Neutral Citation Number: [2021] EWHC 1435 (Admin)

Case No: CO/3397/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before:

MR JUSTICE JAY

- -

Between:

THE QUEEN (on the application of SAVE WARSASH AND THE WESTERN WARDS)	**Claimant**
- and –	
FAREHAM BOROUGH COUNCIL	**Defendant**
- and –	
(1) LORRAINE LOUISE HANSLIP	**Interested**
(2) NATURAL ENGLAND	**Parties**

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- -

Gregory Jones QC and Conor Fegan (instructed by **Fortune Green Legal Practice**) for the **Claimant**
Timothy Mould QC (instructed by **Southampton & Fareham Legal Partnership**) for the **Defendant**
David Elvin QC and Matthew Henderson (instructed by **Rachel Francis, Principal Solicitor**) for **Natural England**
Lorraine Hanslip did not appear

Hearing date: 13th May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 28th May 2021 at 10.00am.

MR JUSTICE JAY:

Introduction: Essential Factual Background

1. My judgment in this case should be read in conjunction with that in *R (oao Wyatt) v Fareham BC* [2021] EWHC 1434 (Admin) which I am handing down at the same time. Grounds 1, 7 and 8 therefore fail. Although there are minor factual differences (viz. the application here was for full rather than outline planning permission for six 5-bedroom detached houses), these distinctions do not impact on the use of the 2.4 person per dwelling occupancy rate.

2. The application for judicial review succeeds in this case on two, related procedural grounds. It fails on the contention that the planning officer applied the wrong test to the issue of the use to which the subject land would have been put had planning permission not been granted.

3. The planning application brought by Mrs Lorraine Hanslip was for a residential development of six detached houses and garages incorporating wetland habitat creation on land at 79 Greenaway Lane, Warsash, Southampton. Various plans and photographs have been provided, and for ease of comprehension I have annexed to this judgment the plan that I believe is the most helpful for this purpose.

4. In broad outline, the land comprehended by the red line lies to the north of the land in the ownership of Mrs Hanslip and abuts Greenaway Lane. For reasons of clarity, I will be describing the whole area (i.e. the red and the blue land) as "the land", the area the subject of the application for planning permission as "the site", and the area which is outwith the planning application, marked in blue on the relevant plan, as "the other land".

5. As for the site, it comprises 8,232.380 m² of currently undeveloped grassland (this excludes the existing detached property which was built about 8 years ago and is surrounded by its own red line) and 646.952 m² of tree belt which will be retained. The dimensions of the other land to the south have not been supplied, but I can take these to be in the region of 10,000 m² or 1 hectare.

6. Two of the proposed plots (identified as plots 1 and 2) lie to the north west of the existing property; the other four (plots 3-6) to the north east. The dimensions of the individual plots vary slightly. Plots 1 and 2 constitute 47% of the site (3,869 m²) and plots 3-6 the remaining 53% (4,363 m²). It is apparent from the plans supplied in conjunction with the planning application that measures will be taken to screen the development from Greenaway Lane, but the planning implications of that need not be addressed in this judgment. The wetland area will be to the south of the site, abutting the red line separating the site from the other land.

7. Mrs Hanslip was contending that the whole of the site, ignoring the tree belt for this purpose, should be ascribed as "lowland grazing" (by horses) with a resultant value of 13 Kg/Ha of nitrogen loss. There was a body of evidence from objectors to the effect that this alleged use had been minimal. For example, in a written representation lodged on 30th March 2020 by Mrs Hilary Megginson who lives on Greenaway Lane, it is contended that:

> "Residents have evidence that 4,350 m² of the site was only actually grazed for a period of around 9 months over a 10 year period. Taking all of this information into account, it is crucial that the calculation within this application includes the amended value of 5 Kg/Ha for the part of the site not used for grazing (approx. 47%) not 13 kg for the whole site as claimed by the applicant."

There was evidence from other objectors in the form of written representations, not statutory declarations, to the effect that horse grazing had only taken place on the area to the north east of the site, in 2016.

8. Mrs Megginson appeared to be accepting that part of the land should attract a future use value of 13 Kg/Ha with the remainder 5 Kg/Ha. However, Mrs Megginson was also seeking to rely on para 4.52 of Natural England's Advice Note, which provides (version 4, at the time she was writing, did not differ from version 5 on this topic):

> "There may be areas of a greenfield development site that are not currently in agricultural use and have not been used as such for the last 10 years. In these areas as there is no agricultural input into the land a baseline nitrogen leaching value of 5 kg/ha should be used. This figure covers nitrogen loading from atmospheric deposition, pet waste and nitrogen fixing legumes."

