Burston Garden Centre, North Orbital Road, Chiswell Green, St Albans AL2 2DS

APP/B1930/W/21/3279463

Section 78 TCPA 1990

Final Submissions on behalf of
St Albans District Council

Main issues

1. The application was refused by the Council for three reasons. The main issues arising from the refusal are identified as being:

    a. the effect of the proposed development on the openness and purposes of the Green Belt;

    b. the effect of the proposed development on the character and appearance of the area;

    c. the effect of the proposed development on the significance of the Grade II* listed Burston Manor (the "Manor") and the Grade II listed outbuilding (the "Outbuilding");

    d. whether the proposed development would make adequate provision for community and infrastructure needs; and

    e. whether harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations so as to amount to the very special circumstances required to justify the proposed development.

Approach

2. Planning law recognises a principle of consistency. Like cases should be decided alike in the absence of very good reason. Not only should cases be decided in the same way as a point of common sense, consistency ensures public confidence in the planning system[1]. This case is clearly similar to the 2020 appeal decision. The Appeal Site is the same, the proposal is for C2 use, the layout and design is similar, the surrounding circumstances are the same, policy is the same, and the claimed justification is very much the same. To apply the touchstone in North Wiltshire there are a number of elements where a different resolution of that element would involve necessarily disagreeing with the previous inspector. The Council does not say that the Inspector is "bound" by the previous decision – but rather that it is a highly material consideration in – the starting point for – the determination on the present appeal. This appears to be common ground with the Appellant's witnesses[2]. The Inspector may depart from the findings on the previous appeal, but before doing so must have regard to the reasoning within the previous decision, have regard to the principle of consistency, and give reasons for the departure from the previous decision[3].

3. The Council has respected the principle of consistency. Inspector Searson gave greater weight to certain matters than the Council did – see the main SoCG from 2019[4]. The Council has accepted the Inspector's conclusions as a starting point and adjusted its analysis to reflect the present scheme.

4. It is, of course, necessary to consider what has changed. The Appeal Site and its surroundings have not changed. The development plan has not changed. National policy in respect of Green Belts and heritage assets has not changed. The proposals remain for C2 development, albeit of modestly reduced scale. In terms of the necessary application of section 38(6) PCPA 2004 the only relevant change in terms of material considerations is the detailed design and layout of the scheme.

[1] See DLA Delivery Ltd v Baroness Cumberlege of Newick [2018] EWCA Civ 1305. I draw attention to para. 29 citing North Wiltshire and discussion thereafter.
[2] XX of KM, DP, AS.
[3] See also para 30 of DLA re the connection between the decisions. See also para 34: A decision "may be material, for example, because it relates to the same site, or to the same or similar form of development on another site to which the same policy of the development plan relates, or to the interpretation or application of a particular policy common to both cases". Here, of course, all three examples apply.
[4] CD 8.9 at 7.9

5. Following evidence, the Appellant relies upon two changes of circumstance to justify a different decision[5]. The withdrawal of the then (i.e. in December 2019) emerging regulation 19 Local Plan in November 2020 and the changes to the detail of the scheme. These are addressed below.

6. The starting point is that the specialist planning inspector is aware of and has properly understood national policy and guidance[6]. A decision letter is a letter to the parties who are well aware of the issues and is not meant to set out every point relating to every argument, but address the important controversial issues[7].

7. These principles are established in the Courts when asked to review a decision, and the same principles logically apply when faced with a broadside argument that the previous inspector got it wrong, and/or failed to apply well-known policy and guidance that was referred to in the arguments before her. It is unfair to insinuate that the Inspector ignored or failed to understand good practice guidance or policy – particularly where it was fully debated before her. Why should one assume that having conducted a round-table session on heritage, for example, the Inspector then ignored the documents discussed? The proper application of the principle of consistency involves taking the previous decision as a lawful and rational starting point and seeing what has changed to justify a different outcome.

Green Belt harm

Approach

8. It is common ground that the Development constitutes inappropriate development in the Green Belt[8].
9. The NPPF is clear in paragraph 143 that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. All harm to the GB, including by way of inappropriateness, must be given substantial weight[9].

[5] Mr Phillips confirmed in xx that he did not advance the decision at Roundhouse Farm (CD5.12) or Harpenden (CD 5.13) as critical changes suggesting a different approach or outcome.
[6] Hopkins Homes Ltd v SSCLG [2017] PTSR 623
[7] See e.g. St Modwen Developments Ltd v SSCLG [2018] PTSR 746 at para. 6
[8] Main SoCG 7.5
[9] NPPF 144

10. The development control test in NPPF 148 is the central development control test on this appeal. If that test is met, then planning permission should be granted. If not, it should be refused. Policy 1 of the Local Plan Review is in line with this.
11. The scope of the test in NPPF 148 is established through caselaw - see Redhill Aerodrome[10]. This effectively deals with Mr Phillips' suggestion that heritage harm should not feature within the 148 balance. Please refer to the extract attached in annex A. The NPPF operates in a straightforward way. Where an application relates to an area or asset of particular importance (paragraph 11(d)(i)) the appropriate development control test for that area/asset is applied. For the GB that is the very special circumstances test. The very special circumstances must clearly outweigh not only the harm to the GB but all other harm as well. That is confirmed by Redhill notwithstanding there may be an alternative development control test within the NPPF that relates to different considerations. There is no basis for determining a GB case by any other measure than the NPPF GB development control test.
12. In the same way it is a mistake to think that the guidance in NPPF 199 is applicable only to a balance under 202. The exhortation in the Framework to give great weight to harm to the significance of heritage assets is a reflection of the statutory duties under ss66 and 72 of the TCP(LBCA)A 1990. It is well-recognised that as a result of these duties considerable importance and weight must be given to harm to the significance of a listed building as part of the planning balance – see Barnwell Manor[11] at 22-24. The notion that one would weigh heritage harm differently under NPPF 202 than NPPF 148 is contrary to the statutory duties, and Court of Appeal authority. There is no sequence of assessment – 148 is a comprehensive and standalone development control test in the GB.

