iAPPEAL REF: APP/B1930/W/24/3338501

Bricket Wood Sports and Country Club, Paintball Site and Bricket Lodge, Lye Lane, St Albans

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COUNCIL'S CLOSING STATEMENT

Introduction

1. The Council maintains that planning permission should be refused for the appeal scheme.

2. It is acknowledged that proposed development would, if delivered, provide significant housing and affordable housing, which would carry very substantial weight. However, the proposals are poorly formulated and under evidenced and there are, as a result, major concerns over the deliverability of that housing and as to the environmental cost which delivering the site would entail.

3. In terms of decision-making route, the parties agree that paragraph 11(d) NPPF is engaged due to the Council's housing land supply ('HLS'). The parties also agree that the site is previously developed land ("**PDL**") within the green belt and that the proposal will make a contribution to meeting local affordable housing needs. This gives rise as to whether NPPF 154(g) applies – this will turn on whether the proposed development gives rise to substantial harm to openness[1]. If the proposed development is inappropriate in the green belt (as the Council maintains) then the Appellant must show very special circumstances or there will be a clear reason for refusal under footnote 7. The tilted balance in NPPF 11(d)(ii) can only be engaged if very special circumstances are shown.

[1] It is agreed that the consultation on the draft NPPF changes can carry no more than limited weight (see ID23). In any event, the draft changes would not change the need to show that the impact of the scheme is less than substantial and the proposal does not comply with the draft NPPF 152 as it does not provide 50% affordable housing and no viability evidence has been adduced to justify a lower amount.

4. These closing submissions will follow the Inspector's main issues[2] as they remain.

Issue 1) Whether the proposal would represent inappropriate development in the Green Belt having regard to the National Planning Policy Framework (the Framework) and any relevant Development Plan policies

5. NPPF 152 provides that

> "Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances."

6. NPPF 154 provides that the construction of new buildings should be regarded as inappropriate in the Green Belt, subject to the exceptions set out. These include NPPF 154(g) which provides that the complete redevelopment of previously developed land ("**PDL**") is not inappropriate development where it would either

> "– not have a greater impact on the openness of the Green Belt than the existing development; or
>
> – not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority."

7. Both parties agree that the proposal will have a greater impact on the openness of the Green Belt than the existing, but that it also will entail the re-use of PDL and contribute to meeting an identified local affordable housing need. As such, the debate turns on the question of whether it will cause "*substantial harm to the openness of the Green Belt"*.

8. Mr Parker set out the case made by the Appellant. As shown in XX, it was deeply flawed.

9. First, the Appellant apparently proceeds on the basis of a distinction (not explored in Mr Parker's written evidence) between the word "impact" in the first bullet point of 154(g) and the word "harm" in the second bullet. Mr Parker's view was

   (1) The former (impact) required a consideration of only spatial/volumetric change to openness, the implicit idea being that greater impacts might not be harmful; whereas

[2] As set out and agreed at ID12.7 para 10.

(2) The latter (harm) placed a much higher emphasis on visual effects, with spatial impacts being (in effect) taken as part of the baseline.

10. The logic behind this distinction is not understood by the Council. A "greater impact" in the terms of the first bullet point can only mean an impact which causes a comparatively greater reduction in the openness of the Green Belt. That is, plainly, harmful in Green Belt terms. The weirdness of Mr Parker's reasoning was revealed when he was willing to accept that:

(1) The development will give rise to a "*substantially greater impact on the openness of the Green Belt*" than the existing development on the site; and

(2) That that impact was harmful; but

(3) Not that this equated to substantial harm.

11. Second, Mr Parker's written evidence and evidence in chief had all emphasised to a significant extent the idea that the impacts of the scheme on openness in spatial terms should be considered to be lower and/or disregarded so that the focus shifts onto visual effects/effects on the wider Green Belt beyond the site because it was inevitable that Green Belt land was going to be needed to meet St Albans' needs: see his proof at 8.9-8.10; 9.3; 9.4; 9.7 and 9.8. This was a major part (he explained) of the reason why he had not followed the *Maitland Lodge* or *Smallford Works* Inspectors (or Mr Hughes) in carrying out an assessment of the degree of change to the spatial features of the proposal in terms of volume, footprint etc.

12. However, he accepted (eventually) that this (inevitability) was a matter which is *irrelevant* to the assessment of the *degree* of harm to the openness of the Green Belt. This is plainly right (not least as a result of the ***Goodman Logistics*** case[3]) but the concession exposed the gaping hole in his analysis – including the reasons why he considers that when dealing with the second bullet point of NPPF 154 (g) (but not the first) the decision-maker must focus on visual/wider GB effects.