So, Mrs Megginson appeared to be arguing at this point for the application of the lower baseline value of 5 Kg/Ha to the whole of the site. Indeed, in a nitrogen budget calculation which she submitted subsequently (I do not have the date), existing use is calculated on the basis of a value of 5Kg/Ha for the entire site. Her reason for doing that was "the grazing period is negligible".

9. In para 8.39 of the planning officer's report to the planning committee, which was provided in good time for the meeting on Wednesday 24th June 2020 (I do not have the date it was placed on Fareham's website, but I consider that I may proceed on the basis that it was in the first half of June), the existing use issue was addressed in the following manner:

> "The land has most recently been used for grazing horses, therefore this use has been used to calculate the current levels of nitrogen produced by the site (or the levels that would be produced at the site in the event that planning permission is not granted) …"

10. Fareham's nitrogen budget calculation was not uploaded to its website until shortly before the planning committee meeting. The reason for this failure has not been provided; it is both unexplained and, frankly, inexplicable. However, the calculation did no more than supply the metaphorical nuts and bolts for what was said in the report. Thus, for existing use the calculation adopts a 0.82 Ha figure for the whole site (i.e. 8,200 m², which we know to be the approximate area of the entire site excluding the tree belt) and accords to all of it a value of 13 Kg/Ha for lowland grazing.

11. This aspect of the planning officer's report creates no difficulty, insofar as it goes, nor does her use of the conditional "would". However, I must say that the report represents a wholly inadequate attempt to deal with the objectors' evidence which is simply ignored.

12. The deadline for the objectors' "deputations" was midday on Monday 22nd June 2020. After close of business on Friday 19th June 2020 and less than 5 working days before the meeting of the planning committee, Fareham uploaded onto its website a mass of further material from Mrs Hanslip. There had been an admittedly short period of unacceptable delay because someone within Fareham was persuaded that commercial sensitivity attached to some of this material. For some inexplicable reason, this material (its omission being the apogee of Save Warsash's case) was not included in the hearing bundle, but during and particularly after the hearing I have been able to consider it carefully. I can summarise it as follows.

13. Between 1951 and 2011 the land was put to agricultural use. On 16th August 2011 it was purchased by Mrs Hanslip. On 21st October 2019 she made a statutory declaration which stated rather laconically:

> "During the period from September 2012 until August 2015 land at 79 Greenaway Lane … was used to graze my horse."

The declaration failed to specify the "land" in question: is this the land as a whole, the site, or the other land, I ask rhetorically? Fareham's reasons for failing to upload this admittedly exiguous evidence in time have not been given.

14. There was also a statutory declaration from the previous owner of the detached house at 79 Greenaway Lane. According to her, "during some of this period [May 2014 to June 2018] I was aware that the freehold land … was used for grazing of a horse". The same epithet may be applied to the quality of this evidence.

15. More compellingly, the late-filed bundle contained a copy of a licence agreement dated 10th January 2016 between Mr Raymond Hanslip and Emma Outers. This accorded her a licence to take "approximately 3.5 acres at land surrounding 79 Greenaway Lane" for the grazing of horses only. Unfortunately, the bundle did not contain the Schedule to the licence agreement which identified the land in question. 3.5 acres is approximately 1.4 hectares and I consider that I may proceed on the basis that this comprised the site and the other land.

16. Mrs Hanslip fairly accepted that horse grazing ceased in late 2016/early 2017 owing to works referable to a different proposed development. There was no grazing in 2017/18 owing to archaeological excavations, and in 2019 the grass had not recovered from trenches and trial pits. The late-filed bundle does contain photographs which appear to show that the other land was used for haymaking in 2019.

17. On 23rd June 2020 Mr Rob Megginson filed representations which attempted to grapple with the late-filed bundle. He had a number of points to make about the quality of the statutory declarations, and said that "residents have not had the chance to prepare their own statutory declarations but are prepared to do so at the earliest opportunity". The arguments he raised about the haymaking photographs were not particularly well-focused but he may be forgiven for that.