Openness

13. National policy emphasises that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and permanence.

[10] Redhill Aerodrome Ltd v SSCLG [2015] PTSR 274
[11] CD 5.4

14. The PPG provides guidance as to the proper approach to assessing the impact of openness[12].

15. Firstly, it is explicit that an assessment of openness is case specific (PPG 64-001). Mr Smith agreed that as such the only relevant baseline is the Appeal Site itself in its current condition[13].

16. Secondly, the PPG then identifies three factors of particular relevance:
    (i) Spatial and visual openness;
    (ii) Permanence/remediability;
    (iii) Level of activity.

17. These factors reflect caselaw. Samuel Smith[14] identifies a central consideration as being "how built up the Green Belt is now and how built up it would be if redevelopment occurs – and factors relevant to the visual impact on the aspect of openness which the Green Belt represents". Effectively, one starts with how much development is proposed and then considers the extent to which the physical presence is reduced by visual aspects.
18. It is very clear by reference to each of those factors that the appeal proposals cause significant harm to the openness of the GB, as Inspector Searson found in respect of the previous appeal. Mr Smith's analysis does little to address this point. The only relevant baseline is the Appeal Site. Mr Smith confirmed that he had not assessed the spatial aspect at all – nor the questions of permanence or level of activity – against the relevant baseline. At the same time he has not expressed a view on the overall impact of the appeal scheme on the openness of the GB. He comments only that the harm is reduced from the previous scheme.
19. When properly analysed all of these elements demonstrate a significant impact on openness. Mr Greaves's analysis considers each relevant factor in turn. The appeal proposals involve the erection of buildings with a floorspace of 15,807 sqm with a height varying from 7.5m to 12.5m.[15] The vast majority of the Appeal Site is not previously developed land.[16] This is because the use and structures are horticultural[17]. The eastern

[12] ID64-001
[13] XX GW
[14] CD 5.1 at 25
[15] Mr Greaves proof of evidence, 6.1.15
[16] Previous Decision, 24; Greaves 6.1.3; Appellant SoC at 6.2.2
[17] See definition of previously developed land on p70 NPPF

part of the Appeal Site is open. The western part contains polytunnels and some glasshouses. These are lightweight in nature. Along the western edge adjoining the garden centre there are a limited number of substantial buildings with a footprint of approximately 925 m^2. The total footprint of structures – including those defined as not being previously developed – and which are appropriate in GB terms – is 7,215 sqm[18].

20. It follows that however one views the existing structures on the site, the impact on openness is significant. Even taking account of the polytunnels and glasshouses there is an increase in floorspace of 8592 sqm – and the heights are substantial – block A for example has a ridge height of 12.5m. Setting the lightweight buildings aside there is an increase of approximately 15,000 sq m. Even taking the Appellant's case at it highest, there can be no doubt that the spatial impact of nearly 16,000 sq m of urban development in the GB is significant.

21. This significant impact is not mitigated by visual aspects. Although the Appeal Site is relatively contained visually, the development will be very appreciable locally and from within the Appeal Site[19]. The visual aspect of openness is distinct from the impact on the character and appearance of the area. Openness is mostly to do with the extent to which the Green Belt would be built up with and without the development[20]. There is also a misunderstanding within the Appellant's case in only considering the visual aspect of openness as though it is a point of visual impact, ie one takes only existing public viewpoints and assesses the degree of change. Such an approach does not reflect the degree to which the Green Belt is spatially and visually built up after the development. The fact that the proposals enable a large number of views of buildings from what will be public spaces goes to the extent to which the GB is appreciated as being built up after the development is an important consideration – which Inspector Searson appreciated[21]- but the appellant does not[22]. Viewpoint 17 is a good example of this. If the development is permitted it gives an illustration of just how built up the Green belt in this location will feel. Providing landscaping – hard and soft – also contributes to the degree to which the GB appears built upon. Reference to CD 2.35 shows that the totality of the site appears as a built up site within the GB – albeit with planting. It is a landscaped urban element directly contrary to the intended openness of the GB – and a permanent one.

[18] Appellant SoC at 2.3
[19] Mr Greaves proof of evidence, 6.2.9, previous decision at 28 – 30.
[20] See Samuel Smith – CD5.1 – at 28
[21] DL29
[22] AS XX GW: only considered impact from existing public view points.

22. The Appellant refers to the appeal decision at Roundhouse Farm[23]. This decision is of no assistance to the appeal proposals. It is a site specific assessment based on the same principles and approach. The differences in outcomes reflect the differences between the sites and schemes - a different scheme for a different form of development on a different site. Anyway, the conclusion in that case was that there was a considerable impact on openness to be given substantial weight[24]. Mr Phillips confirmed that the Appellant does not rely on Roundhouse Farm as a point of distinction from the previous appeal – nor Harpenden Road[25]. Inspector Searson's reasoning in relation to openness at para. 26 of the previous decision is applicable to the appeal proposals and there is unquestionably a significant impact on openness.

