of State is both entitled to assume that that statutory regime will operate appropriately.

7.73 Notwithstanding this, there are alternative sources available to Southern Water to meet all projected development needs without reliance on any demand management measures. This is the case even if groundwater abstraction at Hardham were to cease, which the Appellant accepts must be the working assumption until the Sustainability Review reports in 2025.

7.74 The Part C Report focuses on the period to 2030 as showing a potential deficit between projected demand and expected Southern Water savings, after which Southern Water's supply infrastructure is expected to be in place.

7.75 The Appellant's evidence to the Inquiry on alternative sources of supply that do not rely on Hardham focuses on three sources; 1. Weir Wood reservoir, 2. SES (Sutton and East Surrey) Water import, 3. Portsmouth Water import.

[24] see references at paragraph 114 of the Appellant's closing [ID10]

7.76 Weir Wood reservoir is required to be back in service by 31st March 2025 by statutory notice served on Southern Water by the Drinking Water Inspectorate under Reg 28(4) of the Water Supply Regulations 2016 [ID6]. Failure to comply with the notice engages enforcement action. So the Secretary of State can have comfort that Wier Wood will be operational by March 2025. The reservoir will have a peak deployable output of 13 ml/d.

7.77 The Appellant's assumptions are that projected development needs at 2025 are 0.42 ml/d, without any allowance for Southern Water demand management savings. If revocation of the Hardham licence is assumed, a further 5 ml/d would need to be found to make up for the loss in existing supply. This produces a worst case scenario deficit of 5.42 ml/d, rising to 7.59 ml/d at 2030.

7.78 In light of the above, Weir Wood alone obviates the need for any reliance by Southern Water on Hardham groundwater abstraction. This source will be available no later than 31 March 2025. The development will not be occupied until 2025. The Appellant is content for a condition to be imposed preventing occupations of the proposal until 31 March 2025, although they do not believe this to be necessary due principally to the low likelihood of drought occurring between January and March 2025 triggering a need for abstraction from Hardham.

7.79 The two other sources of alternative supply (SES and/or Portsmouth) import are available to Southern Water now. In the case of SES, 2.7 ml/d is available for bulk import. For Portsmouth Water a full usage of 15 ml/d is available, adding a resource of 9 ml/d on top of current usage. Taken together the two available bulk import sources make an additional 11.7 ml/d available to Southern Water. Adding in the 13 ml/d from Weir Wood, which gives a total available supply of 24.7 ml/d. This exceeds the Appellant's worst case scenario deficit of 5.42 ml/d.

7.80 These alternative sources show that there is more than ample supply that would be an alternative water supply to increasing, or relying on, groundwater abstraction at Hardham. The adequacy of alternative sources was tested during the 2022 drought where groundwater abstraction at Hardham was not increased. Since then, use of groundwater at Hardham has been taken out of drought orders. So future severe droughts will not lead to an increase in groundwater abstraction from Hardham.

7.81 Consequently, the Natural England position that increased development, unless water neutral, would increase groundwater abstraction at Hardham is false. Natural England have not considered these supply side factors at all and neither does the strategic approach in the Part C report, which is concerned with establishing levels of offsetting in order to achieve no increase in water use.

Cogent and compelling reasons not to follow Natural E**ngland's** advice

7.82 The Appellant acknowledges that Natural England is the Government's statutory advisor on nature conservation matters and, ordinarily, a decision-maker will give substantial weight to its advice. However, a decision maker is not bound by that advice and the Courts have been careful to preserve the discretion of the decision maker. The standard of reasoning needed to depart from advice is discussed in two legal authorities, *Wyatt*[25] ('cogent reasons') and *Shadwell*[26] ('cogent and compelling reasons').

7.83 In addition to the five sections on the need for water neutrality set out above, the Appellant provides two further reasons that are also said to be cogent and compelling.

7.84 Firstly, that neither the Environment Agency, as the regulator for potable water, nor Southern Water, as the statutory undertaker with the duty to supply water to development without causing harm to protected sites, have objected to the application on the grounds that it is necessary to demonstrate water neutrality. If either body felt that, without water neutrality, potable water could not be supplied to the development (alone or in combination) without increasing groundwater abstraction at Hardham they would say so.

7.85 Secondly, that Natural England did not appear at the Inquiry to defend their position and be questioned on it. This, in the Appellant's view, left the Council seeking to defend a position on a topic that, on the evidence of their own witness, lies outside of their knowledge and expertise. In the Appellant's view, Natural England's position is based on a mischaracterisation of the issue and should be given limited weight.

7.86 In overall terms, it is submitted that Natural England has got the position on the need for water neutrality badly wrong. It is accepted that, pending the outcome of the Environment Agency's Sustainability Review, there is no known safe level of groundwater abstraction at Hardham. However, it is illogical to jump from that proposition to one that, for new development to be acceptable in Habitats Regulations terms, it must be able to demonstrate that it is water neutral in the sense of not increasing water usage. Natural England have therefore mischaracterised the issue and the weight of their advice is therefore reduced.

7.87 More widely, Natural England's position has been accepted uncritically by Local Planning Authorities. It has given rise to SNOWS, an offsetting scheme that is not necessary, and has had devastating effect on housing delivery in a time of a national and regional housing crisis.

7.88 There is no need for the proposal to demonstrate water neutrality and consent should be granted in accordance with Paragraph 11 (c) of the Framework.

[25] para. 9(4) of [CD5 1.05]
[26] mentioned at para 2.3.1 of [CD1 1.02]

8. The case for the Council

8.1 The case for the Council is set out in full in the evidence before the Inquiry[27]. It is important that the evidence, together with the application and supplementary material, is considered in full to gain a proper understanding of the case. To assist, what follows is a summary based on the case presented in closing [ID9].

Introduction

8.2 The Council believes that the fundamental question for the Secretary of State is whether the use of water in the WSZ after the development is in place, will be the same or lower than before. An answer of anything less than certainty beyond reasonable scientific doubt that water use at the point of occupation will be the same or lower than before, leads to a conclusion that permission must be refused. To comply with Regulation 63(5) of the Habitats Regulations, the Secretary of State must be able to ascertain that the proposal will not add to the existing adverse effect identified in the NE Position Statement. Unless this test is met, approval cannot lawfully be granted.

8.3 No distinction can be made between groundwater abstraction at Hardham and water use in the WSZ as the two are inextricably combined. The Appellant's stance that the Position Statement and Part C Report are wrong because they fail to deal with the issue at hand - which is groundwater abstraction from Hardham, rather than water use in the supply zone - goes nowhere because groundwater from Hardham is included in the WSZ. The NE Position Statement confirms this, and is not disputed by the Appellant:

> *The [WSZ] includes supplies from a groundwater abstraction which cannot, with certainty, conclude no adverse effect on the integrity of [the Arun Valley Sites]. [underlined is the Council's emphasis]*

8.4 So, if water use in the supply zone increases, so can ground water abstraction from Hardham.

8.5 What matters for the purposes of carrying out an appropriate assessment is the effect of the development on the protected sites, in reality. Unless and until the Environment Agency revokes Southern Water's Hardham abstraction licence, there is no way of telling if water used in the supply zone comes from Hardham (so contributing to the existing adverse effect) or some other source. There is, equally, no mechanism to ensure new development only takes water from non-groundwater sources. There is no separate tap labelled 'Hardham'.

8.6 The Part C Report is designed to resolve the existing significant adverse effects (the drying out of the Arun Valley sites) which may be caused by groundwater abstraction at Hardham. It provides the basis for a solution to that problem, by outlining a way development can avoid increasing water use in the WSZ.

[27] including [CD7 1.02a-i], [CD10 1.05a-e], [ID2], [ID9]

8.7 The only way of making sure water use in the WSZ isn't increased, is by not increasing use of water. This exactly as advised by Natural England, as the Part C Report aims to facilitate, and as SNOWS will operate to achieve.

8.8 If the Appellant is right on either of the two following points, a positive appropriate assessment can be concluded:

a) it is certain that the Environment Agency will have revoked the Hardham groundwater abstraction licence (or amended the license to an agreed sustainable level of abstraction) by the time the development occupies, or

b) it is certain that the development will not increase water use in the WSZ when it occupies (on its own or in combination with other developments).

8.9 If the Appellant is wrong a condition must be imposed which prevents additional water use in the WSZ until mitigation is in place. In this case, the only certain mitigation is via payment into SNOWS because the Appellant has not sought to mitigate via a bespoke solution.

Legal principles

8.10 The legal principles governing the appropriate assessment process are well known and summarised at Paragraph 9 of *Wyatt [2023]* [CD5 1.05].

8.11 The Appellant's argument that the Secretary of State can conclude a positive appropriate assessment because they are entitled to assume that other regulatory regimes will work, is wrong in law for three reasons.

8.12 Firstly, Paragraph 194 of the Framework does not apply as the proposal does not concern ground conditions or pollution. Even if it did apply, it would not displace the legal requirement to carry out an appropriate assessment under the Habitats Regulations or in any way alter the relevant legal tests.

8.13 Secondly, Paragraph 20(b) of the Framework and Paragraph 016 of the PPG[28] cannot be relied upon as water supply is not a "general consideration" in this appeal. The appeal is not about whether Southern Water can supply sufficient water to the development, the question is whether the development will increase the use of water in the WSZ and thereby add to an existing adverse effect at the Arun Valley sites.

8.14 Finally, the Environment Agency and Southern Water's non-objection to the proposal cannot be relied upon. The nature conservation impacts of the proposal are outside of their remit. If there were a problem with the supply of water to the development, then no doubt they would object.

8.15 The Appellant contends that the Environment Agency, by allowing Southern Water to continue abstracting ground water from Hardham at a minimised rate pending the outcome of the Sustainability Review, is fulfilling its duties under the Habitats Regulations. In the Council's view, this fails to grapple with the

[28] PPG - Water supply, wastewater and water quality - Paragraph: 016 Reference ID: 34-016-20140306

point that those bodies (*Southern Water and Environment Agency)* have two different duties under the Habitats Regulations of reliance to this appeal, depending on which function they are carrying out.

8.16 There is the general duty under Regulation 9(3) to have regard to the Habitats Directives. This is discussed at Paragraph 85-87 of *Harris [2023]* [ID7] and applies to the exercise of all their functions. Then there is the duty under Regulation 63(5), which applies only when they are acting as the competent authority deciding whether or not to grant consent for a plan or project. The duties are not interchangeable.

8.17 By allowing Southern Water to continue groundwater abstraction at a minimised rate pending the Sustainability Review, the Environment Agency is fulfilling its general duty under Regulation 9(3). This is not the same as discharging its duties to secure protection of the sites.

8.18 The Environment Agency's letter to the Appellant[29] makes this clear when it says:

'As we stated in our letter dated 6 June 2022 and confirmed in our letter dated 13 January 2023, Southern Water's voluntary reduction in abstraction does not discharge the Environment Agency's duties under the Habitats Regulations'…'We would discharge our duties securing the protection of the SAC by making any necessary changes to the abstraction licence. This would be done following the outcome of the investigation'. (Underlined is the Council's emphasis).

8.19 So the Environment Agency's compliance with its duty under Regulation 9(3) of the Habitats Regulations does not provide the requisite certainty for the Secretary of State's appropriate assessment under Regulation 63(5).

8.20 Southern Water has a statutory responsibility to supply water, but it is not an absolute duty. Section 54 Water Industry Act 1991 allows consumers to claim compensation if the supply fails. But, under Section 54(2) *"it shall be a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach".*

8.21 More importantly, the Water Industry Act 1991 does not oblige the undertaker to provide sustainable water. That is achieved at water resource planning level by a Habitats Regulations Assessment/appropriate assessment of the WRMP, with project level assessments where required.

8.22 It does not follow that a positive appropriate assessment at the WRMP level means that it can simply be assumed none of the projects under that plan will result in a significant adverse effect. The Council's draws attention of Paragraph 008 of the PPG on the relationship between strategic level appropriate assessments and projects[30].

[29] dated 11 July 2023 - Appendix B [CD10 1.02]

[30] PPG – Appropriate assessment - 008 Reference ID: 65-008-20190722

8.23 It is also relevant that the competent authority (which for the WRMP will be Southern Water) may nevertheless approve a plan which fails the appropriate assessment. The process allows for exceptions, if three legal tests are met that are abbreviated to IROPI[31]. That is another reason why the legal basis of the Appellant's contention that WRMP 2024 must necessarily be 'zero Hardham' is wrong.

8.24 The Appellant's evidence that the NE Position Statement and the consequent moratorium on new development is a massively disproportionate response is said by the Council to be wrong in law. The Councils refers to Paragraph 2.2.7 of Mr Baxter's proof for the Appellant [CD10 1.04b] which says *'In the absence of reasonable certainty, the assessment should proceed in line with the precautionary principle. In this regard guidance advises that "measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists.'*

8.25 The guidance supporting this statement[32] is a general communication from the European Commission on the precautionary principle covering every area in which it might apply. It does not concern appropriate assessment.

8.26 It is the Council's case that the correct approach to proportionality is set out in the judgment of the Court of Appeal at Paragraph 9(7) of *Wyatt [2023]* [CD5 1.05]. This makes clear that, in the appropriate assessment context, proportionality applies to the test of certainty in the appropriate assessment, rather than to the measures taken. The measure in this case is the requirement that new development in the WSZ be water neutral. If an appropriate assessment cannot conclude beyond reasonable scientific and practical doubt (short of absolute certainty) that the development will not increase water use in the WSZ, then the competent authority's view on the proportionality or otherwise of the measure is legally irrelevant.

Essential matters in dispute

8.27 The Council sets out five matters that, in their view, are the essential ones in dispute:

- Current use of Hardham ground water extraction
- Drought and the draft WRMP 2024
- What the draft WRMP 2024 fully accommodates
- Other sources of supply (extra water)
- Revocation of the Hardham licence

[31] (1)There are no feasible alternative solutions that would be less damaging or avoid damage to the site, (2)The proposal needs to be carried out for imperative reasons of overriding public interest, and (3)The necessary compensatory measures can be secured. (See guidance on derogations at https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site)

[32] Commission of the European Communities (2.2.200) 'Communication from the Commission on the precautionary principle'(Document not before the Inquiry).

Current use of Hardham ground water extraction

8.28 Ground water abstraction at Hardham continues, albeit at a voluntarily minimised abstraction rate of 5 ml/d, which operates as a rolling average rather than a cap. Southern Water have explicitly stated that they are unable to commit either to the cessation or minimisation of Hardham ground water use. The reasons for this relate to drought conditions, as explained in Southern Water's letter to the Appellant[33]:

"Our position is that in most water resource conditions Southern Water has a sufficient supply available to meet demand in the Sussex North WSZ and that we have some flexibility in where water is sourced from, thereby enabling the commitment to reduced abstraction from the Hardham groundwater source while the sustainability study is ongoing.