18. Under the rubric, "Nitrogen Calculations and Land Usage", Mr Megginson said this:

> "The total site area used for the current use and future use is a critical calculation resulting in the net effect of Nitrate increase/decrease. The area described as "area B" of 8,203 m² has been used in full in the calculation for this application as lowland grazing. Residents have specific evidence that this is wholly inaccurate, and the correct area is just under half that figure (circa 4,350 m²) and for a very limited period of time (9-10 months). Residents will testify under oath that the land to the west [i.e. north west] of Greenaway Lane has not been used for grazing horses during the time that they can remember, up to 10 years ago."

Mr Megginson, adopting the same reasoning as his wife, put forward a nitrogen calculation based on 5 Kg/Ha throughout.

19. The planning officer submitted a "supplementary agenda" on 23rd June 2020. It provided in material part as follows:

> "Additional representations have been received since the committee report was published.
>
> The representations raise the following issues:
>
> -The evidence submitted does not prove that all the land has been used for grazing or that it has been used consistently for grazing during the last 10 years.
>
> -Documents relating to the application were not previously made available to the public online. These include the applicant's evidence used to establish the existing land use, the Local Planning Authority's most recent Appropriate Assessment and the Local Planning Authority's calculation of the site's nitrogen budget.
>
> Comment: Natural England's guidance (4.51) states: "It is important that farm type classification is appropriately precautionary. It is recommended that evidence is provided of the farm type for the last 10 years and professional judgement is used as to what the land would revert to in the absence of a planning application. In many cases, the local planning authority, as competent authority, will have appropriate knowledge of existing land uses to help inform this process."
>
> The representations submitted state that because only part of the land has been used for grazing during the last 10 years, the land use should be categorised as open space which has a lower nitrogen level of 5 kg/ha.

> The evidence submitted demonstrates that some of the land has been used for grazing and that the remainder has been used for producing hay during the past 10 years. In the absence of a planning application Officers are satisfied that the land could continue to be used for grazing or for growing hay in light of past use, road frontage and enclosed boundaries. The most recent land use (or the levels that would be produced at the site if planning permission is not granted) informs the levels of nitrogen produced by the site. Natural England's guidance advises that lowland grazing has an average nitrate nitrogen loss level of 13 (kg/ha) and 25.4 kg/ha for general cropping (growing hay.) As explained in the report, in order to be nutrient-neutral the proposed development must produce no more nitrogen than the current land use.
>
> Given that the site has been used for grazing horses and growing hay, the Local Planning Authority has taken a precautionary approach to establishing the existing land use in line with Natural England's guidance and has calculated the levels of nitrogen based on if the site was used solely for grazing. This approach is precautionary because it results in a lower level of nitrogen than if the site was used for growing hay. The proposed development (which will produce increased levels of nitrogen) must provide more mitigation to be nutrient neutral than if the higher level associated with growing hay was used to inform the calculation.
>
> Officers have liaised with Natural England regarding the evidence the applicant has provided and are satisfied that the categorisation of the land as lowland grazing rather than general cropping is a suitably precautionary approach in line with Natural England's guidance."

20. Informal minutes of the planning committee meeting have been made available. Mr Greg Jones QC for Save Warsash objected to their admissibility, but there is nothing to suggest that they may be inaccurate and I reject that submission. In fact, the minutes help him. The planning officer showed members some helpful slides and explained that "the most recent land use, or the levels that would be produced at the site if planning permission wasn't granted, informs the levels of nitrogen produced by the site". She then explained why a 13 Kg/Ha figure for existing land use for the site was precautionary – rather than, for example, the much higher figure for haymaking.

21. Mrs Hilary Megginson provided an "audio deputation" asking for a deferment on the ground of late filing of important documents. Other objectors made a similar application. The Borough Solicitor was then asked to advise, and she said as follows:

> "It's a point that has been raised by the deputees the provision of late information. What I would say members is that the information that has been provided at a later point, is all information which amplifies information that is already made available to you and to members of the public in your committee report. None of that information undermines the information in

> the report, it supports the Council's position in terms of the use of the land, the conclusions of Natural England and the inputs into the appropriate assessment, and therefore, members, I would say that the information that is set out in your report covers all the pertinent issues that you need to consider when arriving at your decision today. As you will have heard from the deputations they have made a number of comments on those issues that have been covered in further detail by additional information uploaded to the website. So they have already made representations about some of that information, such as the former use of the land and the conclusions of Natural England and the fit for purpose or otherwise of the Council's appropriate assessment, so I would say members that there is nothing to prevent you from making this decision today because the information you're relying on was already to a large extent set out in your officer's report."