13. In ReX, an attempt was made to salvage this but Mr Parker's answers were contrary to the answers Mr Parker had already given, wrong and/or revealing:

[3] See CD 6.19 para 30 and para 37. Mr Parker also accepted the point that a development will reduce openness to precisely the same extent whatever the level of housing need.

(1) It was put (and Mr Parker accepted) that some spatial impact was "inevitable" for any re-use of PDL land which might meet NPPF 154(g). However, Mr Parker had accepted in XX that:

(a) That will depend on the nature of the proposed development and the nature of the existing PDL land.

(b) Some PDL land will be much more heavily developed and make less contribution to openness than this site currently does.

(c) It would be possible for a much smaller scheme on this site to come forwards. That might avoid increasing footprints and floor areas at all, and certainly conceivable that something much closer to the existing would not result in substantial harm.

(2) It was put (and Mr Parker accepted) that "spatial increase is not necessarily harmful", but – as set out above – if what is meant by spatial increase is a spatial impact that reduces openness then it is necessarily harmful in green belt terms.

(3) Mr Parker was offered the chance to explain why the focus on visual effects was really important in a NPPF 154(g) case but his response was that on this site "*it is so well screened so there is a reduced impact*". This, when viewed alongside Mr Parker's earlier acceptance of a substantially greater harmful effect in spatial terms, revealed that Mr Parker's position is that the focus on visual effects is driven by his recognition that this appeal scheme will necessarily/inevitably have a substantial adverse impact on openness. He focuses on visual effects from outside the site not because this is the approach required by the NPPF or PPG (it isn't) but because this is where the site's impacts are less obvious.

14. Third, he accepted that it was incorrect to confuse Mr Hughes' use of the term "substantial" to describe weight to be given to material considerations and the term as it was used in NPPF 154(g). While he persisted in his view that it was surprising that reuse of PDL would ever be "*at the highest level*" of harm he could not satisfactorily explain how to square this with the fact that the second bullet NPPF 154(g) can only apply to PDL land.

15. Fourth, he accepted in XX that visual attractiveness/whether something looks nice is not relevant to openness (again rightly). What matters in visual terms is whether the development is perceived as increasing the sense of urban sprawl/urbanisation. However, as with his inevitability argument, the removal of this limb of his analysis leaves a hole in his assessment: see especially his proof at 8.14.

16. In the circumstances, the Council submits that the Appellant's approach is flawed and wrong.

17. The Appellant's sought repeatedly to bolster their position by reliance on the *Maitland Lodge* decision. However:

    (1) Read properly, that decision does not discard or reduce the weight to be given to the spatial impacts of a proposal. As Mr Hughes pointed out, and Mr Parker accepted, (i) that Inspector considered the spatial impact of the proposed development compared to the existing development (ii) its spatial impacts in terms of footprint etc were of a "different order" to the present appeal scheme.

    (2) While the *Maitland Lodge* decision does look in detail at visual effects on the wider Green Belt, that focus (insofar as it is said to detract from the need to examine spatial impacts on the site itself) is not supported by anything in the PPG or caselaw which confirms (see ***Samuel Smith***[4]) that the central concept is the absence of built development and that the NPPF does not require consideration of visual impacts per se.

    (3) The focus on *Maitland Lodge* means that the Appellant fails to grapple with the rather more applicable and comparable decision on *Smallford Works* – which Mr Hughes addressed in detail.

18. Mr Hughes' approach, by contrast, was fair and took account of <u>all</u> the relevant factors. He showed that the proposals would result in a substantial increase in

    (1) Overall built form on the site – in the region of 330% increase in footprint, 476% increases in GEF, and 536% increase in volume;

[4] CD6.4 especially [22], [24] and [39].

(2) The permanence of development on the site (especially in the paintballing area where current development is remediable and transient in character) and

(3) The activity on the site (where only the south west quadrant has anything more than occasional activity.

19. He acknowledges that there are limitations to the wider visibility of the site but was clear that there will be a significant change to Lye Lane not only from the direct perception of the new housing but also from the busy, visible and urban form of the new 10m wide accessway and the proposed footway.