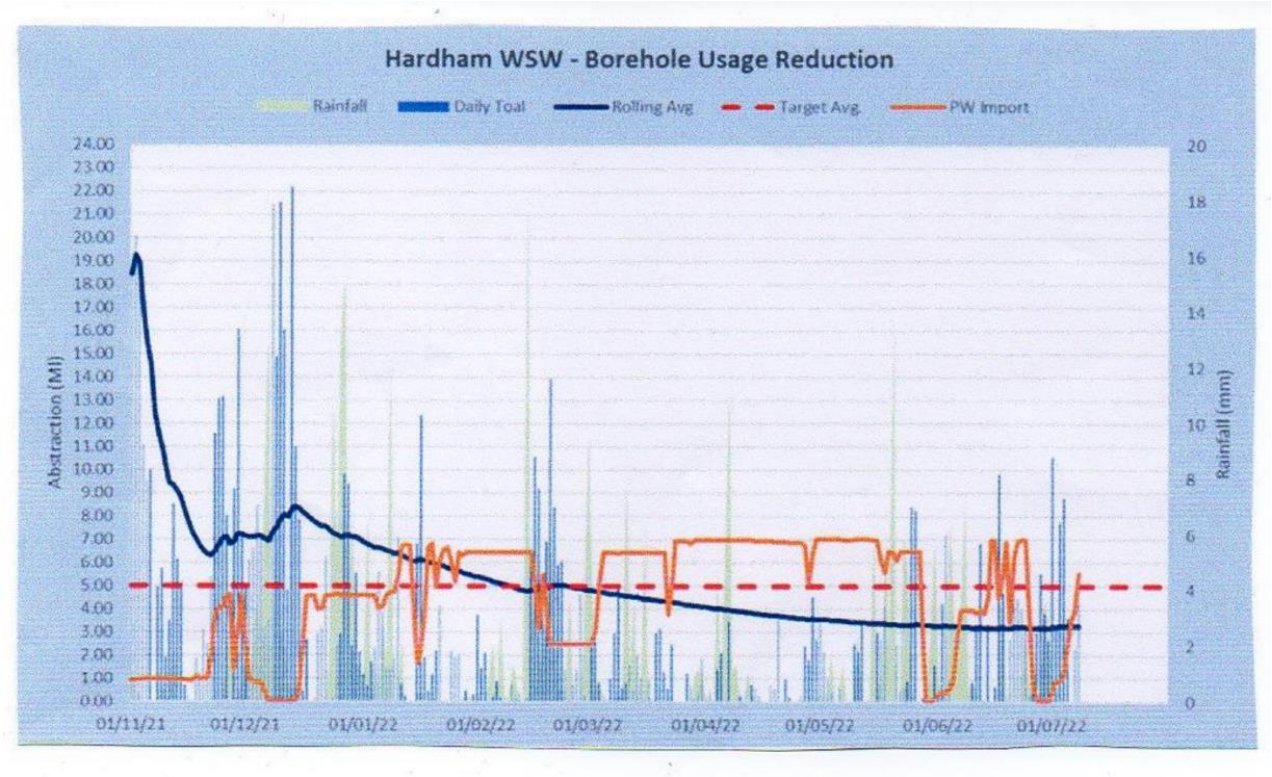
However, when dry periods are experienced and these become more severe, the output of several other sources in Sussex North WSZ become constrained by water availability, placing more reliance on the Hardham groundwater source. In the scenario of a severe drought or major operational supply outage we would potentially need to increase our groundwater abstraction to a higher rolling average, including potentially up to the full licensed abstraction limit for short periods, to ensure the expected supply to our existing customers in the Sussex North WSZ. For this reason, we would not be in a position to commit to a cessation of abstraction from Hardham or to a fixed limit of 5 ml/d [..]as quoted in your letter of June 5."

8.29 The Council point to figures from the summer 2022 Hardham groundwater abstraction volumes[34] as showing why Southern Water cannot make this commitment. They are on page 172 of the Appellant's Shadow HRA Addendum [CD1 1.02] and show that, in July and August 2022, abstraction at Hardham reached volumes in excess of the voluntary 5 ml/d. The Appellant's argument that Southern Water's voluntary minimisation was stress tested during the 2022 drought is proved wrong by this data and Southern Water's letter to the Appellant quoted above.

8.30 It may be that over the whole period from 6 June 2022 to 31 August 2022 the daily average abstraction rate was 5.45 ml/d, but this average is meaningless. The data shows that over the peak drought period (the four weeks from 14 July to 14 August) abstraction increased above the minimised rate, nearly every day, and often by significant volumes to more than double the 5 ml/d minimised rate. During oral evidence at the Inquiry, Mr Aitken for the Appellant said that the spikes in abstraction at Hardham shown in the data could be signal tests. The Council describes this as pure supposition.

[33] letter dated 7 July 2023, at Appendix C of [CD10 1.02a]

8.31 Figure 5.1 at page 19 of Appellant's Shadow HRA Addendum is reproduced below. It shows the 5 ml/d voluntary minimised rate (red dotted line), daily totals at Hardham (blue bar), the rolling average (black line), and the level of Portsmouth Water import drawn upon (orange line). It is the Council's case that this chart precedes the peak drought period by stopping at 1 July 2022. So there is no data about the availability of import from Portsmouth Water during the 2022 drought period to substantiate the Appellant's claim that plenty of alternative supply is available, even in drought conditions.



Drought and the draft WRMP 2024

8.32 The Council accepts that the evidence demonstrates that, under normal conditions, Southern Water can commit to reduced groundwater abstraction from Hardham while the Sustainability Review is ongoing. However, in periods of drought, it cannot. Drought is important because it exacerbates the drying out of the protected sites. The evidence for this point can be found in the Amberley Wild Brooks SSSI adaptation report at Appendix AB2 of Mr Baxter's proof for the Appellant [CD10 1.04c[35]].

8.33 This undermines the Appellant's assertion that the WRMP 2024 must assume a 'zero Hardham' baseline to comply with the Habitats Regulations, and so the Secretary of State can rely on the eventual appropriate assessment for the WRMP 2024. The Statement of Responses for the draft WRMP 2024[36] also does not evidence that the Environment Agency, Natural England or OfWat are

[35] page 14
[36] [CD8 1.04]

asking for the WRMP 2024 to be zero Hardham from day 1 to conclude a positive HRA. The Appellant's have not pointed to any other evidence on this matter.

8.34 Further, the Appellant's points on this are wrong when the Water Resources Planning Guidance [CD8 1.08] is considered. Section 5 of the guidance says that, in developing their supply forecasts, companies in England must ensure their baseline supplies are available in a 0.2% annual chance of failure caused by drought (described as a '1 in 500 year' drought). Section 9.5.1 of the guidance entitled 'lessons from 2022 drought' also states:

'Your plan should clearly include an appendix to demonstrate how experiences from 2022 have been considered. You should set out any lessons you have identified through the 2022 prolonged dry weather and drought event and actions you are taking. This should include changes you have made to your plan as a result and further work you are planning to undertake.'

8.35 The summer of 2022 Hardham abstraction data[37] shows that one of the lessons of that summer, which Southern Water will have to account for in WRMP 2024, is that ground water abstraction from Hardham was needed to maintain supply.

8.36 If Southern Water's demand reduction measures are not taken into account in estimating the volume of water required by new development WSZ (shown by removing the blue columns from the graph at paragraph 7.55 of this report), the required volume ranges from around 0.25 ml/d in 2025 and 2.0 to 2.75 ml/d in 2029-2030. To show that the WRMP 2024 will be zero Hardham, the Appellant needs to show that additional alternative available supply of between 17.58 ml/d and 20.28 ml/d will certainly be available[38]. For the reasons set out in response to the 'other sources of supply' argument (below), the Council says that the Appellant cannot.

8.37 The Council accepts that, if Southern Water's demand reduction measures are accounted for, the required volume of water to supply new development reduces. However, given Southern Water's poor leakage reduction record so far, as evidenced by the letter to them from the Environment Agency/OfWat/Defra of 20 October 2023 [CD10 1.02[39]], there is no certainty that the required volume would be reduced, and if so by how much.

8.38 The Council asserts that the question for the Secretary of State is when will the WRMP 2024 be 'zero Hardham'. This cannot be answered with any confidence, let alone certainty.

[37] page 172 of [CD1 1.02]
[38] the Council calculates these figures by taking the maximum abstraction from Hardham figure of 17.53 ml/d from the 2022 drought data[38] and adding in the 0.25 and 2.75 ml/d respectively.
[39] Appendix C

What the draft WRMP 2024 fully accommodates

8.39 It is the Council's case that the Appellant is wrong to say that the draft WRMP 2024 has 'identified the planned sustainability reductions and included measures to fully accommodate these whilst still meeting its duty to supply consumers'[40]. It has not. It has simply considered a range of potential futures, and:

'[looked at] a potential scenario where Pulborough groundwater source is no longer available, in order to assess alternative options that could be used to maintain the supply-demand balance. It is possible the water neutrality strategy will be required throughout the time frame covered by affected Local Plans, up to 2037.....We are planning to address the supply-demand balance in SNZ as quickly as possible. Our WRMP 2019 included the Littlehampton water recycling scheme to provide benefit from 2027– 28. This could create sufficient supply demand headroom to stop any reliance on the Pulborough groundwater source.' (Underline is the Council's emphasis)[41].

8.40 'Could create' is not the same as 'will create', let alone 'has already created' to satisfy the appropriate assessment for this proposal now.

8.41 It is clear from the draft HRA for the draft WRMP 2024 [CD8 1.21[42]] that the only required licence amendments are:

'factored in to the supply-deficit calculations [..] and the EA will have confirmed that these are valid for the planning period when the WRMP modelling is undertaken. The existing consents regime (taking into account any required sustainability reductions) is therefore the baseline and, by extension, the HRA of the WRMP necessarily focuses ono the additional effects introduced by the WRMP options and does not (and cannot) reassess or reconfirm the existing consents regime'.

8.42 This is crucial as there is presently no required licence amendment at Hardham. There is a voluntary minimisation, but the Environment Agency does not enforce it and there is no legal mechanism for them to do so. If a licence amendment is required this will only be known after the sustainability review concludes, which is expected sometime in 2025. Only after that, and only if the Environment Agency amends the licence, will a zero or reduced Hardham scenario become part of the draft WRMP 2024 baseline.

[40] paragraph 6.11 of CD10 1.02a,
[41] paragraph 6.13, Ibid
[42] page 38 of Annex 20

8.43 So, required reductions to zero are not allowed for within draft WRMP 2024. Reductions, and the means to achieve them, are under consideration but they are not part of the draft WRMP 2024 baseline. There is significant uncertainty about both the date and the achievability of a zero Hardham scenario, as reflected in the Environment Agency's comment on 'Pulborough Groundwater licence reductions' dated August 2023[43]:

'In Southern Water's dWRMP24, the company has included a 'worst case' scenario where they consider the groundwater licence may be lost beyond 2040. However it has not clearly shown that it has considered the range of possible outcomes that could result from the sustainability investigation, when these might happen, or what actions would need to be taken to enable these to be implemented.' (Underline is the Council's emphasis).

8.44 The Environment Agency's position following this comment is there is a *'lack of appropriate options to manage potential outcomes of the licence review'*. There has been no update on the Environment Agency's position since.

8.45 Southern Water's response from the same document, which again is the latest position, is that they:

'will consider additional environmental destination sensitivity scenarios to explore the potential risk of earlier licence changes [i.e. prior to 2040] and are "testing different potential outcomes from the Pulborough licence sustainability investigation through some additional sensitivity testing [...] which would include the risk of earlier reductions or revocation of the Pulborough groundwater abstraction licence'.

8.46 The Council's position on this is that it cannot rationally be concluded that Southern Water is doing anything more than considering and investigating solutions to the potential future impact of a zero or reduced Hardham ground water scenario. Nor is there any evidence to support the Appellant's position that Southern Water consider there is 'plenty of water in the system' already, so a zero or reduced Hardham scenario can easily be accommodated.

Other sources of supply (extra water)

8.47 The 'extra water' the Appellant relies on is principally bulk supply import from Portsmouth Water and SES Water, and Weir Wood Reservoir coming back in to service.

8.48 The draft WRMP 2024 technical report [CD8 1.02] evidences the uncertainty around when these supply sources will be available. Table 7.3[44] (Supply side options – Central Area) shows the "earliest utilisation" of Portsmouth Water import at 15 ml/d to be 2026, and import from SES (volume unspecified) to be 2031.

[43] page 15, question response R2.1 [CD8 1.04]
[44] pages 152-153

8.49 In the Council's view, the Appellant did not address this evidence during the Inquiry. In re-examination, the Council say that Mr Aitken for the Appellant asserted that SW are 'already using' these supplies. Even if that is the case, the technical report addresses the supply assumptions which feed into the draft WRMP 2024 baseline. For the Appellant to argue successfully that the bulk supplies will offset the additional water from its development (in combination with other developments) once the WRMP 2024 is finalised, they must deal with the point that the technical report shows they won't be utilised until after the Appellant wants to occupy.

8.50 There is also uncertainty about what volume of water will be available via bulk supply. Portsmouth Water is under a contract with Southern Water to supply a minimum 'sweetening flow'[45] of 1 ml/d. If Southern Water wants more than that it has to ask for it in line with a commercial contract with Portsmouth Water that is not in the public domain. The Statement of Responses to the draft WRMP 2024 [CD8 1.04[46]] says:

'We have discussed this with Portsmouth Water and agreed that the bulk supply to Pulborough will remain at 15 ml/d for WRMP24 and have agreed with Portsmouth Water that we should both assume a volume of 15 ml/d. Whilst there are risks that the water may not be fully available in extreme droughts, it is the intention of the bulk supply agreement to provide this volume in droughts up to 1-in-200 year drought severity'.

8.51 There is uncertainty in the position and, in the absence of the contract, the Secretary of State cannot be certain that Portsmouth Water will transfer 15 ml/d to Southern Water, or when. Further uncertainty arises from the fact that neither the Council, nor Natural England, nor the Environment Agency, can enforce its terms. Contracts can be cancelled – the Council asserts that the bulk supply contract from Hampshire Water was cancelled.

8.52 As to bulk supply from SES water, Southern Water say in the Statement of Responses[47] that:

'We have agreed in principle with SES Water to extend the current arrangement we have with them in Sussex North WSZ to 2031 and increase DO benefit from the current 1.3 ml/d to 4 ml/d. This has now been incorporated in our revised dWRMP24.'

8.53 According to the Councill, there is no indication that the SES bulk supply 'cancels out' the potential reduction or loss of the Hardham abstraction licence, and there is uncertainty about the start date. If it did, there would be no need for Southern Water to 'test different potential outcomes' to resolve the problem.

[45] clarified in the Inquiry as an amount of water passed through pipes at low volume to keep them in good working order when not in full use.
[46] page 9
[47] page 8

8.54 The Council does not agree that Weir Wood will necessarily supply 13 ml/d in 2025. The predicted supply volumes in the Statement of Responses[48] are as follows:

'[Weir Wood] is scheduled to provide the following PDO benefit over the next five years:

2023-24: 0 ml/d
2024-25: TBC
2025-26: 13 ml/d
2026-27: 13 ml/d
2027-28: 13 ml/d'

8.55 If the development occupies in March 2025, there is no way of telling whether the volume is TBC, or 13 ml/d, or somewhere in between.

8.56 It also appears that not all of Weir Wood's water will remain available in the WSZ. Table 4.1 of the draft WRMP Technical report [CD 8 1.02[49]] shows that Southern Water are contracted to supply South East Water with 5.4 ml/d of potable water from Weir Wood until 2031.

8.57 The delay in delivering the Littlehampton Water Treatment Works recycling scheme adds further uncertainty. In the Statement of Responses[50], Southern Water say:

'We will need to further consider the potential timing of any licence reductions arising from the Pulborough sustainability study as it is likely that, owing to the delay in delivery of Littlehampton WTW recycling option, we will not be able to accommodate loss of groundwater licence without incurring a supply-demand deficit. We will discuss this further with the EA in the development of our Environmental Ambition for our revised dWRMP24'

and

'We will consider additional environmental destination sensitivity scenarios to explore the potential risk of earlier licence changes. However, the delay to our Littlehampton WTW recycling scheme is likely to impact the extent to which we can accommodate earlier licence reductions (before 2030) in Sussex North WSZ'.