Green Belt Purposes

23. In the previous decision, the Inspector considered there would be a degree of sprawl and merger of the nearby settlements of How Wood village and Chiswell Green, in conflict with purposes (a) and (b) and that the development would have an urbanising effect, in conflict with purpose (c).[26] These conclusions turn on the fundamental change to the Appeal Site through its development as a care village – not on the design detail or the precise quantum of development. All these conclusions stand, and there is no reason to depart from them. The Appellant in effect seeks to re-argue the points it lost on the previous appeal, as the Inspector said at 36: "While the appellant considers that the development would not harm any of the purposes of the Green Belt, I consider that there is clear conflict with Green Belt purposes (a) (b) and (c)."

24. It is, with respect, difficult to assess the Appellant's case in this respect because Mr Smith's analysis is not directed at the impact of the scheme on the purposes of the GB, but a comparison with the previous scheme. Also, there are a number of instances in which comments are blended across the purposes, to which they have no relation. Mr Greaves analysis is clear, consistent with Inspector Searson's decision, and to be

[23] CD5.12
[24] CD 5.12 at 23
[25] XX GW
[26] Previous Decision, 34 and 35

preferred[27]. Mr Smith's figures 2.0 to 2.3 show clearly how the existing site, which is open, not PDL, and contains GB appropriate structures, would be turned into an urban/settlement element. Rather than the appeal site combining with the woodland to provide separation, openness and a semi-rural element between large built-up areas the proposals would make the appeal site another urban element and a stepping stone between Chiswell Green and How Wood, enclosing the woodland. The effect is (a) unrestricting the sprawl of large built-up areas; (b) leading towards the merger of How Wood and Chiswell Green; (c) and changing a GB, horticultural site in the countryside into a landscaped urban element which encroaches into the countryside. The Appellant's analysis fails to recognise – and distinct from the Roundhouse Farm and Harpenden sites on which it relies – that the Appeal Site is currently separated from those large built up areas. In particular the woodlands of How Wood and Birch Wood combine with the Appeal Site to create a meaningful, non-settlement, countryside separation between settlements, and an area that restricts the sprawl of the urban areas. The consequence is that the only separation left becomes How Wood and Birch Wood – and some trees along the North Orbital Road – and that woodland is itself compromised and enclosed by the scheme.

25. In conclusion, there remains – unsurprisingly given the modest extent of the changes as to the scale and disposition of the proposals – a clear conflict with purposes (a), (b) and (c) of the GB as expressed in NPPF para 138. Purpose (e), as Mr Smith accepted, is irrelevant given the site is GB and not settlement. Developing in the GB cannot promote the recycling of urban land.

Other harm

Character and appearance

26. It is common ground that the wider context to the Appeal Site is "urban fringe".[28] There is disagreement as to the character of the Appeal Site.

27. As Mr Greaves explained, the Appeal Site has a semi-rural/countryside character. The buildings and structures on the Appeal Site at present, whilst not in good condition, are generally lightweight and horticultural in nature. The Appeal Site is separated from

[27] SG proof 6.122-33
[28] Landscape SoCG, 1.2.

nearby urban areas by the woodlands of How Wood and Birch Wood. That woodland is not, as Mr Smith sought to suggest in round table discussions, part of the urban fringe. It contributes significantly to the countryside character of the area and sits together with the Appeal Site as countryside – and is appreciated as such from the public viewpoints to the east. The site must be assessed together with the woodlands, which contain it.

28. The issue was carefully addressed by Inspector Searson (paras 41 to 49) and there have been no material changes to the site or the context since her site visit in December 2019.

29. Any assessment of character is necessarily site-specific such that – as Mr Greaves explained - it is inappropriate to draw analogies with other sites in terms of character and appearance. Therefore, the focus must be on the characteristics of the Appeal Site as it is currently found. Adopting this approach, Inspector Searson's decision considered the question of character and appearance with reference to the condition of the Appeal Site and the scale of buildings currently located on it. She also took into account the nature of the buildings immediately adjacent to the Appeal Site at Burston Garden Centre and the residential properties located in the wider area surrounding the appeal site.[29]

30. In terms of the impact of the development, the key change is one of overall character, rather than detail. In this respect, the changes since last time are rightly described by Mr Greaves as modest. The conclusion in para 46 remains appropriate: "...the built elements of the proposed development would take up a large proportion of the site. This would give a distinctly urban form which would contrast with both the character and appearance of BGC and the general built form of the dwellings of the surrounding areas". It should also be noted that the previous scheme equally removed the close-boarded fence opening the site up to view[30]. An important consequence of the scheme is that the wood of How Wood becomes enclosed by development (DL48) so that rather than an element providing a degree of separation between settlement and countryside character it becomes enclosed by urban (albeit landscaped urban) elements. The previous Inspector concluded that moderate harm would be caused to the character and

[29] Previous decision, 43.
[30] DL47.

appearance of the area. The Council supports this view in the context of the present appeal.

31. Neither Mr Smith nor Mr Phillips has provided an overall assessment of harm to character and appearance. At the determination of the planning application in May 2021, the Appellant assessed the level of harm as "low".[31] In the round table session on character and appearance, Mr Smith asked the Inspector to substitute his views at table 4.21 of his proof of evidence for the assessment of harm to character and appearance at the determination stage. Mr Smith has not offered any explanation as to how, or why, his assessment differs from that given in May 2021. Neither the Development nor the Appeal Site has changed since that date.

32. In any event, there is no reason to depart from Inspector Searson's conclusion in relation to the previous appeal. The design changes to the Development following the previous appeal do not alter the spread of buildings across the Appeal Site. The apartment blocks, in particular, are large, imposing buildings with a dominating effect. Mr Smith in his evidence emphasised the increase in landscaping as part of the Development as representing an improvement to the impact of the Development. However, it is evident from Views 1, 2 and 3 in the Design and Access Statement[32] that landscaping is designed around the distinctly urban form of the buildings within the Development. It sits within the urban context of the Development as a whole.

