



# FARNHAM TOWN COUNCIL

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Report  
Council

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**Date: 8 August 2023**

## **Potential Judicial Review of Planning Appeal APP/R3650/W/22/3311941**

### **1. Summary**

- 1.1 A Planning Appeal for an application by Wates to build 146 homes on land at Waverley Lane, which had been refused by Waverley Borough Council in November 2022, has been approved by the Government's Inspector (Decision letter dated 3<sup>rd</sup> July attached at Annex 1). The site was not designated for development in the Neighbourhood Plan and was for a greenfield development on land that had been designated for an extension of the Surrey Hills AONB.
- 1.2 The local community and Farnham Town Council are very concerned by this particular decision given the landscape value of the site abutting the Area of Great Landscape Value in an area beyond the Built Up Area Boundary and consideration is being given to making a Judicial Challenge which needs to be made within 6 weeks of the Appeal Decision.
- 1.3 This report with its annexes (some of which contain legal privilege and are therefore being kept confidential) seeks Council's decision on whether or not there are sufficient grounds to make a legal challenge having weighed up the advice received on the prospects of success and the likely costs of a challenge.

### **2. Background**

- 2.1 Following the Inspector's decision, Waverley officers initially advised that apart from grammatical errors in the decision letter which was badly phrased, there was no plan to make any challenge. However, after discussion with councillors, a legal opinion was subsequently taken and Farnham Town Council has been asked if it would support a legal challenge as a Rule 6 participant if further action were to be taken by the Borough Council.
- 2.2 As a result of the WBC initial response that it would not take action, FTC officers have been separately exploring all opportunities to see if there was any prospect of FTC challenging the decision separately. An initial meeting took place with Steve Tilbury, FTC's external planning advisor (Notes attached at Annex 2), and discussions have taken place with the Director and Chair of the Surrey Hills AONB and its planning advisor. Following the Council meeting on 27<sup>th</sup> July, FTC also commissioned a King's Counsel to check independently whether there were grounds for challenging, and if so, what would be the estimated likelihood of success on

the grounds available. Ideally the commissioning of a legal opinion in terms of questions and costs would have been shared with Waverley, but the questions and answers have not been shared and have only been summarised for FTC.

- 2.3 The most significant issue centres around the site allocations and environmental protections in the Neighbourhood Plan, and whether or not the Inspector gave sufficient consideration to Farnham Neighbourhood Plan Policies 14 and 10c. This site was considered particularly important given that it is on the candidate list for an extension to the Surrey Hills Area of Outstanding Natural Beauty which had long been argued by Farnham Town Council and the local community given its setting and proximity to Moor Park and Waverley Abbey.
- 2.4 The site is outside the Built up Area Boundary and had been subject to an unsuccessful Judicial Review by the developers prior to the Neighbourhood Plan being made. This application (the fifth) was in conflict with several elements of the Farnham Neighbourhood Plan including FNPI14 (site allocations) and FNPI10c which sought to “*Conserve and enhance landscape and scenic beauty of the Surrey Hills Area of Outstanding Natural Beauty and its setting – including those Areas of Great Landscape Value under consideration for designation as AONB*”.
- 2.5 The appeal has been determined on the basis of the ‘tilted balance’ which applies when a local planning authority cannot demonstrate a 5 year supply of deliverable land to meet its housing target. It is accepted that Waverley does not have a 5 year housing land supply under the way the Government calculates it, partly because developers have not yet built significant sites that have approval.
- 2.6 The South Farnham Residents’ Association (SOFRA) had put in an enormous amount of work over several years in demonstrating the negative impact development would have, and the harm that would be made to the local environment which was designated as being of high landscape value and high sensitivity in the landscape study undertaken by HDA on behalf of the Town Council in preparing the Neighbourhood Plan. In 2014 AMEC, in a landscape review for the Local Plan had also said “The area with its high quality character, sensitivity, and proximity to the AONB with direct visual connection means that any capacity for development is likely to be limited.” A representation from SOFRA setting out the key issues from their perspective is attached at Annex 3.
- 2.7 The Inspector’s decision is all the more frustrating given three other recent appeal decisions in Farnham (Green Lane, Green Lane Farm and Lower Weybourne Lane) where Inspectors recognised the importance of the Farnham Neighbourhood Plan and turned down the appeals. In the Lower Weybourne Lane (May 23) Appeal Ref: APP/R3650/W/22/3310793) the Inspector said “*I am also mindful of the role that neighbourhood planning has as part of ensuring that the planning system is genuinely plan led and all that Paragraph 15 of the Framework says about providing a positive vision and a platform for local people to shape their surroundings.*” (para.86 of his report). “As a consequence, the clear conflict with the strategy in the Neighbourhood Plan, delivered through the explicit detail of FNPI10 and FNPI11 is a matter that attracts considerable weight.” (Para.87). His conclusion was Para 103. In these circumstances, a grant of planning permission for development that so clearly goes against the wishes of the Neighbourhood Plan would be a serious undermining of it and its underlying strategy for balancing housing growth with environmental objectives.
- 2.8 In Para. 91 the Inspector talks about “Harm from developing an unallocated site outside the BUAB” but gives little consideration to FNPI14 which she calls permissive and was the policy which decided, using careful criteria, which sites to allocate sites. In so doing, she is also disagreeing with the recent Hawthorn’s Appeal Inspector. on this point. She is also ignoring the fact that The Farnham Neighbourhood Plan is delivering housing above those allocated in Local Plan part 1 as recently acknowledged by the Inspector for Lower Weybourne Lane in