8.58 This indicates that, at August 2023, the Littlehampton delay problem had not been resolved and there is no evidence that it has been resolved since. Further information will not be available until the revised draft WRMP 2024, which is not yet published.

[48] page 7
[49] pdf page 497 (Document page 35)
[50] pdf pages 14 and 15 [CD8 1.04]

8.59 Contrary to the Appellant's case, the draft WRMP 2024 has not accounted for a 'zero Hardham' scenario. If that were true, then Southern Water would not identify the delay of Littlehampton Water Treatment Works as impacting on the extent to which it can accommodate licence reductions before 2030.[51]

8.60 The WRMP 2024 has not accounted for anything as the plan does not exist yet. Even on the most optimistic forecasts from Southern Water it will not do so until May 2025. At this stage, options are being considered and Southern Water will have to make decisions prior to finalising the WRMP 2024.

8.61 At the last drought event in 2022, groundwater abstraction from Hardham increased so that Southern Water could supply customers. As this proposal is being determined now, based on the available information, no decision maker could be confident that water would not be drawn from Hardham ground water for new development.

8.62 In summary, none of the appellant's evidence answers with confidence, let alone certainty, the essential question of when a zero Hardham scenario will exist. The only way of ensuring that the proposal will not increase the use of water within the supply zone is via SNOWS, or a bespoke water neutrality scheme.

Revocation of Hardham licence

8.63 The Environment Agency's Sustainability Review into the Hardham licence is scheduled to conclude in 2025. If the outcome is that that ground water abstraction at Hardham must cease, there is no certainty as to when the licence will be revoked. It will not necessarily be immediate.

8.64 The Council notes that the Appellant has agreed to a Grampian condition preventing occupation until March 2025. The licence may or may not be revoked by that date, it is impossible to be certain. In the draft WRMP 2024, Southern Water do not commit to a date earlier than 2030, with a worst case identified by the Environment Agency being 2040.

8.65 The Environment Agency's letter of 11 July 2023 [CD8 1.19[52]] says that a licence revocation need not be immediate *'so long as we are addressing the issues of effects on the SAC and have a plan to act once the extent of the effects is known'.*

The Council's case

8.66 The Council's case can be summarised in six points.

8.67 First, there are no cogent reasons justifying a departure from the advice in the NE Position Statement that this development must demonstrate, with certainty, that it will not add to the existing adverse impact of groundwater abstraction from Hardham. The statement is aimed at the correct problem

[51] pdf pages 14 and 15 [CD8 1.04]
[52] page 3

(significant adverse effects associated with Hardham ground water abstraction), as is the Part C Report and SNOWS. The Appellant's opinion that the ecological interests these measures protect are not worthy of protection, or perhaps not this much protection, is irrelevant.

8.68 Second, the statutory duties of Southern Water and the Environment Agency do not obviate the requirement for an appropriate assessment of this proposal. Nor do they determine the outcome of that assessment. The Appellant's 'parallel regimes' argument is misconceived as (1) The Environment Agency's compliance with its Regulation 9(3) duty is not secured mitigation of this proposal, (2) Southern Water's voluntary minimisation is not enforceable, and therefore also not secured mitigation, and (3) the WRMP 2024 does not exist yet, there is no completed HRA for that plan and a plan level HRA/AA is not the same as a project level appropriate assessment. The Appellant's case that a HRA of the draft WRMP 2024 is 'zero Hardham' from day 1 is wrong.

8.69 Third, the development is not already water neutral by virtue of being 'accounted for' within Southern Water's WRMP 2019. The fact that the development was included in the housing trajectory which formed the basis of WRMP 2019 is irrelevant. The Position Statement and the Part C Report are concerned with new development, whenever it was permitted. The exception to this is development with full permission prior to the NE Position Statement (September 2021). In any event, the estimates in the Part C Report for how much water will be required by planned new development are out of date.

8.70 Fourth, the appellant is unable to demonstrate, with certainty, when the future actions by the Environment Agency and Southern Water which aim to resolve the issues in the Arun Valley will be delivered to ensure this development, and all other similarly qualifying development, avoids adverse effects. The Appellant's evidence does not engage with this issue and reliance on other bodies complying with their statutory duties does not provide the answer. There is a difference between the general duty under Regulation 9(3) of the Habitats Regulations and the appropriate assessment requirement under Regulation 63(5) which is relevant here.

8.71 Firth, the Part C Report is not appropriate for use as a development management tool. The figures in it represent a snapshot in time and are already out of date. There is no certain 'headroom' as contended by the Appellant.

8.72 Sixth, absent an offsite water neutrality scheme (which the Appellant is not offering) the only way in which the development can demonstrate certainty of mitigation is via the Council's proposed condition which prevents development commencing until water neutrality mitigation has been secured via SNOWS.

9. Summary of written representations

9.1 The Environment Agency did not respond directly to the Council's consultation on the application or the appeal. Southern Water responded only in relation wastewater. The Appellant wrote to both and received responses to questions that they put to them. The responses can be found at Appendix B (Environment Agency) and Appendix C (Southern Water) of Mr Aitkin's proof of evidence [CD10 1.02a]. Both parties rely on the responses as part of their cases and I address them as necessary in this report.

9.2 Only Natural England responded to the appeal notification on time. As such, unless otherwise stated, what follows is a summary of the issues raised by parties external to the Council at the application stage.

Natural England

9.3 Natural England formally commented on the proposal three times:

- 12 September 2023 [CD6 1.01]. Responding to the planning application.
- 11 January 2024 [CD8 1.18]. In response to the appeal, ahead of the Inquiry
- 19 April 2024 [ID13]. Following the close of the Inquiry.

Letter of 12 September 2023 [CD6 1.01]

9.4 Natural England believe the proposal could have potentially significant effects on the Arun Valley sites, as per the NE Position Statement. They ask for further information, namely reconsideration of water neutrality with appropriate mitigation and relevant water budget calculations.

9.5 They note the Appellant's Shadow HRA and Addendum [CD1 1.01, 1.02] concludes that it can be ascertained that the proposal will not result in adverse effects on the integrity of the sites. Having considered the measures set out in the HRA to mitigate adverse effects, Natural England disagree. They advise that further consideration of mitigation is needed to ensure the proposal can demonstrate water neutrality.

9.6 They do not agree that impacts can be ruled out on the basis that its water demand is already accounted for in the pre-September 2021 existing/baseline water demand, against which water neutrality for all development thereafter is calculated. This is because the lawful water demand of the proposed dwellings did not exist prior to September 2021 and the proposal did not have full planning permission.

9.7 In response to Southern Water's 5 ml/d voluntary minimisation of groundwater abstraction at Hardham, they note there is no known acceptable level of groundwater abstraction which would be able to rule out having an adverse effect on the Arun Valley sites. In any event, the minimisation is unsecured and voluntary and not, therefore, appropriate mitigation. For these reasons, it is not appropriate to rely on Southern Water's abstraction minimisation as a mitigation measure to offset the increased water demand from the proposal.

9.8 In Natural England's view, water savings from Southern Water's planned demand reduction measures are to be utilised in the developing SNOWS to support the delivery of water neutral local plans across the WSZ. As such, relying on these measures to offset the proposal, without contributing to the strategy, would be double counting. They add that, while an appropriate contribution to such a strategy may be sufficient to rule out this proposal's impacts, no strategy has yet been agreed or implemented. As such, it is not appropriate to rely on the strategy at the time of their letter.

9.9 Natural England advise that any offsetting measures required to achieve water neutrality will need to have their maintenance and management appropriately secured with the competent authority, in perpetuity.

Letter of 11 January 2024 [CD8 1.18]

9.10 Natural England notes the appellants arguments as to why the proposal does not need to demonstrate water neutrality to rule out the adverse effects on the Arun Valley sites. They consider the arguments most relevant to Natural England's remit to be:

- That the proposal's water demand is already accounted for, and
- That Southern Water's voluntary abstraction minimisation or demand reduction measures can be relied upon as offsetting mitigation measures.

9.11 They draw attention to the NE Position Statement and NE Advice Note. They say that achieving water neutrality can be defined as, 'ensuring that for every new development, total water use in the region after the development is equal to or less than the total water-use in the region before the new development' (*underline is their emphasis)*. Natural England's view is that water use before the new development should be calculated in line with actual lawful existing water usage.

9.12 In their view, an appropriate assessment should not take into account mitigation measures which are uncertain at the time of the assessment. This includes voluntary measures not secured by an appropriate legislative or regulatory framework. A competent authority's decisions regarding the certainty of any given measure should consider both scientific certainty and practical certainty. Whereas scientific certainty is concerned with how likely a measure is to be effective, practical certainty is concerned with how likely a measure is to be delivered and secured in the long term.

9.13 They acknowledge that it is for the competent authority to satisfy itself on the certainty of any given measure. However, their view is that voluntarily adopted measures are not secured by an appropriate legislative or regulatory framework at the time of the permission. As such Southern Water's abstraction minimisation is not likely to have sufficient practical certainly to be relied upon as mitigation. Similarly, measures which have not been agreed or implemented are also unlikely to have sufficient practical certainty.

9.14 Natural England note the outcome of the Sustainability Review into groundwater abstraction at Hardham is due to report in March 2025. The findings of that investigation will determine what level of abstraction at Hardham can continue, while ensuring adverse effects on the Arun Valley sites are ruled out. As such, it is not appropriate to rule out adverse effects on the basis that ground water abstraction has been voluntarily reduced to 5 ml/day.

Letter of 19 April 2024 [ID13]

9.15 This letter was received following close of the Inquiry. It responds to specific questions that I put to Natural England aimed at informing an appropriate assessment. My letter also shared new documents that had been put before the Inquiry, as agreed with the parties.

Do you agree with the conclusion in the Shadow Habitats Regulations Assessment [CD1.1 01] in relation to Stage 1: Screening that only the Arun Valley Sites should be taken forward for appropriate assessment? If not, why? Which other sites should be taken forward and what are the reasons?

9.16 Natural England is satisfied that only the Arun Valley sites should be taken forward for appropriate assessment.

Do you agree with the proposition that the key concern in this case can be narrowed to the designated interest feature, namely the Lesser Whirlpool Ramshorn Snail? (See reference at paragraph 3.2.5 of Mr Baxter's Proof [CD10.1 04b] and paragraph 9 of the Appellant's closing [ID10]. If not, why?

9.17 They do not agree. As outlined in the NE Advice Note, the ongoing abstraction is having a detrimental impact on a number of sites, including the Arun Valley SAC, SPA and Ramsar site. A number of designated features associated with the SPA and Ramsar site (as well as their supporting habitats) are water dependent and are therefore potentially impacted as a result of the ongoing abstraction as well.

Do you agree that the evidence provided enables it to be ascertained that the proposal would not adversely affect the integrity of the Arun Valley Sites without the need for the development to demonstrate water neutrality?

9.18 They do not believe that the evidence provided by the Appellant is sufficient to conclude that the proposal would not adversely affect the integrity of the sites without the need to demonstrate water neutrality.

9.19 Natural England refer to the Sustainability Review reporting in March 2025. The findings of that investigation will determine what level of abstraction at Hardham can continue, while ensuring adverse effects on the sites can also be ruled out. Until the investigation has been completed, what is an acceptable level of groundwater abstraction is remains unknown.

9.20 Given the current uncertainty as to the potential impacts of additional abstraction, it is Natural England's advice that "for every new development, total water use in the Sussex North Water Supply Zone after the development must be equal to or less than the total water-use in the region before the new development" (as per the NE Advice Note) in order to ensure that future development does not contribute to increased levels of abstraction.

9.21 Minimisation of abstraction at Hardham does not consider, nor evidence, the fundamental question of how much water can be abstracted without having an adverse effect on the Arun Valley sites. Given the current situation, it is Natural England's advice that the current minimisation does not provide sufficient certainty.

9.22 In the absence of evidence to conclude how much water can be abstracted without having an adverse effect, it remains Natural England's opinion that future development should demonstrate how water neutrality will be achieved to ensure it does not result in additional abstraction beyond appropriate levels.

Do you agree that an alternative method that would protect the Arun Valley Sites has been put forward (paying regard to page 3 of the NE Advice Note)?

9.23 As outlined in the NE Advice Note, it is their view that the delivery of an alternative water supply may be required until the sites are restored to favourable conservation status.

Does the imposition of the condition at page 28 the SOCG [ID11] change your response to the previous two questions? Do you agree that the imposition of the two conditions set out on page 27 of the SOCG enable it to be ascertained that the proposal would not adversely affect the integrity of the Arun Valley sites? If not, please specify your reasons and provide details of any specific measures you consider are necessary.

9.24 They say that the wording and suitability of conditions is outside of their remit and expertise. However, any conditions that seek to ensure that there is not an adverse effect on the integrity on the sites should be suitably worded to ensure that adverse effects can be ruled out and be based upon robust evidence. Any mitigation that a condition seeks to secure should consider both scientific certainty and practical delivery.

Colgate Parish Council

9.25 No comments but notes that the Parish Council and residents are concerned there has been no application submitted for the community hall, shops and other infrastructure.

Comments from neighbours

9.26 One letter of objection was received, raising concern and objection to the proposal on the grounds that further housing being proposed prior to the neighbourhood centre being complete. This is alleged to be in breach of the Section 106 agreement for Kilnwood Vale. Resolving the issue of demonstrating water neutrality is also cited as a reason for delay. It is said

that the objector has been without any amenities for the entirety of the development's existence, and that the developer is actively avoiding building the essentials that were both promised and legally agreed. This is said to also put a strain on the amenities in surrounding areas which has resulted in oversubscription at doctors' surgeries, queues in local shops and lack of medicines at nearby pharmacies.

Southern Water

9.27 They note the development site is not located within Southern Water's statutory area for wastewater drainage services.

Thames Water

9.28 No objection on wastewater grounds subject to a condition aimed at ensuring confirmation of a suitable foul water connection for the development.

West Sussex County Council

Lead Local Flood Authority (LLFA)

9.29 The LLFA wrote to the Council on 18 October 2023 maintaining their initial objections to the proposal on the grounds that an acceptable drainage strategy hadn't been put forward. At the heart of their concerns were the Appellant's calculations relating to rainfall, the margin for flood risk, and the CV value used in the micro-drainage calculations.

Highways

9.30 They give advice relating to the potential adoptability of the proposal's roads, and make a number of comments relevant to that, noting that matters of adoption will be determined as part of any application for an agreement under Section 38 of the Highways Act 1980.

Fire and rescue

9.31 They are concerned that unavailability of additional water supply to fire hydrants in an emergency could increase the risk of being unable to control a fire. A condition is therefore thought to be necessary.

Essex County Council – place services team

Ecology

9.32 They have no ecological objections. Nevertheless, as the proposal does not demonstrate water neutrality, they issued a holding objection. This is subject to Natural England's formal comments on the conclusion of an appropriate assessment.

Archaeology

9.33 No historic environment objections.

London Gatwick

9.34 They have no objection, having examined the proposal from an aerodrome safeguarding perspective.

10. **Inspector's** conclusions

10.1 The numbers in superscript square brackets [xx] in this section are references to previous paragraphs in the report of relevance to the point under discussion. They are for cross referencing purposes only. My conclusions are based on consideration of all the evidence put before the Inquiry that is now also available to the Secretary of State.