33. As a result, the introduction of built form over the majority of the Appeal Site remains notwithstanding the modest reduction in the quantum and spread of the Development following the previous appeal. The key issue which troubled the Inspector in relation to the impact of the Development, as set out at paragraph 46 and 49 of her decision, remains: the Development would result in an urbanised site which would be out of step with its wider surroundings.

34. These impacts give rise to conflicts with both Local Plan Policy 69 and Policy 70. There is no difficulty with these policies embracing both general design matters as well as matters of detail – and such a distinction is consistent with NPPF 130, as Mr Phillips

[31] Statement of Common Ground, Appendix B.
[32] CD 2.36.

recognises in his proof of evidence[33]. This is explicitly the intention of the policies[34]. The Council has never insisted that these policies introduce a policy of no harm or no change to the character of an area, but rather that any change must be sympathetic to the character of the area. Where policies refer to design having regard to particular matters, this means that the overall effect of the design must be acceptable in context, as Mr Phillips acknowledged[35].

35. This was also the reading of Inspector Searson at paragraph 49 of her decision. Mr Phillips acknowledged in cross-examination that the Inspector in her conclusion took into account the positive elements of the design of the development. This is not, therefore, a distinguishing element from the previous appeal. The NPPF has long insisted on high quality design, and the support for high quality detailed design is of course in the context of paragraph 130 and the need for development – however well-designed as a point of detail – to be sympathetic to the character and appearance of the area.

Effect on designated heritage assets

36. The relevant effects relate to the Grade II* Manor and the Outbuilding which is listed at Grade II. It is common ground that the Listed Buildings have aesthetic, historical and evidential value.[36] Section 66 (1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that when considering whether to grant planning permission for development which affects a listed building or its setting, special regard shall be had to the desirability of preserving the building or its setting. NPPF paragraph 199 provides that great weight should be given to the conservation of a designated heritage asset (and the more important the asset, the greater the weight should be). It is established that considerable weight and importance must be given in the planning balance to any harm to the significance of a listed building[37].

[33] Para 7.29
[34] See Supporting text – CD 3.10 at 8.7.
[35] XX GW
[36] Heritage Statement of Common Ground, 3
[37] Barnwell Manor – CD 5.4 at para. 24

37. The Appellant suggests that this statutory duty is selective depending on whether the balancing exercise is under NPPF 202 or 148. That contention is plainly contrary to s66 and the caselaw it has spawned. Such an approach would be unlawful. See Barnwell Manor at 22 to 24 (and above). Whatever balancing exercise is struck, considerable importance and weight must be given to the harm to the significance of the listed buildings.
38. It is also established that the setting of a heritage asset must be assessed in context, taking into account not only physical and visual factors (such as, in this case, the current condition of the Site, the intervisibility between the Site and the Listed Buildings and the changes to the wider area around the Listed Buildings) but also social, historical and economic factors.[38]

39. Local Plan Policy 86 requires the Council to have special regard to the desirability of preserving listed buildings or their setting. This is consistent with the NPPF at 199. Contrary to the Appellant's suggestions the NPPF 202 balance should not be read into policy 86. Such policies are broadly consistent with the Framework in any event in encapsulating the statutory duties[39].

40. It is common ground that the proposals would cause less than substantial harm to the significance of the Listed Buildings.

41. The previous inspector is not only an appointed inspector of the Secretary of State but an inspector with specialist heritage qualifications and experience (Claire Searson MSc PGDip BSc (Hons) MRTPI IHBC). She dealt comprehensively with this issue on the previous appeal at paras. 50 – 66. The Inspector concluded that the Appeal Site as part of the wider setting of the listed buildings made a positive contribution to their significance[40]. This issue is therefore the subject of a recent and directly relevant finding on behalf of the Secretary of State based on a detailed site visit and hearing of evidence (Ms Searson had the benefit of an internal assessment of the listed buildings, which Mr Murphy has not[41] - this is relevant to assessing matters of intervisibility and legibility – not the interior of the building itself). It is resolved that the Appeal Site represents the

[38] Catesby Estates Ltd v Steer [2018] EWCA Civ 1697
[39] See City and Country Bramshill Ltd v SSHCLG para 87 – [2021] 1 WLR 5761
[40] Para 58.
[41] XX GW

last legible remnant of the Manor's historic landscape setting[42]. Mr Murphy accepts that there is no change in circumstances since that conclusion.

42. This last link is severed by the appeal proposals in the same way as with the previous proposals. This is a matter of significance – as recognised in the approach as advised (and applied) by Historic England in GPA3[43]. It is a consequence of the fundamental – and visible – change in the character of the site moving from largely open land with some low level, lightweight horticultural buildings – to a landscaped urban environment. The design changes – principally moving the extra care units away from the northern boundary and exchanging the nursing home for additional extra care units – does reduce the harm slightly but it remains within the range of moderate harm. This inquiry now also has the benefit of detailed consideration by Historic England who conclude that the appeal proposals would cause low to moderate harm to the significance of the Manor[44].

43. It is perhaps useful to take an audit of those who have looked at the site in the context of the appeal proposals or their predecessor:

    (a) Inspector Searson: moderate harm (see DL 58-64);
    (b) Historic England: low/moderate harm on this scheme (CD 7.19 and 7.20);
    (c) Conservation Officer response/Officer Report – less than substantial harm – see Officer report at 8.7.27; consultation response – CD 7.6 "a similar level of harm to the previous submission";
    (d) Mr Greaves: the lower end of the range of moderate harm (see proof 6.3.26);
    (e) The Appellant's heritage advisers: see Built Heritage Statement CD 2.42 dated 11 December 2020p(iv) which confirms a "low level" of harm"; updated in SOCG (Main) App B[45] to reflect Historic England's comments as "Low/moderate" level of harm;
    (f) Mr Murphy considers the harm to be at the very lowest end of the spectrum if not negligible.