20. Mr Parker and Ms Williams contested Mr Hughes' position in relation to the extent of future visibility of the appeal scheme from Lye Lane. However, as explored in XX of them both, there is a basic problem where

(1) The Appellant relies very heavily on the provision of a set-back from Lye Lane, successful planting, and a comparison of existing and proposed building heights; but

(2) There is nothing in the application to secure a set-back or any particular heights; and

(3) When pushed both Ms Williams and Mr Parker accepted that there were pressures on ability of the site to accommodate 115 dwellings (Mr Parker accepted there was "*lots of pressure"*) and that this might result in a situation where the Council were compelled to accept[5] heights or layout or a type of built form which would result in greater visibility or other adverse effects. Indeed Mr Parker directly offered the suggestion that there might have to be less set back than shown on the most recent illustrative masterplan.[6]

21. This rather suggests that the visual effects on openness will be greater than the Appellant currently accepts.

[5] As set out in Opening and discussed with Ms Williams, the grant of outline permission would entail acceptance of the maximum quantum specified in the description of development (i.e. 115). On reserved matters applications it would not be "*available to the local planning authority is to refuse an application for the specified number of dwellings on the basis that the site is not capable of accommodating that number in principle*." It could only refuse "*on the basis that it does not amount to the best means of achieving the delivery of the specified number of dwellings on the site of the outline planning permission*". See Dove J ***in R (Village Concerns) v Wealden DC*** [2022] EWHC 2039 (Admin) at para 47

[6] In XX.

22. Drawing these threads together, the Council considers that the proposal will plainly give rise to "*substantial harm to the openness of the Green Belt*" and comprises inappropriate development as a result.

Issue 2) Effect of the proposal on the landscape character of the area

23. The evidence on landscape impact overlapped (in some regards) with that on openness. However, Mr Hughes' evidence as to why the proposals will give rise to significant harm to landscape character both from the site and the footway works was robust and thorough.

    (1) He acknowledges that there are detracting features on the site already but reasonably concludes that it still makes a positive contribution to the intrinsic qualities of the countryside.

    (2) The proposal would result in this being lost and would also introduce a dense and incongruous development into the countryside without clear relation to any nearby development.

    (3) The planting and landscape framework might assist in mitigating this to some limited extent, but its ability to do so will be constrained by the pressures on the site (discussed above) in terms of its ability to deliver 115 dwellings and key features like the need for an acoustic fence to the Lye Lane boundary.

    (4) The Lye Lane footway proposals will also have an adverse impact on character – resulting in suburbanisation which will be increased by any resulting tree loss as well as engineering features like fences, kerbs and retaining walls.

    (5) Ms Williams relies on removal of the paintballing operation as a landscape benefit to offset that harm – but this has not yet been secured. It also should not be double-counted as both landscape mitigation and a freestanding benefit (see below).

24. There are clearly a number of differences in judgement between Mr Hughes and Ms Williams on the detail of the existing site and proposal – the Inspector will of course be able to make up his own mind.

Issue 3) Whether the proposed development would support active and sustainable modes of travel

25. NPPF 109 requires the planning system to actively manage patterns of growth in support of the objectives of sustainable transport.

> "Significant development should be focused on locations which are or can be made sustainable, through limiting the need to travel and offering a genuine choice of transport modes. This can help to reduce congestion and emissions, and improve air quality and public health. However, opportunities to maximise sustainable transport solutions will vary between urban and rural areas, and this should be taken into account in both plan-making and decision-making."

26. The proposal is a significant housing development. The site has no public transport access, no footpath access and the only cycle access is along Lye Lane to either north or south – both of which perform very poorly against LTN 1/20 assessment criteria.[7] The Appellant accepts that it is not currently in a sustainable location and rely on the provision of a footpath connection south along Lye Lane as an essential component of the scheme.[8] No case is advanced that permission should be granted if that link is not secured[9].

27. Even if the footway is delivered as shown, the Council considers that there are a number of deficiencies in the provision offered which should be weighed as harms:

    (1) The footway would provide a walking distance to bus stops and relevant facilities which is beyond the 400m recommended by CIHT[10] and HCC[11]. Although Mr Ferguson attempted to challenge this by comparing to decisions on two other examples – The Kestrels and Hanstead Park – he accepted in XX that this was not a reasonable criticism: (i) Hanstead Park had a bus service rerouted to the site (ii) The Kestrels was justified on the basis that a connection to the bus service would be within 400m. He also drew attention to the PTAL guidelines in London but accepted that London's environment would generally support longer walking routes given (i) road congestion (ii) better quality footways and (iii) higher power lighting options.

[7] CD1.41 Table 1 and 2 starting pg 24. Discussed by Mr Carr in EiC.
[8] Mr Parker and Mr Ferguson in XX.
[9] Agreed Mr Parker in XX.
[10] CD10.6 para 6.4
[11] CD10.3.1 para 7.8

(2) There is no cycle offer available for most users. This is apparent from the Appellant's own Active Travel Audit[12].

(3) The bus service at Bricket Wood, even if accessed, is significantly below the minimum service provision sought by HCC's policy,[13] a point relied upon by the Tollgate Road inspector.