10.2 Having regard to the matters on which the Secretary of State particularly wishes to be informed about [1.7], the matters in dispute between the parties, and the evidence to the Inquiry, the main considerations where my conclusions may assist are:

- Whether a Habitats Regulations compliant appropriate assessment can be concluded and, if so, on what basis.
- Whether the evidence otherwise indicates that the reserved matters should be approved.
- How the first two considerations relate to any planning balance necessary.

Appropriate assessment

10.3 The Applicant's shadow HRA [CD1 1.01] includes a summary of the main legislative principles, repeated at various points across the evidence by both parties. Beyond differing emphasis, the applicable law is not materially in dispute [7.16, 8.10]. The main principles are worth repeating for clarity and to set the context for the appropriate assessment.

10.4 By Regulation 63(1) of the Habitats Regulations a competent authority (which includes the Secretary of State exercising planning decision making powers) before deciding to give any consent, permission or other authorisation 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) must make an appropriate assessment of the implications of the project for that site in view of that site's conservation objectives.

10.5 Under Regulation 63(2) an applicant (the Appellant in this case) must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required. Regulation 63(3) says that the competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies. The appropriate nature conservation body is Natural England.

10.6 Regulation 63(5) specifies that, in the light of the conclusions of the appropriate assessment, a competent authority may agree to the project only after having ascertained that it will not adversely affect the integrity of the European site.

10.7 In considering whether a project will adversely affect the integrity of the site, under Regulation 63(6), the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that it should be given subject to.

10.8 Beyond Regulation 63, Regulation 9 of the Habitats Regulations includes general duties on bodies relating to European sites and exercising functions so as to secure compliance with the requirements of the Habitats Directives (Regulation 9(1)). In exercising any of its functions, bodies must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions (Regulation 9(3)).

10.9 Two overarching legal points of relevance to the Secretary State's decision making relate to imperative reasons of overriding public interest (IROPI) and the precautionary principle and the question of proportionality. As both are questions of law, my view is based on the submissions made by the parties.

10.10 The duty under Regulation 63(5) of the Habitats Regulations is subject to Regulation 64, which makes provision for a project to be agreed notwithstanding a negative assessment of the implications for the European Site if the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest. The legal tests relating to this is referred to as 'IROPI' and are as follows:

- There are no feasible alternative solutions that would be less damaging or avoid damage to the site,
- The proposal needs to be carried out for imperative reasons of overriding public interest, and
- The necessary compensatory measures can be secured.[53]

10.11 The Appellant's position on IROPI is that it is not applicable as it only applies in the absence of alternatives [7.16]. Paying regard to the reasons given by the Secretary of State for calling in the appeal[1.7] it is relevant that IROPI offers a route within the Habitats Regulations to balance a negative assessment of effects on the Arun Valley Sites against other factors, which may in principle include housing demand and supply. However, as the substantive evidence does not make the case and there appears to be feasible alternative solutions if conditions are used as suggested below, I would not recommend that the Secretary of State reaches a decision on the basis that IROPI applies.

[53] see guidance on derogations at https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site

10.12 Turning to proportionality, to accord with Regulation 63(5) of the Habitats Regulations, a decision maker may only grant approval having ascertained that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the protected sites (the test of certainty). Wyatt[54], at paragraph 9, summarises some of the relevant points that emerge from applicable domestic and European caselaw. This includes that the duty under Regulation 63(5) embodies the precautionary principle, requiring a high standard of investigation.

10.13 In relation to proportionality in applying the precautionary principle, *Waddenzee*[55] assists in confirming that 'no reasonable scientific doubt' is not a requirement for absolute certainty as no such thing exists and that would be disproportionate. Nevertheless, the bar is a high one. This is reflected in *Sweetman*[56] in the context of compliance with the Habitats Directives, a compliant appropriate assessment *'cannot have lacunae and must contain complete, precise and definitive findings and conclusions'*.

10.14 The Council makes a fair distinction between (1) proportionality in complying with the test of certainty and (2) proportionality of any avoidance or mitigation measures necessary to conclude favourably on whether adverse effects on the Arun Valley sites are likely [8.26]. The former is uncontested between the parties, the test of certainty is not one requiring absolute certainty.

10.15 For the second proposition, the Appellant primarily relies on European Commission guidance [7.28]. This document was not put before the Inquiry in full and is instead quoted within the Shadow HRA [CD1 1.02[57]]. The guidance appears to relate to general application of the precautionary principle across a range of functions, rather than being specific to the duties under Regulation 63 of the Habitats Regulations or anything comparable. As such, although it would wrong to dismiss the guidance out of hand, it is safer to base findings mainly on an examination of the legislation itself.

10.16 Regulation 63(5) is clear that the Secretary of State can grant approval in this case only after having ascertained that it will not adversely affect the integrity of the Arun Valley sites, considering the conclusions of an appropriate assessment. The scope of the consideration is limited to effects on integrity. Beyond IROPI, there is no mechanism for balancing the Regulation 63(5) duty, and any necessary avoidance or mitigation measures, against impacts that are unrelated to effects on integrity.

10.17 The Appellant's case includes the encouragement of such a balance, by narrowing down on the Lesser Ramshorn Whirlpool Snail (which isn't legitimate anyway, for the reasons set out below), commenting on the limits of its distribution and other things they think could have been done to address the issue, and the impact of what they see as a requirement for water neutrality and the NE Position Statement more broadly has on the delivery of

[54] [CD5 1.05]
[55] referred to at para 9(7) of Wyatt [CD5 1.05]
[56] referred to at para 9(10) of Wyatt
[57] paragraphs 2.4.2-2.4.5

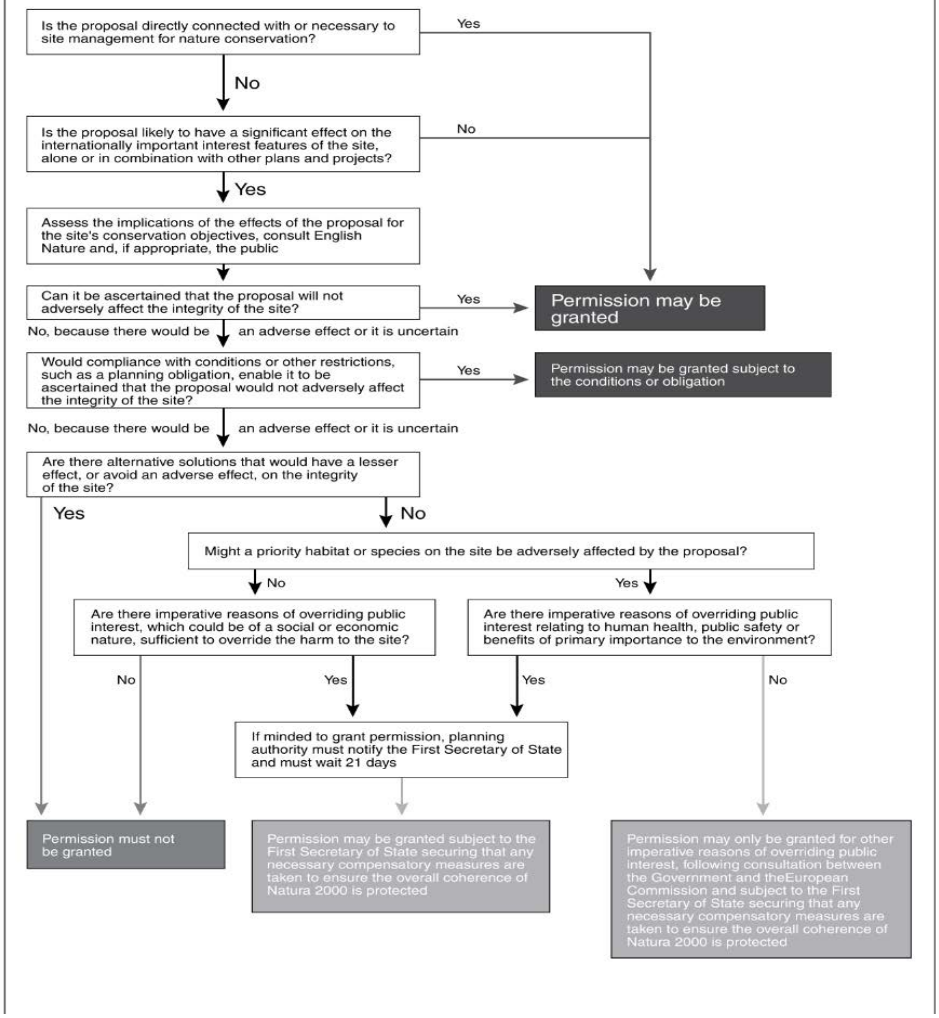
development and cost [7.33-7.45]. This internal balance is outside the scope of the Regulation 63(5) duty and, therefore, taking account of the impact on delivery of development and costs would be to take account of legally irrelevant factors.

10.18 For similar reasons, taking account of the Appellant's view on more proportionate things that they think other bodies could have done as an alternative to issuing the NE Position Statement would be to introduce legally irrelevant considerations that, in any event, are highly speculative [7.38-7.42].

10.19 For these reasons, I recommend that the Secretary of State does not agree with the Appellant's arguments relating to 'whether demanding water neutrality for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest' [7.33-7.45].

10.20 What follows is an assessment of the main further points raised by the Appellant. This is to assist the Secretary of State with seeing the conclusions relevant to deciding an appropriate assessment, I have structured addressing them to generally align with the flow chart of the HRA process at Appendix 5 of the Appellant's shadow HRA [6.1]. It is reproduced below:

Figure 1: **Consideration of development proposals affecting Internationally Designated Nature Conservation Sites**



10.21 Looking the first step on the flowchart, there is no suggestion that the proposal is directly connected with or necessary to site management for nature conservation. The next relevant steps providing a pathway through the flowchart are considered below in detail are as follows:

- Is the proposal likely to have significant effects (either alone or in combination)?
- What are the implications of the effects for the site's nature conservation objectives?
- Can it be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the site?
- Would compliance with conditions or other restrictions enable it to be ascertained that it the proposal would not adversely affect the integrity of the site?

10.22 There is some overlap between the Appellant's arguments and where they may, arguably, fit within the structure.

10.23 In addition to addressing the key arguments in the appeal, what follows is also intended to give the Secretary of State the necessary information to conclude and adopt this part of the report, with the references to evidence within it, as appropriate assessment of the proposal.

Is the proposal likely to have significant effects (either alone or in combination)?

10.24 Section 3 of the Shadow HRA goes through the process of screening for likely significant effects[58], concluding that effects are unlikely in relation to the Ashdown Forest SAC, Lewes Downs SAC, and Pevensey Levels SAC. This is based on the assessment in the HRA produced to support the Outline Permission as circumstances are said to be unchanged.

10.25 In relation to the Arun Valley Sites, the NE Position Statement is an obvious change in circumstances. The Shadow HRA concludes that, as likely significant effects on the sites are possible, it is necessary to take the Arun Valley Sites forward for appropriate assessment.

10.26 Natural England agree with the approach taken to screening in the HRA [9.16] and I have no reason to recommend a different conclusion. As such, the scope of the appropriate assessment is limited to effects on the Arun Valley Sites.

10.27 The basic tenet of the NE Position Statement is not seriously contested by any party. As the WSZ includes supplies from ground water abstraction (Hardham) it cannot, with certainty, be concluded that there will be no adverse effects on the integrity of the Arun Valley Sites. Fundamentally, as this is 'the problem' and there is no evidential basis to say otherwise, this should be adopted as a starting point.

[58] section 3

10.28 This being the case, projects such as the proposal[59] need to show with reasonable certainty that they will not add to the impact. One way to achieve that, according to the NE Position Statement, is to demonstrate water neutrality using the definition which relates to water use in the WSZ [7.6].

10.29 The statement specifically relates to planning and is aimed at 'all applications which fall within the supply zone'. It being focused on what action can be taken within the system to conclude favourably under the Habitats Regulations is therefore unsurprising. Water neutrality being specifically identified as 'one way' of showing that development will not add to the impact is an action within the control of Local Planning Authorities and developers is also understandable. This doesn't hint at a lack of understanding on Natural England's part of the role of other actors in what is a complex and multifaceted problem.

10.30 Water neutrality is a demand side intervention and is therefore concerned with water use. Development obviously has the potential to put pressure on water use. There is no requirement for new development, including this proposal, to facilitate a reduction in groundwater abstraction from Hardham. However, it must not increase its use, either alone or in combination, and make the problem worse. Authorising projects that contribute to the problem in these circumstances, without suitable avoidance/mitigation, would not accord with Regulation 63.

10.31 It is not the purpose of this appeal to examine the rationality of the NE Position Statement or the wider policy response to the problem. I do not accept the Appellant's arguments that the NE Position Statement and the related documents mischaracterise the issues, in so far as they relate to this appeal. Although water neutrality is clearly a focus of both the Council and Natural England, as demonstrated by the Part C Report and SNOWS, there is nothing to seriously suggest that the intention is to do anything other than bring forward a planning related solution to an uncontested problem in the Arun Valley Sites.

10.32 For these reasons, I recommend that the Secretary of State finds the Appellant's arguments criticising the NE Position Statement and the concept of water neutrality to be not of central relevance to question of whether a favourable appropriate assessment can be concluded [7.6-7.11].

What are the implications of the effects for the site's nature conservation objectives?

10.33 The designation information relating to the Arun Valley Sites, including conservation objectives and qualifying features, is summarised at paragraph 3.8 of the Shadow HRA. In relation to the SAC and the SPA the conservation objectives include ensuring the integrity of the sites is maintained or restored and contributing towards the achievement of a favourable conservation status of its qualifying interest features.

[59] without full planning permission prior to September 2021 when the NE Position Statement was published.

10.34 The qualifying interest features are identified as the Lesser Ramshorn Whirlpool Snail (for the SAC) and the Bewick Swan (for the SPA). For the Ramsar, the site is designated for its international importance under Criterion 1[60] for its representative, rare or unique wetland types. Specifically showing a greater range of habitats than any other chalk river in Britain, including fen, mire, lowland wet grassland and small areas of woodland. It is also designated under Criterion 2 for supporting a diverse range of wetland flora and fauna, including several nationally rare species. Under Criterion 6 the site is designated for regularly supporting a sizable population of species of waterbird.

10.35 Natural England do not agree with the Appellant seeking to narrow the relevant qualifying interest feature to the Lesser Ramshorn Whirlpool Snail [7.35-7.36, 9.17]. The Council did not contest this point significantly during the Inquiry. However, by their own admission, they had limited supporting ecological expertise to do so.

10.36 The Appellant's response to Natural England's letter after close of the Inquiry [ID14] describes the snail as a 'key receptor' indeed 'arguably the most sensitive receptor and the focus of much of the discussion'. It also correctly says that the Appellant's Shadow HRA acknowledges the relevance of overlapping designations of the SPA (for birds) and Ramsar (for aquatic flora and invertebrates).

10.37 Even accepting that the snail is a key focus, based on the evidence presented, it cannot be said with reasonable certainty to be the only qualifying feature affected in the Arun Valley Sites. Adopting a precautionary approach, I would not recommend accepting the Appellant's evidence that the qualifying interest affected by the issue in the NE Position Statement can be narrowed to the Lesser Ramshorn Whirlpool Snail.

10.38 Regardless, narrowing the focus loses much of its utility if the Secretary of State agrees that the Appellant's arguments relating to 'whether demanding water neutrality for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest' should be rejected [7.33-7.45], which I recommend [10.20].