May. Unfortunately, in this context, Farnham's over delivery is set against the wider under delivery across Waverley as a whole.

- 2.9 The Neighbourhood Plan no longer retains the 2 year protection for Made Neighbourhood Plans and the proposed NPPF changes (announced by Rt Hon Michael Gove in a Written Ministerial Statement in December 2022) extending this to 5 years have not yet come into place. The Borough is short of its five-year land supply because approved sites are not being built out, which puts sites allocated in Neighbourhood Plans in a worse position than sites allocated in Local Plans which enjoy a five year protection in up-to-date Local Plans).
- 2.10 The AONB planning advisor's views were incorporated in the brief submitted for the Counsel's advice, and the summary of the KC reflects the points raised by the AONB team.

### **3 Summary of key points from the Legal advice undertaken**

- 3.1 The summary of the advice received by Waverley is contained at EXEMPT Annex 5 and the advice commissioned separately by Farnham Town Council from a leading King's Counsel who is familiar with the Farnham Neighbourhood Plan is attached at EXEMPT Annex 4. If Members wish to discuss the detail of this advice, Council will need to move into confidential session.
- 3.2 The conclusion of both sets of advice are that the Inspector seems to have demonstrated to a sufficient degree that she has considered the issues at most concern (Site allocations, the landscape quality and the harm that will result, and the candidate status of the land for inclusion in the AONB) and does not have to necessarily explain every element she has taken into consideration. There are also other elements that were seemingly not provided in evidence at the appeal, and these cannot be raised at a judicial challenge. The Inspector has, in a general sense, shown that she has taken these factors into account even if she has dismissed them in coming to her conclusion. There is generally a "benevolent" approach to the construction of decision letters with the result is that the potential grounds for a successful challenge are limited.

### **4 Issues for consideration and next steps**

- 4.1 Council is asked to consider the following issues:
- i. Should there be a legal challenge based on the advice received and if so, on what basis – by FTC alone or in support of the Borough Council if the Borough Council will take the matter forward. If supporting the Borough Council, this would be as a 'Rule 6' supporter with a seat at the table and by potentially committing to the Borough Council costs. Any contribution would need to be in discussion with the Borough Council and reflect the Aarhus principle that costs for town and parish councils would be expected to be capped;
  - ii. If, on balance, no legal challenge were to be made, what other actions can be undertaken to mitigate harm from this Inspector's decision. For example, should Waverley be asked to put out to scrutiny all documents relating to the discharge of conditions on this site, noting that the Inspector talked about potential harm to landscape and its surroundings in Para 51 but did not impose a specific condition to minimise that harm;
  - iii. Given that the Neighbourhood Plan, as part of the Development Plan for Waverley, is seemingly not always supported by planning officers, how can the policies in the Neighbourhood Plan be given greater emphasis in determining planning applications and defending appeals;
  - iv. What are the implications for the review of the Neighbourhood Plan.

## **Recommendations**

**It is recommended that Council determines whether or not it wishes to:**

- 1. a) Instigate a Judicial review on its own; or b) Support a Judicial Review led by Waverley Borough Council as a Rule 6 supporter, and with a financial contribution; or c) not pursue a further legal challenge having considered the potential prospects of success.**
- 2. Pursue any other matters in relation to this appeal.**
- 3. Authorise the Town Clerk to negotiate the best way to progress decisions agreed by Council in consultation with the Co-Leaders and Mayor.**