28. However, HCC and the Council are not satisfied that a safe and accessible footpath can be provided. As the Council's witnesses explained there are a number of fundamental barriers to successful delivery. These are (and I address each in term)

(1) Culverting not acceptable;

(2) Works would lead to unacceptable risk of harm to protected trees/woodland;

(3) Overall path unacceptable in design terms;

(4) Additional risk re common land consent.

Culverting not acceptable

29. The proposal requires the culverting of the entire length of the existing ditch along one side of Lye Lane.

30. Ms Waters on behalf of the LLFA made it that this is very unlikely to be acceptable and their consent under s.23 Land Drainage Act 1991[14] would be a precondition for the details of the footway being approved under s.278. While it is right that the LLFA cannot predetermine the application[15], her evidence as an expert in water and environment management is that culverting a significant stretch of open watercourse (i) may result in additional flood risk and (ii) will result in ecological and water quality harms which are entirely contrary to the requirements of Policy 7 of HCC's adopted policy which provides:

[12] CD1.41
[13] CD10.3.1 para 7.8.
[14] ID9
[15] This is not what Ms Waters evidence amounts to. She is entitled to give her professional view as to the likely acceptability of an application – this is entirely distinct from the LLFA unlawfully fettering its future decision-making.

> "Any works carried out within an ordinary watercourse must not have a detrimental impact to the water quality and the ecological status of the watercourse with regards to the Water Framework Directive"[16]

31. The latter view (in relation to ecological and water quality) was not challenged in cross examination or contradicted by any of the Appellant's witnesses.

32. Mr Hartfree gave evidence to contradict Ms Waters' view but

    (1) He is not a flood risk or drainage expert, he is an engineer and his answers to the question of whether culverting could be achieved were framed by reference to technical standards (the DMRB) and did not address at all the ecological and water quality issues raised by Policy 7.

    (2) His evidence on flood risk was based on his view (expressed for the first time in EiC) that, contrary to the Appellant's Arboricultural expert Mr Clarke's evidence, the ditch is in fact dry and only drains the highway. Notwithstanding his view, he accepted the catchment to the ditch still needs to be established – which obviously is something that cannot be prejudged.

33. This is a fundamental point. Culverting is contrary to the principles of the Water Framework Directive which sets the context for almost all water body decisions. The LLFA's approach is to accept very limited culverting at accesses on a purely pragmatic basis but even then it seeks bridging where possible[17]. Ms Water was clear that in her 20 years of experience she has never seen a culvert of this length consented and Mr Hartfree accepted that he could not point to any examples either[18].

Works would lead to unacceptable risk of harm to protected trees/woodland

34. The backfilling of the ditch, laying of the culverts and construction of the footpath will also give rise to an unacceptable risk of harm to protected trees and ancient woodland along the edge of Lye Lane.

35. This is an issue which was clearly raised on the application.[19]

36. However, despite that notice, the Appellant has failed to present any coherent case capable of demonstrating that the footway can be delivered without the harms to

[16] See also the supporting text.
[17] Waters EiC
[18] Hartfree XX
[19] CD3.1 8.5.13-14 and RfR 4

trees/ancient woodland arising. Mr Parker said in his ReX that he understands there will be "*only a beneficial impact*" but it is submitted that there is no credible evidence on which to found such a conclusion.

(1) First, there is no information which clearly identifies the trees which would either be lost or be of concern/under threat.

    (a) No tree survey has been undertaken.

    (b) There are some trees which are shown on the General Arrangement and Section plans but no information as to how those trees have been identified/selected for consideration or whether there are other trees which might be affected or should be retained. Mr Clarke, who did not appear at the Inquiry, challenged the view of the Council's tree officer that an "*extensive* " number of trees would be affected but provides no assessment of his own.[20]

    (c) While Mr Ferguson (supported by Mr Parker who had reviewed his proof) were confident in asserting that no trees would be lost. This is simply untrue as the general arrangement plans themselves show.[21]

(2) Second, there is no information capable of identifying the zones around the trees which need to be kept free from development and/or digging.

    (a) Mr Clarke makes reference to the need to establish root protection areas and provides an argument as to why roots are unlikely to have established in the ditches but does not provide any assessment of the actual root protection areas which would need to be established.

    (b) As such that there is no way of telling whether the proposals will involve breaching any root protection areas.