10.39 If the Secretary of State does not reject that argument, I would recommend that any question of proportionality is considered based on there being the potential for effects on all qualifying interests in the Arun Valley Sites, rather than narrowing the issue to the snail.

[60] Although not before the inquiry, to assist with understanding, general information about the Ramsar Criterion can be found at - https://www.ramsar.org/sites/default/files/documents/library/ramsarsites_criteria_eng.pdf

Can it be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the site?

10.40 The adoption of water neutrality is described in the NE Advice Note as a tool to help ensure compliance with the Habitats Regulations. It does not preclude the consideration of alternative methods to protect the sites and enable development, provided the requirements of the Habitats Regulations are met and is not intended to pre-judge the outcome of individual applications[61]. It is for the Appellant to bring forward any alternative methods in the form of avoidance/mitigation measures that meet the test of certainty. What follows is an assessment of the main elements of the Appellant's case that, taken together, are said to allow a favourable appropriate assessment to be concluded without the need for water neutrality.

Reliance of other regulatory regimes [7.12-7.13, 7.17-7.21]

10.41 The Appellant's case rellies at least partially on performance of action by the Environment Agency, Southern Water, and others under regulatory regimes and functions beyond planning. This raises a question about the degree to which such regimes/functions can be relied upon as mitigation/avoidance measures to conclude that the proposal will not adversely affect the integrity of the Arun Valley Sites. The main regimes/functions in this case can be summarised as −

- Powers of the Environment Agency to grant, revoke, and amend water abstraction licences under the Water Resources Act 1991.
- Duties on Southern Water to supply potable water and prepare and maintain a WRMP under the Water Industries Act 1991.

10.42 In line with the well-established principle in planning decision making, the Secretary of State can assume that other regulatory regimes will operate effectively and, therefore, it is not necessary to duplicate them. The subject matter of Paragraph 194 of the Framework (ground conditions and pollution) is not relevant to this case. However, the policy principle aligns with long understood general practice across the planning system. The caselaw referred to by the Appellant supports this approach[62] [7.25, 8.11].

10.43 Planning Practice Guidance[63] says that planning for the necessary water supply would normally be addressed through strategic policies. Water supply resulting from planned growth can then be reflected in the WRMPs produced by water companies. This points towards a co-dependence between the town and water planning regimes, with local plans identifying planned growth and water companies planning for supply based on it. It also reflects the principle that water supply should not normally be a general consideration in development management decision making.

[61] See page 3 of [CD8 1.16]
[62] R(An Taisce) [CD 1.01] and Sizewell C [CD5 1.02]
[63] Paragraph: 016 Reference ID: 34-016-20140306

10.44 In Horsham there is no dispute that Kilnwood Vale is 'planned growth' and that the WRMP 2019 was published in full knowledge of it [7.18], albeit ahead of the NE Position Statement. In this case, water supply is being considered only in the very specific legislative context of the Habitats Regulations. It cannot, therefore, fairly be described as a general consideration that may conflict with the principles set out in Planning Practice Guidance [7.24, 8.13]. In any event, the guidance does not overrule the legislative requirement.

10.45 In my view, in assessing the appropriateness of mitigation/avoidance measures, the Secretary of State is entitled to assume that other regulatory regimes will operate effectively. This does not, however, disapply the need to satisfy the test of certainty to accord with the duty under Regulation 63(5) of the Habitats Regulations. It is not sufficient to simply assume that the problem will be dealt with by others without a proper examination of practical and scientific certainty, including adopting the precautionary approach where necessary. Doing otherwise risks delegating responsibility to others and leaving gaps in coverage of protection for the Arun Valley Sites, contrary to the wider purpose of the Regulations (and, by extension, the Habitats Directives).

Southern Water voluntary minimisation and Environment Agency action following the Sustainability Review [7.46-7.53, 8.28-8.31]

10.46 Until the Sustainability Review concludes in 2025, and subsequently reports on its findings, there is no known 'safe' level of groundwater abstraction from Hardham that can be excluded from having a significant effect on the Arun Valley Sites. The review will inform the Environment Agency's decision making about whether to take action to impose changes on the existing Hardham licence using powers in S.52 of the Water Resources Act 1990[64].

10.47 Southern Water's voluntary minimisation of a target rolling average of 5 ml/d is a temporary measure they have committed to keeping in place at least until the Sustainability Review concludes[65]. Minimisation in this context means Southern Water using their best endeavours to keep abstraction as low as possible whilst also meeting customer demand[66]. It is taken as a rolling average and has been exceeded, notably in the 2022 drought [8.30].

10.48 Voluntary minimisation was agreed between the Environment Agency and Southern Water in the short term as appropriate action for keeping ground water abstraction at Hardham from increasing appreciably above September 2021 levels. This timing is significant as it relates to the point at which the NE Position Statement was issued. It allows parties to say, at least until the Sustainability Review reports, that the likely adverse effects on the Arun Valley Sites are unlikely to worsen. It does not, as made clear by their letter of 11 July 2023[67], discharge the Environment Agency's duties under the Habitats Regulations. That would, instead, follow by making any necessary changes to the abstraction licence.

[64] the existing licence is a Licence of Right granted in 1966 and is, therefore, not time limited. (see Environment Agency letter 28 April 2022 in Appendix B of CD10 1.02a)
[65] see page 2 of Southern Water letter dated 7 July 2023 at Appendix 2 of [CD1 1.02a]
[66] see Environment Agency letter dated 6 June 2022 at Appendix 2 of [CD1 1.02a]
[67] Appendix 2 of [CD1 1.02a]

10.49 It logically follows that reasonable certainty of the appropriateness of the existing level of voluntary minimisation only exists until the Sustainability Review concludes. The purpose of the review is to collect hydrological and ecological data to support future decision making. As the Environment Agency puts it in their letter of 13 January 2023;

'The protection of the [Arun Valley Site] will be secured by making any necessary changes to the abstraction licence. A voluntary commitment to reduce abstraction does not secure the necessary protection, although it is a welcome step to reducing the risk of deterioration of, and risk of adverse effects to, the site whilst detailed investigations are being carried out in relation to the abstraction'.

10.50 The current temporary minimisation measures, that were only ever intended to be short term, cannot be relied upon as avoidance/mitigation that confirms reasonable certainty of no adverse effects on the Arun Valley Sites.

10.51 Natural England and the Council's concerns that voluntary minimisation is not secured is secondary to the fact that it is only a short-term measure. Whether a licence change at Hardham is necessary will only be known once the Sustainability Review concludes. At that time, the Environment Agency would have a range of options that includes amendment or revocation of the licence. As part of that decision making, they are under a duty under Regulation 9(3) of the Habitats Regulations to secure compliance with the Habitats Directives, and therefore to consider the effects on the Arun Valley Sites.

10.52 I agree with the Council that the Regulation 9(3) duty is more general than the Regulation 63(5) obligation to only authorise a project having ascertained that no likely adverse effects on integrity will result. The Environment Agency's response to the Appellant of 26 April 2022 at Appendix 2 of [CD10 1.02a] gives a sense of how they see their obligations *'in exercising our powers, we have to take account of our legal obligations when undertaking this action – these include our duties and obligations to protect the environment as well as any legal duties regarding the impact of our action on the licence holder and any duties they may have to provide public water supply'.*

10.53 The response indicates a perceived greater freedom on the Environment Agency's part to balance a wider range of factors and still accord with their obligations under the Habitats Regulations. Notwithstanding this and the more general nature of the duty under Regulation 9(3) of the Habitats Regulations, it would be wrong to discount evidence of the Environment Agency's role out of hand.

10.54 The Secretary of State can have confidence that the Environment Agency will appropriately monitor and review a voluntary minimisation agreement with a water company and consider taking formal action if breach of it leads them to think that is necessary. Their letter of 6 June 2022[68] provides evidence of the monitoring process they have in place, as well as confirming that they do not formally enforce voluntary action. So, while voluntary minimisation is not legally secured, discounting it purely on this basis fails to pay regard to the Environment Agency's powers and obligations, which the Secretary of State

[68] Appendix 2 of [CD1 1.02a]

can assume will be operated judiciously.

10.55 Looking forward, beyond the Sustainability Review, there are a range of unknown actions that the Environment Agency could take in relation to the ground water abstraction licence at Hardham in the exercise of their powers under S52 of the Water Resources Act 1991. There are also things that Southern Water may volunteer to do or, indeed, they may formally apply to change in the licence under S51 of the 1991 Act.

10.56 The unspecified future action of these parties does not provide the necessary reasonable certainty to conclude that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal. While they can be expected fulfil their legal obligations under the Habitats Regulations, the question of 'how' and 'when' lacks reasonable certainty.

10.57 In summary, I recommend that the Secretary of State does not discount voluntary minimisation out of hand on the basis that it is not secured. However, it is only a short-term measure and reasonable certainty of its appropriateness cannot be judged until the Sustainability Review reports. Further, while they can be expected to comply with their legal obligations, the unspecified future action by the Environment Agency and/or Southern Water in response to the Sustainability Review does not provide evidence of reasonable certainty that the Secretary of State can rely upon to confirm that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal.

The WRMP 2024 *[7.63-7.70, 8.32-8.46]*

10.58 For information, an uncontested description of the preparation and function of WRMPs is described in the proof of evidence of the Appellant's water supply witness[69]. The overarching objective of the WRMP is to look ahead over 25 years and describe how the water company aims to secure a sustainable supply/demand balance. The Government's Water Resources Planning Guideline [CD8 1.08] assists companies with preparing WRMPs and, at paragraph 6.3, says that water demand growth projections should be based on those in local plans and the resulting supply must not constrain planned growth [7.17,7.18].

10.59 When the final version is published, the WRMP 2024 would be a statutory plan[70] and must, therefore, be accompanied by its own HRA. As things presently stand the WRMP 2024 and it's HRA are in draft form. The Statement of Responses [CD8 1.04] indicates a range of relevant information and new material that would need to be considered ahead of finalising either document. The likelihood of changes being made brings into question the validity of the draft WRMP 2024 and it's HRA as a basis for present decision making. The specific details of the documents themselves do not, therefore, provide a credible basis on which to reach a conclusion about reasonable certainty.

[69] paragraphs 4.19- 4.41 of [CD10 1.02a]

10.60 A reasonable planning system parallel to this situation would an HRA prepared for a Local Plan being used to support a development management decision. Paragraph 008 of the PPG provides some relevant advice [8.22] including reminding decision makers that the HRA would still need to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt on the impact of the project. This is a high standard to meet and will need to be assessed on a case by case basis.

10.61 Although not a direct comparison, the guidance helps to support a view that measures in a WRMP are capable in principle of being avoidance/mitigation measures that confirm an absence of likely adverse effects on a European Site. However, the draft stage at which the WMRP 2024 has reached in this case leads me to conclude there is an absence of reasonable certainty. In this respect, I agree with the Council's view that a positive appropriate assessment at the WRMP level does not mean that projects under that plan can be assumed to have no significant adverse effects.

10.62 In a more general sense, the Secretary of State can expect that the relevant bodies will comply with their duties under the Habitats Regulations when the WRMP 2024 is finally published. This includes carrying out any appropriate assessment of likely adverse effects on the Arun Valley Sites necessary to meet the Regulation 63(5) duty.

10.63 The Appellant's working assumption that the WRMP 2024 is likely to be published ahead of the Sustainability Review reporting is a fair one, in the absence of evidence to the contrary [7.68]. The Council questions the degree to which the draft WRMP 2024 plans for a 'zero Hardham' baseline [8.39-8.46]. While the evidence doesn't support a firm view that the current draft of the WRMP 2024 does, there is reasonable evidence that water supply scenarios informing the WRMP will need to contemplate excluding ground water extraction from Hardham [7.69]. However, concluding on the specifics would be speculation. Possible reasons for the WRMP 2024 needing to adopt zero Hardham include (1) that the Environment Agency revokes the abstraction licence in response to the Sustainability Review or (2) a favourable appropriate assessment of the WRMP 2024 cannot otherwise be conclude and an IROPI argument is not, or cannot, be made.

10.64 The Appellant is incorrect to say that the WRMP 2024 could not be published if it included an unfavourable appropriate assessment [7.67, 7.69]. Regulation 64 of the Habitats Regulations and the associated IROPI tests provide a legislative route to do just that and whether any such decision would be made in response to evidence that, is at present, is unknown [8.23].

10.65 The Council's questioning of whether the WRMP 2024 could, in practice, adopt a zero Hardham baseline based primarily on Southern Water's available water supply in times of drought does not particularly assist [8.32-8.36]. It comes largely from a disagreement between the parties around how ably water supply coped in response to the 2022 drought [7.79, 8.32-8.36]. For reasons that include the lack of certainty about demand management measures and the availability of alternative sources (discussed below) there isn't the evidence to conclude on this point one way or another.

10.66 Overall, there is not the certainty in the draft WRMP 2024 or its accompanying HRA to conclude that any of the specific measures within it provide reasonable certainty of no adverse effects on the integrity of the Arun Valley Sites will result from the proposal. Other bodies can be expected fulfil their legal obligations under the Habitats Regulations. This includes Southern Water concluding any necessary favourable appropriate assessment, unless IRPOI applies. However, as the question of 'how' and 'when' lacks reasonable certainty.

10.67 The Appellant answers a firm 'no' to their own question of '*whether supply sources in the WRMP 2024 include groundwater abstraction at Hardham, at levels that cannot be excluded from the potential of harm to the integrity of the protected site'* [7.63]. For the reasons set out above a response of 'we don't know' is a more accurate answer. I recommend that the Secretary of State takes the same view based on the available evidence.

10.68 In these circumstances the Secretary of State is being asked to do little more than rely on the unspecified future action of parties fulfilling responsibilities under the Habitats Regulations under other regulatory regimes, including the assumption that any necessary favourable HRA must come forward. The Secretary of State is entitled to assume that other regimes will operative effectively. However, without more detail of what will happen and when, in this case it does not provide evidence of reasonable certainty that can be relied upon to confirm that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal.

10.69 It is the Appellant's case that addition water demand (including form the proposal) can be met by a combination of greater utilisation of other sources of supply and/or demand management measures [7.65]. Neither of these are secured mitigation measures for the proposal. Instead, they support the Appellant's case that the Secretary of State can rely on other regulatory regimes to avoid/mitigate the likely adverse effects on the Arun Valley Sites and have confidence that supply side options for doing so can be utilised without the need for water neutrality. The merits of both are discussed below.

Alternative sources of supply *[7.71-7.80, 8.47-8.62]*

10.70 Evidence on alternative sources of supply supports the Appellant's argument that a resulting loss of supply from groundwater extraction Hadham ceasing to 2030[71] can be made up elsewhere [7.64]. As there is no detailed evidence before the Inquiry to contradict the Appellant's worst case scenario deficit assumptions, and they otherwise appear fair, is it reasonable to adopt them as a starting point [7.76].

10.71 In relation to Weir Wood, the statutory notice under regulation 28(4) of the Water Supply (Water Quality) Regulations 2016 was available to the Inquiry [ID6]. There is no detailed evidence about progress towards completing the measures in the statutory notice and the likelihood of it becoming operational by 31 March 2025. On the other hand, there is no evidence to suggest the statutory notice will not be complied with. The Secretary of State is also entitled to assume that the regime under the Water Supply Regulations will

[71] see para 7.73 of this report on the relevance of 2030

operate effectively [7.75]. The Council's information from the Statement of Responses does not cast serious doubt over the timings, as they are driven by the statutory notice [8.54-8.55]. Unlike the Environment Agency's consideration of the Hardham licence, which is dependent on the Sustainability Review reporting, there is reasonable certainty of outcome on the timing of Weir Wood becoming operational.