[42] Para 59
[43] See CD 4.3- Cumulative Change on p4
[44] CD7.19 and 7.20
[45] CD 1.5(iii)

44. The previous inspector, HE, the Council's conservation response, and Mr Greaves all acknowledge the existing condition of the site and reach their conclusion in light of it. The Appellant itself accepted HE's assessment of the harm as low-moderate – unsurprisingly given that this was consistent with Inspector Searson's assessment. HE did make suggestions as to how to reduce the level of harm – although none have been taken up[46]. Mr Murphy's assessment is the outlier – although he does acknowledge a negative effect as a result of the development. His criticism of the previous Inspector appears particularly unfair. DL 60 is an explicit and impeccable application of the guidance in GPA 3 paragraph 9 on cumulative change. Mr Murphy's accusation is that despite applying this paragraph impeccably the Inspector ignored the stepped approach within GPA 3. This is an untenable position. DL 58 and 59 assess the contribution made by setting to significance, and DL60 begins the exercise of assessing impact. Mr Murphy also does not recognise the context of the decision. As the Inspector noted there was considerable common ground at the previous inquiry – with the same heritage consultant who prepared the heritage application documentation (Mr Smith of RPS). Inspector Searson referenced the common ground as to significance, which necessarily involves that aspect of significance resulting from its setting (DL53). This is set out in the previous heritage SOCG[47].
45. That core analysis remains part of the Appellant's case on re-application – the BHS[48] noting at 3.33 that the group of assets "shares an historic, residual functional association with the Site, which historically formed a small part of the extensive agricultural landholding associated with Burston Manor House and farm, certainly at the time of the St Stepehen's Tithe Map in 1838"[49]. This is a key part of the Appellant's assessment of the significance of the assets. It is entirely consistent with the Inspector's analysis as to the contribution made by the setting to the assets' significance. Indeed, it is only really Mr Murphy who is out of step with the consensus view, and the Appellant's case to the previous inquiry– not on impact but contribution – in that Inspector Searson agreed with

[46] CD7.20
[47] See in particular 1.7: It is agreed that the appeal site makes a secondary contribution to the significance of the heritage assets through the historic illustrative value as historically associated land; And 1.11: the north-eastern potion of the Appeal Site, though part of the commercial nurseries, has remained open and without any built form, and is an historic remnant of formerly associated agricultural land.

[48] CD 2.42
[49] 3.33.

the Appellant's BHS at 4.2.2[50] that "The remnant unmanaged grassland on the eastern reaches of the Site represents a last vestige of the asset's historic pastoral landscape setting….". Mr Murphy now seeks to distance itself from that analysis -but without any foundation. A short survey of the historic maps shows that the previous Inspector was correct. The setting of the Manor has significantly changed – but the Appeal Site together with the woods represents the last element of the secondary or wider setting that is not urban. Pretty or not – it is open, horticultural land and the last reminder/vestige/remnant – whatever word you choose to use – of its historic setting. GPA 3 is very clear that any assessment of the contribution made by setting should be rooted in an understanding of the history of the asset. Mr Murphy is deeply – and unjustifiably – critical of Inspector Searson for "imagining" the site rather than "observing" it[51] - but the decision letter in fact shows careful assessment of the existing condition of the land imbued – and experienced as required by the PPG and GPA 3– with an understanding of history[52].

46. Once the contribution of the setting to significance is properly assessed then the difference between the parties effectively disappears. The change in the character of the site is a fundamental one – it becomes urban. It is common ground that there would be a certain degree of less than substantial harm[53] and Mr Greaves considers – in line with the previous decision- the level of harm is towards the lower end of the moderate range[54].

47. Broadly, the reasons for the Inspector's decision still stand. The Development would result in the open appearance and agricultural use of the Site being lost, such that the remaining historic setting of the Listed Buildings would be wiped away. Following the Previous Decision, as Mr Greaves explains, the changes made to the Development lessen the harm to the Listed Buildings.[55] This appeal also benefits from a response from Historic England, which was not available in relation to the previous decision. The re-assessment of the level of harm from moderate to the lower end of moderate has been made in light of Historic England's response.

[50] Cd 8.7
[51] Proof 4.18
[52] See CD 4.3 a5 9 and 27; and PPG 18-13.
[53] Heritage SoCG para 8
[54] Proof 6.3.25
[55] Mr Greaves Proof of Evidence, 6.3.21 and 6.3.25

Very Special Circumstances

48. The other considerations relied on by the Appellant are the following:

    (1) Local need for care accommodation and lack of alternative sites

    (2) General housing needs

    (3) Health and wellbeing benefits

    (4) Release of under-occupied family housing

    (5) Meeting a local need

    (6) Employment and economic benefits

    (7) Highway improvements

    (8) Site availability and achievability

Overview

49. Mr Phillips' approach recognises the need for a change in circumstances to justify a different outcome to the planning balance[56]. On the benefits side it is very difficult to understand what different circumstances the Appellant relies upon. The core case of the VSC relates to providing specialist housing for older persons in an area where it is agreed that there is a real and growing need. Such accommodation not only provides health and well-being benefits but also frees up market housing. This formed the basis of the previous decision, and the attribution of substantial weight.
50. Since then, and contrary to the case presented on the application[57], general and specialist housing needs have not become worse. So, the prediction in the Planning Statement that justified "substantial weight" to general housing needs and releasing family housing was a HLS of 1.9 yrs at April 2019, and 1.2 years at April 2020[58]. In fact, it is 2.4 yrs as at April 2020[59]. As to specialist accommodation Mr Appleton confirmed that in fact since his previous analysis – see CD 8.11(ii) – the need and shortfall figures to 2035 have reduced by 70 units due to changes in the ONS population projections. The suggestion that the housing situation – general or specialist – has become worse is simply incorrect.