22. Councillor Mike Ford asked the following question, and the planning officer replied to it:

> "Q. Just going back at the history and this seems to be the subject of lots of correspondence going to and fro. If we accepted the objectors who said there'd only been a horse grazing on there for 10 months in the last 10 years would that still retain its status as being grazing land?
>
> A. I think the point to make is that we don't have evidence from the applicants that is sufficient to counter the evidence that we have from the applicant. The applicant has provided a signed affidavit, that is evidence that we give a lot of weight too. We are content that the whole of that site could be used for grazing horses. I'm happy to confirm that not, in our opinion not all of the land has been used for horse grazing, we've not been given evidence to say that all of the land has been used, but we're happy that as a local authority all of the land could be used for grazing horses."

23. Councillor Price then supported the objectors' application for a deferral, in particular on the ground that the late filing of documents prejudiced them in their inability to obtain professional advice in time. The Chair then made his contribution to the meeting, and observed:

> "This morning, by this morning, I had a stack of paperwork, I've run out of ink trying to print off all the documents from either the applicant or the objectors. I had an absolute pile of it around, I spent all the morning looking at the stuff from early, and I have to say that I'm not going to call anybody liars, either the applicant or the objectors but I've seen a series of photographs with no dates on them that claim fields being empty, sometimes occupied some people are suggesting so at the end of the day what you have to come down to is, if we voted to delay this

> application further, can we come out with anything different in say next month's meeting or the following month's meeting, or do we just go on delaying for day, month and so on? What we've got here is we've got professional officers. Each of us Councillors are lay people we've got some expertise in something we've done in our lives up to now. But at some stage or other you have to accept the fact that our officers are professional, they're handling this nitrate issue as best they can, and the backup is, is that Natural England have approved the calculations and if we go on and on, the objectors saying no this isn't right and our officers saying it is, Natural England saying it is, and then the objectors come back and say no, no, no, we've got to make a decision and today I see it as today. Keith Evans made a very good point. We need to decide now on the evidence that we've got, the professional advice we've had, the legal advice we've had and all the documentation I've seen which leads me towards saying the objectors are trying to make a point. Whether it's right or wrong, that's for some other time, but not here. We need to make a sensible based decision on officer's recommendation and Natural England who have advised them that we have provided the right evidence, and that's where I stand on it. Does any other member... Do you want to say anything further Rachael I can see you in the apprehensive, or does any member, any other member want to make any further comment?"

24. No member intervened and asked for the deferral application to be put to the vote. In due course, the application was approved by 7 votes to 2, and planning permission was granted subject to conditions on 11th August 2020.

The Judicial Review

25. In this judgment I will address only three of Save Warsash's Grounds. Those which have been covered by my judgment in Wyatt do not require express mention. Given my conclusions on the procedural grounds, I have decided not to express a view about Ground 2.

Ground 3

26. By Ground 3 it is contended that the planning officer's report misinterpreted Natural England's Advice Note. The short point is that, whereas the Advice Note demands that consideration be given to the use to which the land *would* be put in the absence of planning permission, Fareham asked itself the different question, namely the use to which the land *could* be put.

27. I consider that both parties have laboured what is a very short point. There is a material difference between "could" and "would", although the former is of course relevant to the latter. "Would" imports a more stringent test.

28. However, the planning officer's advice must be considered as a whole. Although it is correct that "could" appears twice, "would" appears more often. In my judgment, the

overall tenor of the planning officer's advice to members was that the real question for determination was the use to which the land would be put in the event that the application failed. There were reasonably strong arguments in support of the proposition that the land would be put to some sort of grazing use, rather than no use whatsoever, and members were aware that on any view of the evidence it had not recently been used for horses. There is no reasonable possibility that members applied the wrong legal test.

29. Ground 3 therefore fails.

Ground 4 and 5

30. It is convenient to take these Grounds together.

31. By Ground 4 it is contended that Fareham failed to make documents available in breach of ss. 100B and 100D of the Local Government Act 1972. By Ground 5 it is contended that Fareham unreasonably failed to exercise its power to defer the meeting on 24th June 2020.