10.72 How the additional supply from Weir Wood would be used is a different matter. The Statement of Responses[72] references Southern Water's 'current pressures from the treatment works outage at Weir Wood', which is also acknowledged by the Appellant's witness on Water Supply[73]. There is also evidence of ongoing issues with the Littlehampton Water Treatment Works [8.56-8.58]. As such, the degree to which additional supply from Weir Wood is needed to address existing pressures, rather than serve new growth, is unclear. As is the nature of any contractual agreement with other water companies to export water elsewhere [8.56]. For these reasons, although on the face of it Wier Wood is capable of making up for a loss of supply resulting from cessation of groundwater extraction at Hardham, there is not reasonable certainty in the evidence provided that would be the outcome.

10.73 In these circumstances, a condition preventing occupation of the development until at least 31 March 2025 would serve no planning purpose and would not, therefore, pass the test of necessity in the Framework [7.77].

10.74 The bulk supply agreements between Southern Water and Portsmouth Water and SES Water respectively are subject to commercial contracts that are not before the Inquiry or otherwise in the public domain. The Council takes issue with the availability of the supplies [8.48-8.53]. In my view the lack of reasonable certainty comes more fundamentally from the absence of transparency around the terms of the contracts. As such, while they may in theory provide supply capable of making up for a cessation of groundwater extraction at Hardham, reasonable certainty of supply in practice cannot be concluded upon.

10.75 In summary, there are alternatives to serving new development other than from additional groundwater abstraction at Hardham. The Secretary of State should give some weight to the options as potentially available alternatives if a decision is taken in the future to cease groundwater abstraction at Hardham. However, the need for them being theoretical and questionable evidence that their availability is secured, places limits on the weight that can be attached.

Demand management savings [7.54-7.62, 8.69, 8.71]

10.76 The Appellant's arguments on demand management savings are enabled principally by their consideration of the measures in the WRMP 2019 and how they are treated in the Part C Report to generate what is referred to as the Southern Water contribution [7.54-7.57]. It is by utilising the contribution that the Appellant claims that the proposal is already water neutral as it is 'accounted for' in Southern Water's WRM2019. More generally, demand management savings provide further evidence that addition water demand for development

[72] page 7 [CD8 1.04]
[73] paragraph 6.27 [CD10 1.02a]

can be met from other sources without the need for water neutrality [7.58-7.59][74].

10.77 Taking a step back, the purpose of the Part C Report is to set out a strategy for achieving water neutrality in the WSZ and provide part of the evidence base to support the adoption of Local Plans in Horsham and the other affected Local Planning Authorities. The strategy has three components, (1) reducing water demand through new build efficiency targets modelled on 110 or 85 l/p/d[75], (2) offsetting through the Southern Water contribution, and (3) offsetting the remaining demand by other means using the planning system (through the strategic approach that has become SNOWS or a bespoke solution)[76]. The three components are intended to work together to provide the coverage necessary to say that water neutrality in the WSZ is achieved, delivering reasonable scientific and practical certainty of no likely adverse effects on the Arun Valley Sites. The success or failure of one component has an impact on the other two.

10.78 The Southern Water contribution is drawn from the WRMP 2019 and the demand management measures within it aimed at reducing household water consumption and leakage. The Part C Report makes an allowance to account for these measures to determine an assumed Southern Water contribution. It is therefore an estimate intended to inform the strategy in the Part C Report based on the evidence available on that time.

10.79 The Environment Agency/Ofwat/Defra letter to Southern Water of 20 October 2023 refers to concerns that the company has reported a supply-demand balance significantly below what is forecast in the WRMP 2019, driven in large part by leakage[77]. No updates to the Part C Report have been made since its publication assessing the continuing appropriateness of the assumed Southern Water contribution. The evidence available to the Inquiry suggests that, as the underlying figures are open to question, it cannot be relied upon to create the 6345 to 8335 dwelling headroom claimed by the Appellant.

10.80 The Appellant appears to accept that the figures may lack realism and the Council is under no specific duty to bring forward alternative figures in circumstances where the October 2023 letter to Southern Water is enough to cast serious doubt. As such, the extent of assumed reductions from demand management measures is evidentially unclear and the lack of clarity does not support the Appellant's case that the proposal is 'accounted for' in the WRMP 2019. The question of whether water supply from alternative sources can be assumed, even in the absence of savings from demand management measures, is addressed elsewhere in this report [7.61-7.62].

[74] the Appellant's detailed reasoning explaining how the proposal is accounted for in the WRMP 2019 can be found in paragraphs 8.15-8.45 of their Statement of Case [CD7 1.01]
[75] for information, it is the difference between these two modelled scenarios that creates the 6345–8335 dwelling margin, depending on whether a 100 or 85 l/p/d efficiency target is utilised/achieved.
[76] a summary can be found in the Executive Summary to the Part C Report on page iv + [CD8. 1.14c]
[77] pages 1 and 2 and accompanying table heading 'leakage', Appendix 1 of [CD10 1.02a]

10.81 The 'conceptual division' of development needs is a tool of the Appellant's invention [7.59]. It appears to come from discussion around the remaining demand to be offset explained in section 5.2.4 of the Part C Report. However, categorisation of development 'needs' was never the purpose of the Part C Report, nor was it intended to be used directly to support development management decisions or in the manner utilised by the Appellant.

10.82 As a strategic development allocated in the HDLP, Kilnwood Vale quite clearly formed part of the baseline informing the WRMP 2019. In this respect, the proposal is 'planned for'. However, this is irrelevant when viewed in the context of the NE Position Statement that distinguishes development in only two ways (1) development with full planning permission prior to September 2021 that is exempt from the statement as it cannot act retrospectively, and (2) other development. The Appellant's claim that there is another category in the middle that the proposal falls into is fictitious and, in any event, is based on figures that (for reasons explained above) are open to question. In this respect, there is no evidentially clear 'headroom' to utilise. Even if there were, there is no evidence on how such headroom would be apportioned to support the insistence that this proposal must be entitled to use it.

10.83 It does not appear to be in dispute that the proposal can achieve water efficiency that would meet the target of 110 l/p/d. Indeed, the open market dwellings are calculated as 91.40 l/p/d. Achievement of this could be secured by conditions. However, for the reasons above, that does not assist with confirming that the proposal would fall within any perceived headroom alluded to in the Part C Report.

10.84 In summary, I recommend that the Secretary of State does not agree that the extent of demand management savings programmed by Southern Water provides reasonably certain further evidence that additional water demand for development can be met from other sources without the need for water neutrality. Further, I recommend the Appellant's arguments that the proposal can fairly utilise 'headroom' they believe the Part C Report confirms as available are rejected. Neither of these provide evidence of reasonable certainty that the Secretary of State can rely upon to confirm that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal.

Conclusions

10.85 To summarise, in my view the Secretary of State is entitled to assume that other regulatory regimes will operate effectively. In principle, this can provide reasonable certainty of mitigation/avoidance of likely significant effects on a European site and a positive appropriate assessment to be concluded to discharge of the duty under Regulation 63(5) of the Habitats Regulations.

10.86 However, the evidence in this case does not allow such a conclusion to be reached. Existing voluntary minimisation of groundwater extraction at Hardham by Southern Water is only designed to be a short term measure in advance of the Sustainability Review reporting. It is not of itself an appropriate mitigation measure for the proposal. While they be expected to fulfil their legal objections, the unspecified future action of the Environment Agency and/or Southern Water in response to the Sustainability Review does not provide reasonable certainty of no adverse effects on integrity due to the lack of detail about what action will be taken and when.

10.87 The draft WRMP 2024 and the accompanying HRA are subject to change and do not, of themselves provide reasonable certainty of avoidance/mitigation measures. This leaves the Secretary of State relying on the generality of the WRMP process itself and the fact that the WRMP 2024 would either need to conclude a favourable appropriate assessment or make an IROPI case. There is little certainty here, nor about whether the detail, coverage, and spatial scale of the WRMP 2024 could be used as an appropriate basis for decision making on the proposal.

10.88 The evidence does not, with reasonable certainty, support the Appellant's case that Southern Water's WRMP 2019 demand management savings provide reliable evidence that additional water demand arising from development can be appropriately met from this source and the claim that the Part C Report confirms the existence of headroom that the proposal can fairly utilise is without merit.

10.89 The question of availability of alternative sources of supply is a complex one, due primarily to fluid nature of contractual arrangements between water companies and the lack of public transparency on the terms of such arrangements. The evidence does not allow a specific source of alternative supply to be identified, nor is there a need for there to be one. However it does, in general, point towards some capacity in supply that the Secretary of State can take confidence in should groundwater abstraction at Hardham need to cease in the future.

10.90 In conclusion, based on the evidence provided, taken separately or as a whole the Appellant's evidence of avoidance/mitigation does not lead me conclude that it can be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the Arun Valley Sites.

10.91 If the Secretary of the State is of the view that the Appellant's evidence of avoidance/mitigation result in a favourable conclusion on adverse effects, they are entitled to conclude a positive appropriate assessment on this basis. There would be no need to go on to consider conditions or other restrictions in the section below.

<u>Would compliance with conditions or other restrictions enable it to be ascertained that it the proposal would not adversely affect the integrity of the site?</u>

10.92 In the absence of being able to otherwise ascertain that it the proposal would not adversely affect the integrity of the Arun Valley Sites, it falls to consider whether use the Council's suggested pre-commencement condition on page 27 of [ID11] requiring water neutrality mitigation to be secured via SNOWS would allow a favourable appropriate assessment to be concluded. The suggested condition is as follows:

> *No development shall commence until water neutrality mitigation has been secured via Horsham District Council's adopted Offsetting Scheme (in line with the recommendations of the Sussex North Water Neutrality Study: Part C – Mitigation Strategy, Final Report, December 2022) and this has been confirmed in writing by Horsham District Council.*

10.93 Although Natural England have not commented on the wording or suitability of the condition, as they see that as being beyond their expertise, they advise that any such condition should lead to scientific and practical certainty of ensuring no adverse effects [9.24]. In my view, it is appropriate to clarify that the standard should be 'reasonable certainty' to be consistent with the caselaw principles discussed elsewhere in this report.

10.94 SNOWS is part of the strategic approach to achieving water naturality that is designed to provide one way of addressing the issues raised by the NE Position Statement and it is endorsed by Natural England[78]. The overall mitigation strategy in the Part C Report is only effective when all three of its elements[79] work together. SNOWS is designed to 'make up' for any deficit left over from the other 2 elements through Local Authority offsetting and, taking a step back to look at the Part C Report as a whole, is capable of responding with reasonable flexibility to adjust to the best available evidence at particular times.

10.95 In these circumstances, a negatively worded/Grampian condition requiring accordance with SNOWS, and therefore water neutrality, can in principle provide reasonable certainty of no adverse effects on the integrity of the Arun Valley Sites. This is subject to an accompanying condition relating to on-site water efficiency that would achieve levels within the targets contemplated by the Part C Report, and therefore be consistent with the wider mitigation strategy. Section 4 of the Appellant's Water Neutrality Statement provides evidence that this would be achievable [CD10 1.03a][80]. This condition is recommended in Annex 4 of this report at Condition 5.

10.96 Turning to national policy and guidance on the use of conditions. The points above lead me to conclude that a SNOWS condition would be necessity to secure accordance with the Habitats Regulations. As such, one of the Framework tests at paragraph 56 would be met. I would also not take issue that the condition would be relevant, enforceable, capable of precision.

10.97 The only remaining question on the paragraph 56 tests worthy of detailed examination is whether such a condition would be reasonable. As it specifically addresses the use of Grampian conditions, the following PPG principle should also be considered in more detail *'such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission'*[81].

10.98 SNOWS is not currently operational which, according to the Council, will not happen until later in 2024. The Proof of Evidence from one of the Council's witnesses provides details of progress on SNOWS [CD10 1.05d][82]. Its introduction is subject to matters that include agreement between the relevant Local Planning Authorities around prioritisation of access, the tariff that

[78] [CD8 1.22]
[79] (1) reducing water demand through defined water efficiency requirements for new development, (2) water company demand management delivery, and (3) SNOWS
[80] Appendix A
[81] reference ID: 21a-009-20140306
[82] paragraph 3.6- 3.15

developers looking to use SNOWS will be asked to pay, and (related to this) an update to capacity and costs calculations to reflect the latest figures on water demand forecasts and the WRMP 2024.

10.99 These matters are substantially outside the Council's control and have the potential to impact on the introduction date for SNOWS. They will also affect when a developer can be expected to have access to SNOWS post introduction and the tariff they would be asked to pay.

10.100 In these circumstances, notwithstanding the Appellant's willingness to accept the condition in the absence of anything else short of an unfavourable appropriate assessment, in my view the Council's suggested condition as drafted stretches the test of reasonableness. Nevertheless, there are two appeal[83] decisions before the Inquiry where residential development in Horsham was allowed and a similar condition was used.

10.101 Lower Broadbridge Farm was for development on unallocated land, with a Grampian condition and unilateral undertaking providing restrictions that would prevent implementation until either a water neutrality scheme had been approved and implemented or, alternatively, use of SNOWS when available. In this case, neither the mitigation land nor landowner for the water neutrality scheme were identified at the point the decision was made.

10.102 In the case of Storrington, the land was allocated in a neighbourhood plan with a Grampian condition restricting development until a site-specific water neutrality mitigation scheme had been agreed and implemented or, alternatively, use of SNOWS when available. In this case, more detail of the site-specific mitigation scheme and land were known at the decision date than was the case in Lower Broadbridge Farm.

10.103 Both decisions consider their respective conditions against the tests in the Framework and conclude that they were necessary to confirm no adverse effects on the integrity of the Arun Valley Sites[84]. Both acknowledge the uncertainty related to SNOWS and prioritisation of access to it for their proposals but do not identify these issues as a barrier to linking conditions to it.

10.104 For this proposal, while the Council cast some doubt over prioritisation of access in oral evidence at the Inquiry, their acceptance that the proposal may well score highly in the prioritisation system when it is finalised in the Proof of Evidence from one their witnesses is a fair reflection of the position[85]. This does not appear to be a materially different situation to the one presented to the Inspectors in the two appeal cases, where a favourable conclusion was reached. There is no evidence in this case leading me to recommend a contrary view. As such, I consider that there is some prospect that the proposal would be able to access the SNOWS scheme within the permission

[83] Lower Broadbridge Farm (APP/Z3825/W/23/3321658) [ID3] and Storrington (APP/Z3825/W/22/3308455 & APP/Y9507/W/22/3308461) [CD5 1.03]
[84] see analysis at paragraphs 13 to 56 and condition 12 (in the Lower Broadbridge Farm decision) and paragraphs 67 to 109 and condition 13 (in the Storrington decision)
[85] see paragraph 4.10 of [CD10 1.05d]

time limit and a condition securing this would accord with the principle in the PPG.

10.105 On the more general question of reasonableness, it is notable that in both the Lower Broadbridge Farm and Storrington cases accessing SNOWS is specified in the absence of a bespoke water neutrality solution being implemented. This is essentially using SNOWS as a fallback and differs from the present proposal where, as currently drafted, offsetting via SNOWS would be the only option available to the developer.