[56] XX GW
[57] See CD 2.35 paras 1- - 15
[58] Para 10
[59] CD3.21 para 3.13 – 2.4yrs in scenario 1 applying 20% buffer. (3.4 yrs in scenario 2).

Different commentators may use language differently, and the attribution of weight can be a linguistic exercise – but at the core of any weighing exercise is the substance of the issue. The empirical evidence relied on by the Appellant discloses a lesser general and specialist need and shortfall than in January 2020. At the same time the extent of the benefit, rather than the weight to be given to the benefit, of the scheme has also reduced. The Council submits that the exercise undertaken in cross-examination of Mr Phillips by reference to the Planning Statement and Appendix B to the SoCG, alongside Mr Phillips' proof of evidence, shows the appellant increasing the weight to the benefits over time without foundation. There is absolutely no factual justification for increasing the weight given to the benefits from the previous decision. This includes by reference to the withdrawal of the emerging local plan. It is axiomatic that the withdrawal of an emerging local plan that was agreed not to be a material planning consideration in 2020 cannot alter the planning balance[60]. The reality is that the emerging plan has been delayed and is now anticipated to be adopted by the end of 2023. The Appellant's point would only have any validity if the withdrawal of the draft plan had led to a worsening of the need position. It has not. It is also relevant that the Appellant's case was not presented only by reference to need, but also by reference to shortfall as predicted in 2035 – which has also decreased[61]. As Mr Phillips confirmed[62], all the points about the uncertainty relating to the Local Plan and the ability to demonstrate a 5 year HLS at a fixed moment in time remain. The Appellant cannot demonstrate any material worsening of the position relating to general of specialist housing as a result of the delay to the local plan, and that need has already been taken into account in assessing the weight to be given to the need case. This is not a case of the Council denying the need for such accommodation – the Council's case fully recognises the unmet and growing need and gives this substantial weight. It is rather a case of respecting the principle of consistency and also that demographically the need case is very much the same as before. This coincides with the removal of the Care Home which previously was a matter that attracted weight – see DL 72. It is also appreciable that the weight given to the benefits of the previous scheme was based on the scheme meeting the local need assessed (DL72

[60] DP XX GW
[61] Supplemental SoCG on need table
[62] XX GW

and 92). In this context an offer to market only 20% to eligible residents (which includes non-residents of the district who have family within it) is nothing to the point.

Local need for care accommodation and alternative sites

51. It is common ground that there is an immediate unmet and growing need for extra care accommodation within the Council's area.[63] The extent of this need is disputed. The Council's assessment relies upon the projections in the South West Hertfordshire Local Housing Needs Assessment (September 2019), which was prepared in accordance with the PPG.[64] The position, therefore, remains as at the Previous Decision: the Appellant has identified a greater need for specialist housing than the Council.

52. Inspector Searson did not find it necessary to reach a precise conclusion on the need for this type of housing, noting that the proper forum for doing so is as part of the development plan process; however, noting the immediate unmet and growing need and the contribution which could be made by the proposed development to meeting those needs, she gave the benefits relating to C2 housing need substantial weight.[65] The Council accepts and endorses that position and Mr Greaves gives this issue substantial weight in its balancing exercise. The Council has the advantage of an up-to-date and comprehensive assessment of need not only in the district but in the sub-region. Housing need and availability operates at the level of the housing market area and the assessment undertaken by the 5 local authorities reflects that[66]. It has been prepared by GL Hearn in line with the PPG. Mr Appleton's concern about the tool used (Shop@) is unwarranted in the circumstances of this case – GL Hearn have used a bespoke analysis to reflect the particular needs of the authorities concerned. As in any case, there may be differences of professional view as to the best method of assessment, but it seems fair to conclude that the assessment undertaken is a reasonable one. An average has been taken to reflect the differences between the different methods of analysis[67] - but in any event the various bases of assessment (including the HOPSR figure – i.e. not using SHOP@) show a broad consistency. In summary, it may well be that there is a valid disagreement

[63] Need Statement of Common Ground, p.1at 3.20 as clarified by NA in round table discussion
[64] NPPG 63-004
[65] Previous Decision, 70 and 71
[66] CD 6.11
[67] See paras 7.50-52

about how precisely need should be quantified, and this will be considered through the Local Plan process, but it is no worse than it was at the time of the previous decision.

53. In terms of alternative sites, at the time of the Previous Decision the Inspector found that the Appellant's alternative site assessment lacked robustness in its approach to availability.[68] The Appellant has now addressed this point, and the respective landowners have confirmed that the alternative sites are not available. Mr Greaves gives greater weight accordingly to this consideration. The weight is moderated because substantial weight is already given to the need for such housing, and extra care is able to come forward on non-GB sites albeit through smaller scale developments that the appeal proposals. The Chelford House decision is an example of a 62 bed nursing home coming forward in the district but not in the Green Belt.

54. The Council understands that the Appellant considers that the consideration of alternative sites is not necessary. That is surprising – given that it is a point that the Appellant relies on in support of its case. If the Appellant wishes alternative sites to be immaterial – so be it - although the Council has given weight to this issue in light of Inspector Searson's previous decision. The Council also takes the view that this consideration is relevant based on case law. The role of an alternative sites assessment can be to increase the weight to a need argument by showing that the need addressed by the proposal could not be met outside of the Green Belt. Caselaw recognises (see Trust House Forte Ltd v SSE (1986) 53 P & CR 293 at 299) that "*where there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the benefit outweighs the planning disadvantages inherent in it*". That reflects the situation here where the proposal causes substantial harm to the openness of the Green Belt and is inappropriate development – clear planning arguments – and the Appellant's very special circumstances argument has a need case at its heart.