32. Section 100B provides in material part:

> "**100B Access to agenda and connected reports.**
>
> (1) Copies of the agenda for a meeting of a principal council and, subject to subsection (2) below, copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below.
>
> ...
>
> (3) Any document which is required by subsection (1) above to be open to inspection shall be so open at least five clear days before the meeting, except that —
>
> (a) where the meeting is convened at shorter notice, the copies of the agenda and reports shall be open to inspection from the time the meeting is convened, and
>
> (b) where an item is added to an agenda copies of which are open to inspection by the public, copies of the item (or of the revised agenda), and the copies of any report for the meeting relating to the item, shall be open to inspection from the time the item is added to the agenda;
>
> but nothing in this subsection requires copies of any agenda, item or report to be open to inspection by the public until copies are available to members of the council.
>
> ..."

33. By subordinate legislation dealing with the consequences of the pandemic, the words "open to inspection" included, at the material time, "being published on the website of the Council".

34. Section 100D provides in material part:

> "**100D Inspection of background papers.**
>
> (1) Subject, in the case of section 100C(1), to subsection (2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public —
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council."

35. For present purposes "background papers" includes what I am calling the late-filed papers which were uploaded to Fareham's website on 19th June 2020. In my judgment, nothing turns on other late papers because they could have made no material difference to the outcome.

36. Mr Tim Mould QC for Fareham accepted that his clients were in breach of statutory duty in relation to the late-filed papers.

37. In *R (Joicey) v Northumberland CC* [2014] EWHC 3657; [2015] PTSR 622, Cranston J explained that this court sets a very high standard in determining, in response to submissions made by defendants and respondents, that statutory breaches would have made no difference:

> "51. All these cases are relevant material consideration cases. The present case involves a breach of statutory duty to disclose information. However, the remedial test Maurice Kay LJ stated in Holder, taken from Simplex, is in line with the principle laid down by May LJ in R (Smith) v North Eastern Derbyshire Care Trust [2006] EWCA Civ 1291; [2006] 1 WLR 3315, where there was a failure in the statutory duty to consult those affected by a change in medical services. Citing Simplex and other authorities, May LJ held that the probability that the decision after consultation would have been the same is not enough. The decision-maker must show that the decision would inevitably have been the same with proper consultation, if the claimant is to be denied relief. In my view this is the appropriate test in the analogous situation of a breach of right to know legislation: ***the claimant will be entitled to relief unless the decision-maker can demonstrate that the decision it took would inevitably have***

> ***been the same had it complied with its statutory obligation to disclose information in a timely fashion***." [emphasis supplied]

38. Mr Mould accepted that he had this high threshold to surmount.

39. The only jurisprudence relevant to Ground 5 is the decision of McCloskey J (as he then was) in *In the matter of an Application by Belfast City Council for Judicial Review v The Planning Appeals Commission* [2018] NIQB 17. At para 63 he said this:

> "A further brief observation is conveniently made at this point. It is abundantly clear from the aforementioned transcript, considered in conjunction with other items of related and surrounding evidence, that the PC made no attempt to grapple with 31 the IP's request for deferral. Under the PC's OP deferral is one of the optional courses. It is an elementary proposition of law that in cases where this is raised it must be considered. A further flaw in both the written and oral presentations of the Council's planning officers is readily identifiable. No attempt was made to engage with the deferral request. The correct analysis clearly is that the PC, having failed to address itself to the deferral request, made no decision upon it. This is yet another ground upon which its refusal decision is vitiated."

40. There was a rather arid, if not pointless, debate between the parties as to whether members actually made a decision not to defer the hearing on 24th June 2020. In my judgment, they clearly did, albeit by default. The Chair impressed his personality on the meeting and no one demurred.

41. However, I am completely satisfied that the Chair's contribution, and members' supine acceptance of what was happening, was plainly wrong. Members and the Borough Solicitor completely ignored the position of the objectors, who were obviously prejudiced by the late filing of important documents. They failed to grapple with the deferral application, and took a high-handed approach to it. As far as members were concerned, all that mattered was that this corpus of evidence appeared to support the stance officers had taken and which a clear majority of the decision-makers were going to accept. The possibility that it was capable of being effectively countered or rebutted was neither here nor there. As far as the Chair was concerned, no further delay could be countenanced, notwithstanding that this was scarcely the fault of the objectors. This elementary solecism was, I regret to say, contributed to by the advice given by the Borough Solicitor.

42. I must say that the planning committee in this case was guilty of egregious unfairness. I would suggest that my judgment be emailed to all concerned so that lessons may be learned.

43. Ultimately, though, the fate of Ground 5 turns on exactly the same issue that will determine the destiny of Ground 4: would members' decision inevitably have been the same had there been no breach? This question predicates a fair-minded decision-maker prepared to take on board points that differ from his or her preliminary view.