10.106 Considering the points above, to ensure a SNOWs condition for this proposal is reasonable, and therefore in full accordance with the paragraph 56 Framework tests, there needs to be an option within it for a bespoke specific water neutrality scheme to be brought forward. Otherwise, the developer would be tied to the use of SNOWS regardless of prioritisation or the tariff. Provided such a scheme were approved by the Local Planning Authority, adopting this approach would not introduce uncertainty into the process in a way that may offend the Habitats Regulations.

10.107 Accommodating the possibility of a bespoke specific water neutrality scheme within the condition for the proposal would not be dissimilar to the circumstances in Lower Broadbridge Farm, where neither the mitigation land nor landowner for the water neutrality scheme were identified at the point the decision was made. As such, this approach would be consistent with other appeal decisions.

10.108 The option of amending the Council's suggested condition in this way was discussed with the parties at the Inquiry, with the Appellant supporting the approach and the Council being prepared to accept it if necessary to resolve any concerns I might have around reasonableness. The Council's position is reflected in paragraph 81 of their Closing [ID9].

10.109 Turning to the trigger for the condition, the need for water neutrality arises because of the occupation of the dwellings. This is because it is the use of water by the end users that gives rise to likely adverse effects on the Arun Valley sites. As there is no evidence of risks from construction, the Council's suggested pre-commencement trigger arguably lacks clear justification as the condition could be linked to occupation and still fulfil its intended purpose. This brings into question whether it would accord with the final sentence of paragraph 56 of the Framework.

10.110 In oral evidence at the Inquiry, the Council argued that an occupation trigger would make administration and enforcement of the conditions difficult, as rectifying potential breaches becomes harder when people are living in the homes. This is an understandable but generic argument with no specific evidence before the Inquiry of risk. It does not amount to clear justification. As such, a prior to occupation trigger would be a more pragmatic approach in this case as it would give the developer an option to construct the dwellings ahead of SNOWS becoming operational if they wished to do so, whilst at the same time not authorising the action that gives rise to likely adverse effects until the condition is discharged. I recommend this approach.

10.111 Considering the above, Condition 6 of Annex 4 in this report recommends the adopting the Council's suggested SNOWs condition, subject to the following main amendments:

- Use of a prior to occupation trigger in preference to pre-commencement.
- The addition of an option to agree and subsequently implement a site-specific water neutrality scheme.

10.112 For these reasons, I recommend that compliance with conditions enables the Secretary of State to ascertain that the proposal would not adversely affect the integrity of the Arun Valley sites.

Conclusion of appropriate assessment

10.113 Considering the assessment and conclusions carried out above, and subject to compliance with conditions, the Secretary of State is able to ascertain with reasonable certainty that the proposal would not adversely affect the integrity of the Arun Valley Sites. The Secretary of State is therefore able to conclude a favourable appropriate assessment and discharge their duty under Regulation 63(5) of the Habitats Regulations. I recommend that the Secretary of State adopts this section of the report, and the references included, as their appropriate assessment of the proposal.

10.114 In fulfilling this duty, regard has been paid to representations for Natural England, as the appropriate nature conservation body for the purposes of Regulation 63(3) of the Habitats Regulations. Natural England not appearing at the Inquiry has not lessened the regard paid to their representations [7.84].

Approval of the reserved matters

10.115 Sections 4 and 5 of the Appellant's Statement of Case [CD7 1.01] presents their view on the detail of the reserved matters. The Council have provided their assessment in section 3 of their Statement of Case [CD7 1.02a]. Section 6 of the SOCG [ID11] agrees the matters as common ground. Together, they provide adequate reasoning for why the proposal accords with the parameter plans, the Section 106 under the Outline Permission, and accords with relevant policies in the current development plan, including the policies described in Section 5 of this report.

10.116 Prior to the Inquiry, there was an unresolved issue related to flood risk and drainage [9.29]. There was disagreement about the proposed sustainable drainage system, specifically the appropriate figure (CV value) that should be used within the surface water calculations. The issue drew a holding objection from the LLFA and motivated them to submit a proof of evidence to the inquiry [CD10 1.06].

10.117 Ultimately, following discussion between the parties ahead of the Inquiry, the LLFA withdrew their objection and didn't appear. Two updated drawings [ID4 and ID5] arise from the discussions that took place and alter the surface water systems serving sub phase 3DEFG to increase pipe sizes and ensure there will be no increase in flood risk on or off the site.

10.118 Considering the technical nature of the updated drawings, no fairness or other issues resulted from allowing them to be added as inquiry documents. Subject to the updated drawings being specified in an approved details condition, I recommend agreeing that the proposal would be acceptable in flood risk and drainage terms.

10.119 Colgate Parish Council and a letter from a neighbour both question whether the wider development at Kilnwood Vale accords with the governing S106 agreement, particularly in terms of provision of community facilities. The Council has not raised any concerns in this regard and, while the S106 was not before the Inquiry, the Council's appraisal supports a view that sub phase 3DEFG accords with it. Any enforcement of the wider S106 provisions is beyond the remit of this appeal.

10.120 Beyond this, there is little I can add to the assessment of matters unrelated to habitats effects provided by the Council, supported by the SOCG, other than to say that I agree with it and recommend adopting the reasoning. For these reasons, the reserved matters can be approved subject to the conditions discussed below.

Planning balance

10.121 The planning balance presents three options for the Secretary of State. My recommendation is that the Option 1 is adopted. Although they are alternative courses of action, I do not recommend adopting either Option 2 or Option 3 for the reasons provided.

Option 1 (recommended)

10.122 Firstly, if it is agreed that Condition 6 at Annex 4 of this report requiring water neutrality is necessary and appropriate, for the reasons discussed above[10.90-10.110], the proposal accords with the development plan for the area as a whole and therefore benefits from the statutory presumption in S38(6) of the 2004 Act. As appropriate mitigation measures would be provided by the condition securing water neutrality, which is the basis for concluding a favourable appropriate assessment[10.111-10.112], there is no conflict with Policy 31(4) of the HDPF [5.6] and the development plan taken as whole. Paragraph 11(c) of the Framework indicates that the proposal should be approved without delay. As such, my recommendation is that the reserved matters should be approved.

Option 2

10.123 Secondly, if the Secretary of State thinks that the Appellant's evidence of avoidance/mitigation allows a favourable appropriate assessment to be concluded, the water neutrality condition is likely to be become unnecessary and reserved matters can be approved using the same pathway explained in the paragraph above.

Option 3

10.124 As a final option, if the Secretary of State does not think that the Appellant's evidence of avoidance/mitigation allows a favourable appropriate assessment to be concluded and disagrees with the use of the water neutrality condition, the proposal would not, in my view, accord with Policy 31(4) of the HDPF due to an absence of appropriate mitigation and compensation measures. It would also conflict with the environmental objective in the Framework of protecting the natural environment [5.19]. Approval of the proposal in these circumstances would also be in breach of the Secretary of State's duty under Regulation 63(5) of the Habitats Regulations. This would be a very significant material consideration to be weighed against other considerations.

10.125 The Council's housing land supply position is uncontested and poor [7.43]. There is no dispute that Kilnwood Vale is an important contributor to delivery. It is a long-standing allocation that has been part of Council's spatial strategy for circa 15 years. It has outline planning permission and substantial parts that have been implemented through other phases.

10.126 The Appellant's frustration at the delay to Sub Phase 3DEFG is understandable, although there is no evidence that they seriously explored a site-specific solution that may have assisted with managing a delay. Regardless, implementation of Sub Phase 3DEFG accords with Framework on delivering a sufficient supply of homes and is a significant material consideration [5.18].

10.127 The statement of case of the Appellant's planning witness [CD10 1.101a][86] sets out a full range of planning benefits associated with the proposal. I would not take issue with any of them. Collectively the benefits are significant material considerations.

10.128 It is also important to highlight that there are currently occupied homes at Kilnwood Vale with people living day to day with an incomplete development and an absence of local services that are related, directly or indirectly, to the delivery of Sub Phase 3DEFG. Delay in completion effects the establishment of the community and the lives of those currently living there. As an ongoing construction project, delay would likely get to a point where the continuing employment of site staff would be put at risk.

[86] Paragraphs 9.10-9.36

10.129 Neither of these points are substantially evidenced but are natural and immediate consequences that should not be lost sight of.

10.130 The balance of benefits is tempered by the fact that the length of actual delay in any of the scenarios considered in this report is not extensively evidenced. Nevertheless, the benefits are significant material considerations.

10.131 Weighing these matters up, notwithstanding the significance of the benefits, they do not outweigh the conflict with legal obligations in the Habitats Regulations that would, in the absence of a favourable appropriate assessment, put the Secretary of State in breach of the duty under Regulation 63(5). As such, my recommended decision under this third option would be a dismissal of the appeal.

10.132 For completeness, the presumption at Paragraph 11(d) of the Framework is not relevant in this scenario as the application of Framework policies that protect areas particular importance[87] provides a clear reason for refusing the proposal.

Conclusion on planning balance

10.133 To directly address the reason for recovery [1.7], for the reasons discussed above, Regulation 63 of the Habitats Regulations does not allow for a balancing of different planning objectives beyond affects on the integrity of the Arun Valley Sites [10.13-10.20]. While an ordinary consideration of the planning balance under S38(6) of the 2004 Act allows for a wider balance, breach of the legal obligations under the Habitats Regulations weighs overwhelmingly in the balance, even in the face of other very important policy objectives.

10.134 In opening, the Appellant said that the intention of the appeal is expressly to test the validity of the NE Position Statement and the Council's response to it [ID1][88]. With due respect, the wider public policy questions this encompasses includes elements that are outside the scope of the decision that is before the Secretary of State. At this project level the question is fundamentally about whether, on a proper application of the law as it stands, accordance with the Habitats Regulations can be secured to allow agreement of the reserved matters for Sub Phase 3DEFG.

10.135 When considered on this basis, I recommend that reserved matters should be approved in line with the first option discussed above[10.120].

[87] Which, under footnote 7, includes Habitats sites and/or SSSIs
[88] paragraph 7

11. Conditions

11.1 Should the appeal be allowed, recommended conditions and the reasons for them, are attached at Annex 4. Unless otherwise stated they are as per the list at Appendix 2 of the SOCG [ID11], except for any minor drafting changes/amalgamation needed for clarity. The list was updated following the Inquiry and discussion about their accordance with Paragraph 56 of the Framework.

11.2 The water neutrality conditions are discussed in paragraphs 10.90 to 10.110 of this report.

11.3 Although suggested by the LLFA, I do not recommend a separate condition requiring accordance with drainage plans (see Condition 14, SOCG, Appendix 2). This would be unnecessary as it would replicate the plans condition at Condition 1, which contains the drainage plans.

11.4 Conditions 14 and 15 relating to foul water and fire and rescue were not discussed at the Inquiry and come at the suggestion of the relevant consultees. This appears simply to have been an oversight, as the Appellant will have had the opportunity to review the consultation responses. Examining the contents, I recommend including them for the reasons set out.

12. **Inspector's recommendation**

12.1 For the reasons set out above, I recommend that the application for reserved matters approval be granted subject to the conditions in Annex 4.

Annex 1: Appearances

FOR THE APPELLANT:

Counsel for the Appellant - Christopher Boyle KC (Landmark Chambers)

Witnesses:

Alistair Baxter CEcol CEnv MCIEEM (Aspect Ecology)
Alistair Aitken C Eng MICE MCIWEM C.WEM (Fortridge Consulting Limited)
Dan Smyth BSc, MSc, DIC (Savills)
Sarah Beuden BSc MSc MRTPI (Savills)

FOR THE LOCAL PLANNING AUTHORITY:

Counsel for the Local Planning Authority – Noemi Byrd (6 Pump Court)

Witnesses:

Tal Kleiman (Horsham District Council)
Adrian Smith (Horsham District Council)

Annex 2: Core Documents

Agreed between the parties as core documents ahead of the inquiry. Full documents can be accessed here.

CD1: Planning Application Documents and Plans

Reference	Content
CD1 1.01	Shadow Habitats Regulations Assessment (October 2022)
CD1 1.02	Shadow Habitats Regulations Assessment Addendum (Drawing: August 2023, Ref N/A)
CD1 1.03	Water Neutrality Statement (Drawing: August 2023, Ref N/A)
CD1 1.04	Preliminary Surface and Foul Water Drainage Strategy (Sheet 1 of 2) (Drawing: 2107120-002, Ref D)
CD1 1.05	Preliminary Surface and Foul Water Drainage Strategy (Sheet 2 of 2) (Drawing: 2107120-003, Ref D)
CD1 1.06	Preliminary Surface and Foul Water Drainage Strategy (Sheet 1 of 2) (Drawing: 2107120-002, Ref E)
CD1 1.07	Preliminary Surface and Foul Water Drainage Strategy (Sheet 2 of 2) (Drawing: 2107120-003, Ref E)
CD1 1.08	PPS25 Flood Risk Assessment (Drawing: July 2010, Ref N/A)
CD1 1.09	Site Wide Drainage Strategy Report (Drawing: December 2016, Ref D5)
CD1 1.10	Applicant Response to LLFA Holding Objection (Drawing: 07.08.2023, Ref N/A)
CD1 1.11	Drainage Strategy Briefing Note (Drawing: 04.08.2023, Ref A)
CD1 1.12	Drainage Strategy Briefing Note (Drawing: 29.09.23, Ref B)
CD1 1.13	Phase 2 and 3 Remaining Infrastructure Drainage Report (Drawing: October 2023, Ref N/A)
CD1 1.14	Site Location Plan

CD2: Original Application Relevant Documents

Reference	Content
CD2 1.01	Kilnwood Vale Outline Consent Decision Notice (October 2011)
CD2 1.02	Kilnwood Vale Section 73 DC/15/2813 Decision Notice (April 2016)
CD2 1.03	DAS Addendum (December 2015)

CD2 1.04	Phasing Plan (Drawing: 321, Rev ADD02)
CD2 1.05	Building Heights Plan (Drawing: 361, Rev ADD03)
CD2 1.06	Density Plan (Drawing: 322, Rev ADD05)
CD2 1.07	Land Use Plan (Drawing: 321, Rev ADD04)
CD2 1.08	Movement Plan (Drawing: 351, Rev ADD03)
CD2 1.09	Open Space Plan (Drawing: 322, Rev ADD01)
CD2 1.10	Pedestrian and Cycle Plan (Drawing: 351, Rev ADD02)
CD2 1.11	Illustrative Masterplan Phasing Plan

CD3: Documents not part of original application

Reference	Content
CD3 1.01	Applicant's response to the Lead Local Flood Authority's Holding Objection (7 December 2023
CD3 1.02	Drainage Strategy Briefing Note (Ref: 2107120-01C)

CD4: The Development Plan and Evidence Base

Reference	Content
CD4 1.01	Horsham District Planning Framework (November 2015)
CD4 1.02	Horsham District Local Plan 2023-2040 Regulation 19 (January 2024)
CD4 1.03	Horsham District Local Plan: Habitats Regulations Assessment (November 2023)
CD4 1.04	Annual Monitoring Report 2022/23 (18 January 2024)
CD4 1.05	Local Plan Viability Study (Aspinal Verdi, November 2023)
CD4 1.06	Joint Topic Paper: Water Neutrality (HDC & others, May 2023)
CD4 1.07	Water Neutrality Statement of Common Ground (HDC & Others, July 2023)