55. Again, this is not an issue that the Council has shied away from. It has recognised the difficulties with delivering C2 accommodation of this nature in this district and has given the lack of alternative sites weight in its analysis. The Council's position is only

[68] Previous Decision, 79

that the Appellant overstates its case. C2 accommodation can be delivered by the market, and the shortcomings in the market's ability to do so is reflected in the general and specialist housing needs case. The comment that Mr Greaves makes – which the Council stands by – is that C2 accommodation comes in many different forms, and it is an overstatement to say there is no prospect of such accommodation being delivered in urban areas, or even less sensitive GB areas, as evidenced by Chelford House[69].

56. At the end of the inquiry the Council suggests a good ready-reckoner is Appendix B to the Main SOCG which represents the Appellant's case at the date of determination – since when it is agreed that nothing material has changed. This analysis fully reflected all relevant circumstances – including the local plan – and what is notable is the extent to which all parties were in line with Inspector Searson's decision. The beefing up of the need case since that time by Mr Phillips is unjustified and also – as explored in cross-examination – appears to rely more on emboldening conclusions than the analysis underpinning them[70].

General housing needs

57. The Council currently has 2.4 years' supply of deliverable housing sites which is a slight improvement than at the time of the previous decision. There is no basis for altering the weight accorded by Inspector Searson.

Health and wellbeing benefits

58. There is no reason to alter the weight given to this benefit from the previous appeal. Mr Greaves gives this substantial weight[71].

Release of under-occupied family housing

59. Substantial weight is attributed to this planning benefit, in accordance with the previous decision. This assumes a degree of local take-up of the proposed units. The 20% marketing offer makes no difference because it was always assumed that a good proportion of the units would go to meeting the local need. Despite applying significant

[69] CD 5.14
[70] Note the difference relating to the core benefits between DP proof 9.24 and paras 7.79, 7.76 and 7.109.
[71] 6.35.34

weight to affordable housing contributions at the date of the application no such contributions are now offered[72].

Employment and economic benefits

60. The Council gives these the same as did Inspector Searson. The only change is the reduction in employment and economic benefits resulting from the removal of the nursing home.

Highway improvements

61. It is common ground that some weight should be attributed to highway access improvements. [73]

Biodiversity

62. The proposals will provide biodiversity net gains – as they should and as is welcome. This is part and parcel of redeveloping the site. The previous proposals also had detailed landscaping proposals and although there was no metric presented, the situation does not appear much different. It seems fair to say that there are certain fundamental elements in the balancing exercise that go very much to the principle of the redevelopment of the site – and the detailed landscaping and ecological proposals are not one of them.

Site availability and achievability

63. There is no reason to doubt the delivery of the scheme – which is taken into account in attributing weight to the benefits.

Conclusion/Planning Balance

64. The critical development control test on this appeal – as last time – is whether or not the potential harm to the GB, which attracts substantial weight, and any other harm is clearly outweighed by the very special circumstances that weigh in favour of the scheme. This is the test that arises under the development plan and national policy. Within that balance

[72] See Planning Statement CD 2.35 – where very significant weight was offered to an affordable housing contribution to distinguish the balancing exercise on the previous appeal – para 14
[73] Statement of Common Ground, Appendix B

considerable importance and weight must be given to the harm to the significance of the listed buildings.

65. The case is fundamentally the same as before. The scheme develops out the horticultural site as a care village. The scheme is reduced but the change to the character of the site is essentially the same. There is a significant impact on openness, moderate harm to the significance of the listed buildings, and moderate harm to the character and appearance of the area. All of this is largely as assessed by Inspector Searson. The explicit and implicit criticisms of Inspector Searson are hard to understand. The 2019 inquiry was comprehensive. The Appellant was represented by senior counsel and a full team. No challenge was made to the appeal decision. The judgments made by the inspector obviously fall within the realm of reasonable. Nothing really has changed. The scheme is marginally smaller, but the design choice[74] has remained to develop across the full extent of the Appeal Site.

66. The benefits of the Scheme also remain effectively the same – albeit a nursing home would no longer be delivered. The general housing position is marginally improved in the district, and the specialist need remains broadly the same. The Council does not shy away from these needs and gives the benefits of the scheme substantial weight – as did Inspector Searson. The balance remains as before, and the considerable harm is not clearly outweighed by the benefits so that the appropriate development control test is not met. Accordingly, permission should be refused, and paragraph 11(d)(ii) NPPF is not engaged.