44. Mr Mould valiantly submitted that I may be satisfied that the outcome would inevitably have been the same. In essence, his argument was that objectors were accepting that 53% of the site had been used for horse grazing, and that the planning officer made it clear during the course of the meeting that "not all of the land had been used for horse grazing". So, the fact that all of the site could be used for that purpose meant that it was reasonable to conclude that all of it would be.

45. In my judgment, there are two flaws undermining Mr Mould's submission, attractively though it was presented.

46. The first flaw is that the submission did not accurately encapsulate the objectors' case. Although there was a modicum of inconsistency in the Megginsons' representations, they did not speak for all the objectors and were clearly saying that because horse grazing use had been so minimal para 4.52 of the Advice Note applied and any "lowland grazing" could effectively be ignored. So it came about that objectors included a figure of 5 Kg/Ha for the entire site, for these purposes 0.82 Ha. Fareham's policy, it appears, is to place greater weight on statutory declarations, and Mr Megginson had made it clear that he was in a position to file evidence in this form from a number of people if time had permitted. Mr Megginson's argument would have had far less force had the statutory declarations filed on behalf of Mrs Hanslip not been so late. As it happens, the declarations filed by Mrs Hanslip and the previous owner of 79 Greenaway Lane were inadequate. In my opinion, it is not inevitable that focused representations to Fareham made on the basis of statutory declarations, read in conjunction with all the other evidence in the case, would result in members arriving at the same conclusion. Members might decide, for example, that the whole of the site should be valued at 5 Kg/Ha, or they might conclude that the figure should be 13 Kg/Ha only in relation to 53% of its area.

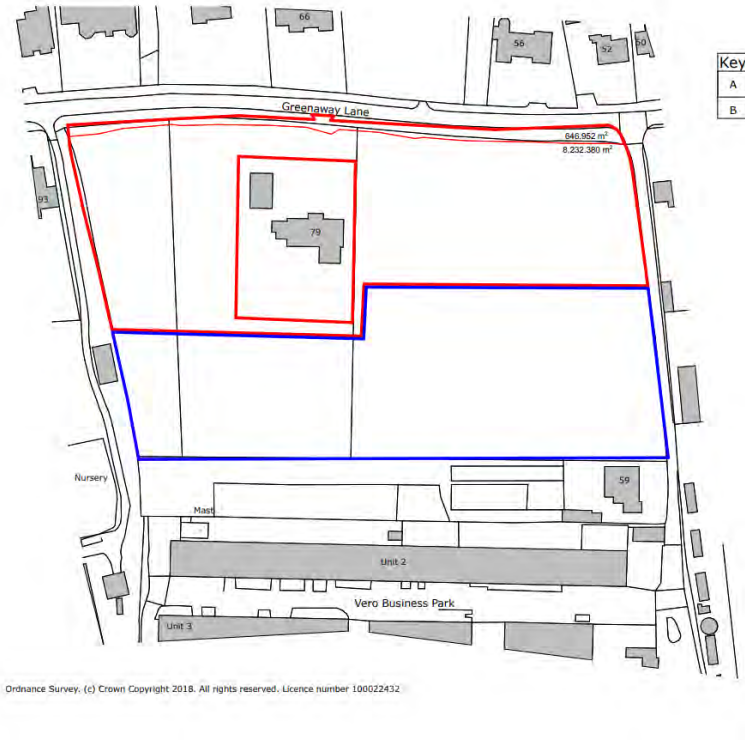
47. The second flaw is that it is unfair in my view to judge the likely impact of evidence and submissions advanced by objectors against the touchstone of what Mr Megginson was able to file over the weekend. It is certainly possible to envisage that with the professional advice mentioned by one of the councillors a more cogent case might be advanced.

48. By some considerable margin, I am not satisfied that the outcome would inevitably have been the same had the breaches not occurred, and Grounds 4 and 5 therefore succeed. I emphasise that in reaching this conclusion I am not impliedly commenting on the merits of the underlying case, namely the strength of the parties' respective arguments on the future use issue.

Disposal

49. This application for judicial review succeeds on Grounds 4 and 5 but otherwise fails. Fareham's grant of planning permission made on 11th August 2020 must be quashed.

ANNEX



Key	Description	Area
A	Existing tree belt to be retained	646.952sqm
B	Low land grazing	8203.377sqm