CD5: Relevant Planning Appeal Decisions and High Court Judgements

Reference	Content
CD5 1.01	Judgement: R (An Taisce) v SSECC - [2014] EWCA Civ 1111 1 August 2014
CD5 1.02	Judgement: R (Together Against Sizewell C) v SoS for Energy Security and Net Zero [2023] EWHC 1526 22 June 2023
CD5 1.03	Appeal A Ref: APP/Z3825/W/22/3308455 Land west of Ravenscroft, Storrington, West Sussex RH20 4HE Appeal B Ref: APP/Y9507/W/22/3308461 Land west of Ravenscroft, Storrington, West Sussex RH20 4EH
CD5 1.04	Appeal ref. APP/Z3825/W/22/3308627 Copsale Road Appeal on 3rd October 2023
CD5 1.05	Wyatt v Fareham BC [2023] Env. L.R. 14
CD5 1.06	Appeal Ref : APP/Z3825/W/23/3324144 Land North of The Rise, Partridge Green – 8 February 2024
CD5 1.07	Appeal Ref: APP/Z3825/W/23/3321658 - Lower Broadbridge Farm
CD5 1.08	Judgement - Harris v Environment Agency [2022] EWHC 2263 (Admin)

CD6: Statutory Consultee Responses

Reference	Content
CD6 1.01	Natural England (12 September 2023)
CD6 1.02	Lead Local Flood Authority (22 May 2023)
CD6 1.03	Lead Local Flood Authority (18 October 2023)

CD7: Appeal Documents

Reference	Content
CD7 1.01	Appellant Full Statement of Case (January 2024)
CD7 1.02	HDC Statement of Case (January 2024)

CD8: Other

Reference	Content
CD8 1.01	Southern Water Water Resources Management Plan (December 2019)
CD8 1.02	Southern Water Draft Water Resources Management Plan (2024)
CD8 1.03	Southern Water: Draft Water Resources Management Plan 2024 Statement of Response August 2023
CD8 1.04	Southern Water : Water Resources Management Plan 2024 Statement of Response Annex 5.2: Responses to non questionnaire respondents by organisations August 2023 Version 1
CD8 1.05	Southern Water: Water Resources Management Plan 2019 Annex 10: Strategy for the Central area December 2019 Version 1
CD8 1.06	Southern Water: Draft Water Resources Management Plan 2024 Annex 17: Leakage Strategy October 2022 Version 1.0
CD8 1.08	Gov.Uk : Guidance Water resources planning guideline Updated 14 April 2023 https://www.gov.uk/government/publications/water-resources-planningguideline/water-resources-planning-guideline
CD8 1.09	Biodiversity and Geological Conservation: Circular 06/2005
CD8 1.10	National Planning Policy Framework
CD8 1.11	National Planning Practice Guidance
CD8 1.12	Water Neutrality and Planning Applications prepared by Horsham District Council (June 2023)
CD8 1.13	Water Neutrality and Planning Policy prepared by Horsham District Council (June 2023) https://www.horsham.gov.uk/planning/water-neutrality-in-horshamdistrict/water-neutrality-and-planning-policy
CD8 1.14a	JBA Consulting - Sussex North Water Neutrality Study: Parts A: Individual Local Authority Areas (July 2021)
CD8 1.14b	JBA Consulting - Sussex North Water Neutrality Study: Part B – In-combination (April 2022)
CD8 1.14c	JBA Consulting - Sussex North Water Neutrality Study: Part C - Mitigation Strategy (December 2022)
CD8 1.15	Natural England's Water Neutrality: Position Statement and Response (2021)
CD8 1.16	Natural England's Advice Note regarding Water Neutrality within the Sussex North Water Supply Zone prepared by Natural England (February 2022)
CD8 1.18	Natural England Correspondence (11 January 2024)
CD8 1.19	Correspondence from the Environment Agency (11 July 2023)
CD8 1.20	Correspondence from Southern Water (7 July 2023)

CD8 1.21	Southern Water Draft WRMP 2024 Annex 20 – Habitats Regulations Assessment
CD8 1.22	Natural England endorsement of Part C Position Statement (November 2022)
CD8 1.23	SN Authorities Water Neutrality Statement of Common Ground (July 2023)
CD8.1.24	Horsham Local Plan Water Technical Note (Aecom, March 2021)
CD8.1.25	HDC Rebuttal Land at Lower Broadbridge Farm. (Appeal ref. APP/Z3825/W/23/3321658
CD8.1.26	The Wallingford Procedure, Volume 1 Principles, Methods and Practice 1981
CD8.1.27	The Wallingford Procedure, Volume 4 Modified Rational Method, 1981
CD8.1.28	CIRIA X108 - Drainage of Development Sites - A Guide
CD8.1.29	CIRIA C753 The SuDS Manual
CD8 1.30	Water-stressed areas - final classification 2021
CD8 1.31	Glossary Combined (4.3.2024)

CD9: Statements of Common Ground

Reference	Content
CD9 1.01	Main Statement of Common Ground (February 2024)

CD10: Proofs of Evidence

Reference	Content
CD10 1.01	Appellant Planning – Miss Sarah Beuden
CD10 1.02	Appellant Water Supply, Demand and Resources – Mr Alistair Aitken
CD10 1.03	Appellant Water Calculations – Mr Daniel Smyth
CD10 1.04	Appellant HRA – Mr Alistair Baxter
CD10 1.05a	HDC HRA/Planning/Water – Mr Adrian Smith - Main
CD10 1.05b	HDC HRA/Planning/Water – Mr Adrian Smith - Summary
CD10 1.05c	HDC HRA/Planning/Water – Mr Adrian Smith – Appendix 1
CD10 1.05d	HDC Water Supply – Mr Tal Kleiman

CD10 1.05e	HDC Water Supply - Summary – Mr Tal Kleiman
CD10 1.06	Lead Local Flood Authority – Katherine Waters
CD10 1.07	Appellant Flood Risk – Mr Brian Cafferkey

Annex 3: Inquiry documents

Documents submitted during or after the Inquiry

Accepted on the basis that I was satisfied the material was directly relevant to, and necessary for, my decision and that no prejudice arose from accepting them. Documents can be accessed here.

- ID.1 Mr Boyle's (Appellant) opening statement
- ID.2 Ms Byrd's (Council) opening statement
- ID.3 3321658 Land at Broadbridge Heath Appeal Decision, 7 March 2024
- ID.4 Preliminary Surface and Foul Water Drainage Strategy (Sheet 1 of 2) (Drawing: 2107120-002, Ref G)
- ID.5 Preliminary Surface and Foul Water Drainage Strategy (Sheet 2 of 2) (Drawing: 2107120-003, Ref G)
- ID.6 Southern Water Services Limited – Weir Wood New Build Notice under regulation 28(4) of the Water Supply (Water Quality) Regulations 2016
- ID.7 Judgment – Harris v Environment Agency [2022] EWHC 2263 (Admin)
- ID.8 Source of Shadow HRA, Figure 5.1. SW 11 July 2022
- ID.9 Ms Byrd's (Council) Closing statement
- ID.10 Mr Boyle's (Appellant) Closing statement
- ID11 Final statement of common ground
- ID12 Clarification note in respect of access
- ID13 Natural England letter dated 19 April 2024
- ID14 Appellant's response to Natural England letter dated 19 April 2024

Annex 4 :Recommended conditions

1) The development hereby permitted shall be carried out in accordance with the approved plans listed in Appendix 1 of the Statement of Common Ground between Horsham District Council and Crest Nicholson Operations Limited dated 18 March 2024

Reason: In the interests of certainty.

Pre-Commencement (Slab Level)

2) No development above ground floor-slab level shall commence until a schedule of materials, finishes and colours to be utilised for the external walls, windows and roofs of the approved buildings, has been submitted to and approved by the Local Planning Authority in writing. All materials to be utilised in the construction of the approved buildings shall, thereafter, conform to those approved.

Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

3) No development shall commence above ground floor-slab level, until full details of underground services, including locations, dimensions and depths of all service facilities and required ground excavations, have been submitted to and approved by the Local Planning Authority in writing. The development shall be carried out as per the approved details and coordinated with the approved Residential Landscape Masterplan (ref: 30125-5 DR-5000 S4-P12), Softworks Proposals (3015-5-DR-5001-P9, 3015-5-DR-5002-P9, 3015-5-DR-5003-P6, 3015-5-DR-5004-P6, 3015-5-DR-5005-P6, 3015-5-DR-5006-P10, 3015-5-DR-5007-P10, 3015-5-DR-5007-P10 and 3015-5-DR-5008-P9) and Preliminary Surface and Foul Water Drainage Strategy (refs: 2107120-002 G and 2107120-003 G).

Reason: To ensure the successful delivery of necessary underground services without conflict with the approved landscaping and drainage strategy, in accordance with Policies 33 and 38 of the Horsham District Planning Framework (2015).

4) No development shall commence above ground floor-slab level, until full details of any street-furniture to be installed, which can include any lighting columns, public cycle stands and bollards have been submitted to and approved by the Local Planning Authority in writing. The development shall be implemented in accordance with the approved details.

Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

5) No development above ground floor slab level shall commence until full details of the water efficiency measures required to achieve a maximum of 91.4 l/p/d have been submitted to and approved in writing by the Local Planning Authority. The submitted details shall include the specification of all fixtures and fittings to be included in all dwellings, and a completed Part G calculator confirming the targeted water consumption is achieved.

i. No dwelling hereby permitted shall be occupied until the approved water efficiency measures to serve that dwelling have been installed and made available for use in accordance with approved details, with evidence of installation submitted to an approved in the writing by the Local Planning Authority.

ii. The installed water efficiency measures, or any subsequent replacement of measures over the lifetime of the development, shall achieve equivalent or higher standards of water efficiency to those approved unless otherwise agreed in writing with the Local Planning Authority.

Reason: To ensure the development uses measures which promote the conservation of water in accordance with policies 35 and 37 of the Horsham District Planning Framework and to ensure the development is water neutral to avoid an adverse impact on the Arun Valley SAC, SPA and Ramsar sites.

Pre-Occupation

6) No dwelling hereby permitted shall be first occupied until written agreement from the Local Planning Authority has been provided that either:

i. A water neutrality mitigation scheme has been secured via Horsham District Council's adopted Offsetting Scheme (in line with the recommendations of the Sussex North Water Neutrality Study: Part C – Mitigation Strategy, Final Report, December 2022). OR

ii. A site-specific water neutrality mitigation scheme has been (a) agreed in writing with the Local Planning Authority as being equivalent to Horsham District Council's adopted Offsetting Scheme AND (b) implemented in full.

Reason: To ensure the development is water neutral to avoid an adverse impact on the Arun Valley SAC, SPA and Ramsar sites in accordance with Policy 31 of the Horsham District Planning Framework (2015), Paragraphs 185 and 186 of the National Planning Policy Framework (2023), and duties under the Conservation of Habitats and Species Regulations 2017 (as amended).

7) All approved soft/ hard landscaping and boundary treatments within the curtilage of an approved building shall be implemented prior to the first occupation of that dwelling, in accordance with the approved soft/hard landscaping drawings, unless alternative hard and soft landscaping details and/or boundary treatments are submitted to and been approved in writing by the Local Planning Authority prior to the commencement of development above ground-floor slab level.

Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

8) All soft landscaping outside of the curtilage of an approved dwelling shall be carried out in the first planting and seeding season, following the first occupation of the relevant buildings or the completion of the development, whichever is the sooner. Any trees or plants detailed on the approved landscaping strategy which die, are removed, become seriously damaged or diseased, within a period of five years following the completion of the development shall be replaced with new planting of a similar size and species.

Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

9) Prior to the first occupation of any part of the development, a landscape management responsibilities plan (delineating areas of ownership and maintenance responsibility) for all communal landscape areas shall be submitted to and approved in writing by the Local Planning Authority. The landscape areas shall be managed and maintained in accordance with the approved details.

Reason: To ensure a satisfactory development and in the interests of visual amenity and nature conservation in accordance with Policy 33 of the Horsham District Planning Framework (2015).

10) No dwelling hereby permitted shall be occupied until secure covered cycle parking facilities to serve that dwelling have been constructed and made available for use in accordance with approved drawings. The cycle parking facilities shall thereafter be retained as such for their designated use.

Reason: To provide alternative travel options to the use of the car in accordance with Policy 40 of the Horsham District Planning Framework (2015).

11) No dwelling hereby permitted shall be occupied until the car parking spaces serving the respective dwellings have been constructed and made available for use in perpetuity. All unallocated (visitor) parking spaces shall be completed and made available for use prior to the completion of the development and shall, thereafter, remain available only for use as visitor parking.

Reason: To ensure future occupiers benefit from sufficient access to parking facilities and in accordance with Policy 41 of the Horsham District Planning Framework (2015).

12) No part of the development shall be occupied until details of the proposed solar PV apparatus, including locations and amounts, have been submitted to and approved in writing by the Local Planning Authority. The equipment shall, be installed prior to the first occupation of each respective dwelling in accordance with the approved details.

Reason: To provide certainty to the Local Planning Authority as to the extent of solar PV provision within the approved development, the extent of benefit to be derived in respect of the mitigation and minimisation of impacts of climate change and visual impacts of solar PV provision in accordance with the provisions of Policies 33, 35, 36 and 37 of the Horsham District Planning Framework (2015).

13) No dwelling shall be first occupied until secure covered provision for the storage of refuse and recycling has been made for that dwelling in accordance with the submitted plans. The refuse and facilities shall thereafter be retained for use at all times.

Reason: To ensure that future occupiers benefit from sufficient facilities for the storage of refuse/ recycling bins and in the interests of visual amenity in accordance with Policies 32 and 33 of the Horsham District Planning Framework (2015).

14) No dwelling shall be first occupied until confirmation has been provided to the Local Planning Authority that either:- 1. All foul water network upgrades required to accommodate the additional flows from the development have been completed; or- 2. A development and infrastructure phasing plan has been agreed with the Local Authority in consultation with Thames Water to allow development to be occupied. Where a development and infrastructure phasing plan is agreed, no occupation shall take place other than in accordance with the agreed development and infrastructure phasing plan.

Reason: To ensure that any necessary improvements to the foul water network are made ahead of occupation.

15) No dwelling shall be first occupied until details showing the location of fire hydrants and method of installation and maintenance in perpetuity have been submitted to and approved in writing by the Local Planning Authority, in consultation with West Sussex County Council's Fire and Rescue Service. The development shall be carried out in accordance with the approved details and retained as such, unless a variation is agreed with the Local Planning Authority.

Reason: In the interests of emergency planning and in accordance with policy CP13 of the Horsham District Local Development Framework; Core Strategy and DC40 of the Horsham District Local Development Framework: General Development Control Policies (2007) and policy CP3 of the Horsham District Local Development Framework Core Strategy (2007), HDPF Policies 33 and 39.

Regulatory and monitoring

16) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), no roof extensions falling within Class B, Part 1, Schedule 2 of the Order shall be erected, constructed and/or installed to any dwelling hereby approved without express planning permission from the Local Planning Authority first being obtained.

Reason: To ensure that the Local Planning Authority can fully consider whether prospective roof extensions adequately preserve the visual amenity of the area and privacy and living conditions of nearby occupiers in accordance with Policy 33 of the Horsham District Planning Framework (2015).

17) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), all garages hereby permitted shall be used only as private domestic garages for the parking of vehicles incidental to the use of the properties as dwellings and for no other purpose.

Reason: To ensure adequate off-street provision of parking in the interests of amenity and highway safety, and in accordance with Policies 40 and 41 of the Horsham District Planning Framework.

Ministry of Housing, Communities & Local Government

www.gov.uk/mhclg

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, King's Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.