67. For the above reasons, the Council considers that the appeal should be dismissed.

Landmark Chambers, **GUY WILLIAMS**

180 Fleet Street,

London EC4A 2HG **14th December 2021**

[74] KM XX GW

Annex A

18. There is no dispute that the words in para 88 should not be construed in isolation, and must be construed in the context of the Framework as a whole, but Mr James Maurici QC and Mr Stephen Whale for the defendants rightly submit that the starting point must be the words of the policy in para 88. Not only are the words "any other harm" in the second sentence of that paragraph unqualified, they are contained within a paragraph that expressly refers, twice, to "harm to the Green Belt." When the policy wishes to restrict the type of harm to harm to the Green Belt it is careful to say so in terms.
19. The defendants also submit that the judge's approach to "any other harm" would lead to an imbalance in the weighing exercise that is at the heart of para 88. In para 51 of her judgment, having rejected the second and third defendants' submission that the effect on landscape character and the visual impact of the proposed development were harms to the Green Belt, Patterson J continued, at para 51:
"The effect on the landscape character and the visual impact of a development proposal are clearly material considerations but are different from a consideration of harm to a Green Belt. If a development proposal contributed to the enhancement of the landscape, visual amenity and biodiversity within the Green Belt those could well be factors in its favour as part of a very special circumstances balancing exercise."
20. It is common ground that all "other considerations", which will by definition be non-Green Belt factors, such as the employment and economic advantages referred to by the inspector in her decision in this case, must be included in the weighing exercise. On the judge's approach, if an inappropriate development in the Green Belt is *beneficial* in terms of the appearance of the landscape, visual amenity, biodiversity or, presumably any other matter relevant for planning purposes such as the setting of a listed building, or transportation arrangements, it must be weighed in the balance when deciding whether "very special circumstances" exist; but if the inappropriate development is *harmful* to any of those non-Green Belt considerations, that harm must not be weighed in the balance when deciding whether "very special circumstances" exist. I accept the defendants' submission that this imbalance is illogical. If all of the "other considerations" in favour of granting permission, which will, by definition, be non-Green Belt factors, must go into the weighing exercise, there is no sensible reason why "any other harm", whether it is Green Belt or non-Green Belt harm, should not also go into the weighing exercise.
21. Mr Katkowski submitted that it was not illogical to exclude non-Green Belt harm from the weighing exercise because the underlying purpose of the policy was to protect the openness of the Green Belt so that it could continue to serve one or more of the five purposes identified in para 80 of the Framework. Since there is no suggestion that the underlying policy purpose has changed as between PPG2 and the Framework—the essential characteristics and the five purposes of the Green Belt all remain the same—this argument is, in reality, a return to the submission that the *River Club case [2010] JPL 584* was wrongly decided. There is no dispute that the underlying purpose of the policy was, and still is, to protect the essential characteristic of the Green Belt—its openness—but there is nothing illogical in requiring all non-Green Belt factors, and not simply those non-Green Belt factors in favour of granting permission, to be taken into account when deciding whether planning permission should be granted on what will be non-Green Belt grounds ("very special circumstances") for development that is, by definition, harmful to the Green Belt.
…

30. The judge accepted that submission, saying in para 56 of her judgment:

"Where an individual material consideration is harmful but the degree of harm has not reached the level prescribed in the [Framework] as to warrant refusal … it would be wrong to include that consideration as 'any other harm'."
It is not clear whether the judge considered that where an individual non-Green Belt consideration did reach the impact level for refusal prescribed in the Framework, eg where there would be "significant harm" to biodiversity, such a consideration could then be taken into account in the weighing exercise as "any other harm". If that was the judge's approach, it was not supported by Mr Katkowski who submitted that non-Green Belt harm, whether or not it reached the impact level prescribed for refusal in the Framework on another ground, such as transport or biodiversity, was not "any other harm" for the purposes of para 88 of the Framework.
31. In my judgment, there are two fallacies in this submission. There is no question of an applicant or appellant being "cheated" of the benefit of another policy in the Framework which prescribes a threshold for a refusal of permission on a particular ground, such as transport or biodiversity. First, the submission assumes that if the threshold for a refusal of planning permission on transport or biodiversity grounds is not met in the case of a proposed development *outside* the Green Belt any adverse impact on transport or biodiversity must simply be ignored when a decision is taken whether to grant or refuse planning permission. That assumption is incorrect. Take the example of a proposal for a large scale commercial development in the countryside outside the Green Belt. If, as is likely, the proposal is not in accordance with the policies in the development plan for the protection of the countryside, planning permission must be refused in accordance with the development plan "unless material considerations indicate otherwise": see section 70(2) of the Act and section 38(6) of the Planning and Compulsory Purchase Act 2004 , and paras 11–12 of the Framework.
32. The Framework does not purport to alter the statutory duty to have regard to "any other material consideration" when determining a planning application or appeal: see section 70(2) of the Act. When deciding whether "material considerations indicate otherwise" the local planning authority or the inspector on appeal will consider all of the material considerations, those which point in favour of granting permission, and those considerations which, in addition to the conflict with the development plan, point against the grant of permission. In the former category there may well be employment and economic considerations of the kind referred to in the inspector's decision in the present case. If the proposed development would cause some, but not significant harm to biodiversity; some, but not substantial harm to the setting of a listed building; and some, but not severe harm in terms of its residual cumulative transport impact, those harmful impacts will fall within the "material considerations" which point against the grant of permission. The fact that a refusal of planning permission on biodiversity grounds, heritage grounds or transport grounds would not be justified does not mean that the harm to those interests would be ignored. The weight to be given to such harm would be a matter for the inspector to ***286** decide in the light of the policies set out in the Framework, but it would not cease to be a "material consideration" merely because the threshold in the Framework for a refusal of planning permission on that particular ground was not crossed. The position is no different if development is proposed within the Green Belt, save that the "very special circumstances" test will be applied if the proposal is for inappropriate development in the Green Belt.
33. The second fallacy in the claimant's submission is the proposition that "any adverse transport impact, even if far less than severe … would lead to a refusal of planning permission unless 'clearly outweighed' by 'very special circumstances'". The harm that must be "clearly outweighed by other considerations" is not simply the less than severe transport harm, but the harm to the Green Belt by reason of inappropriateness and "any other harm", which would include, but would not be limited to the less than severe transport harm. If,

having carried out this balancing exercise, the inspector concluded that “very special circumstances” did not exist, she would refuse planning permission, not on transport grounds, but on the ground that the proposed development did not “comply with national policy to protect the Green Belt set out in the Framework”: see the inspector's decision in this case (para 6 above).