(3) Third, the Appellant's case on why there will not be harm to trees from excavating and backfilling the ditch depends on Mr Clarke's view that anaerobic conditions will have established in the soil due to "*waterlogged conditions"* which will result in root activity preferentially taking place elsewhere. This was a position he advanced

[20] CD2.13.2 para 1.
[21] Accepted by Ferguson in XX.

to rebut Ms Richardson's view that "*there are sections where the ditch is shallow and not waterlogged. Therefore it is likely that there is root development*"[22]. However, his view was flatly contradicted by Mr Hartfree's evidence about the limited water carrying function of the ditch and his repeatedly expressed view that (save for the southernmost stretch) the ditches are dry.

(4) Fourth, the footpath proposals themselves are difficult to understand and at various points self-contradictory. They have been amended at various points including during the inquiry but without any sufficient explanation being offered which would enable the Inspector to have confidence in their accuracy/conformity with conditions on the ground. So for example:

(a) The sections at CD2.11.13 (which were clearly provided to and formed a part of Mr Clarke's assessment of the scheme – see CD2.4.3) are presented as detailed scale drawings based on a survey of the specific pinchpoints identified. Mr Hartfree agreed with this, accepting that they were not (as he originally tried to suggest) indicative or illustrative but were in fact the most detailed illustration of what was proposed available.

(b) When it was pointed out (first via my opening but then further in cross examination of Mr Hartfree) that they were inconsistent with the 1.5m width of pinchpoints shown on the General Arrangement plans the response was that they are mistaken and a new set of sections submitted (ID16). However, this revision opens more questions than it addresses:

(i) Section A is unrecognisable when compared to the original. The tree is now shown as larger, and much further from the highway boundary. Its trunk appears have moved from the bottom of the ditch[23] and is much further from the footway – despite the footway being 0.4m wider.

(ii) Section B is equally divorced from the evidence previously presented (and assessed by Mr Clarke). It shows a tree squarely in the bottom of the ditch but further from the highway boundary. It has dispensed

[22] CD9.2.1ep20
[23] The red dashed line shows existing ground level

with the minimum 500mm distance from the proposed retaining wall and is sited much closer.

(c) No explanation has been offered by the Appellant to explain these changes or to provide any updated arboricultural assessment of their implications.

(5) Fifth, although both Mr Ferguson and Mr Hartfree (and Mr Parker) sought to suggest that the proposals had been prepared in consideration of its potential arboricultural impacts, they confirmed that Mr Clarke was not instructed until March 2024 – long after the initial plans had been developed. [24] The suggestion that this design has been led by arboricultural concerns rings very hollow.

37. Any risk of harm needs to be considered with care. As Mr Hughes said and Mr Parker agreed[25], the ancient woodland benefits from a very high degree of policy protection. No case has been advanced to show that the "wholly exceptional circumstances" which would be needed to justify harm to the ancient woodland exist. Further, even if other (non-ancient woodland) harm through loss of trees were to occur this would need to be taken into account as part of the harm to the character of Lye Lane.

38. In addition to questions over the feasibility of the footway, there are also questions as to what ecological, landscape and arboricultural impacts will arise. These need to be taken into account in deciding whether to grant permission.

39. The Appellant has already made much of the fact that the application is in outline. However, it should be remembered that access to the site is not a reserved matter. As defined in the Town and Country Planning (Development Procedure Management) (England) Order 2010 this includes accessibility to the site:

> "access", in relation to reserved matters, means the accessibility to and within the site, for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access network; where "site" means the site or part of the site in respect of which outline planning permission is granted or, as the case may be, in respect of which an application for such a permission has been made;"

40. It follows that, while conditions can be applied in order to require submission of further details regarding the footpath, they should only be used where the Inspector is satisfied

[24] See plans originally submitted (as designed by Paul Mew) CD1.20
[25] In XX

that the principle of the access is acceptable. The Council's position is that the information available is simply insufficient to reach this threshold.

Overall path unacceptable in design terms

41. Even if the footpath as shown on the General Arrangement Plans *could* be delivered without unacceptable culverting or tree impacts, Mr Carr confirmed that the number of departures from the desirable footway width standards set out in HCC's guidance was a concern and would lead to the overall footway failing to provide a genuine sustainable transport mode. This needs to be judged overall, but the Inspector is asked to have regard to:

    (1) The number of pinchpoints;

    (2) The overall length and character of the footway which would be relevant to whether it was suitably desirable (this includes the fact that it already requires people to walk for more than the 400m maximum set out by HCC and derived from CIHT's Planning for Walking[26]);

    (3) The overall quality of lighting which is likely to be achievable given the ecological and character constraints.

Additional risk re common land consent

42. This is a lesser point but it is accepted by the Appellant that common land consents will be required to carry out the work. While this a more standard feature, it is striking that the Appellant has given no evidence to explain how the relevant tests will be satisfied. There is plainly an additional risk in this regard.

Issue 4) Effect of the proposed development on highway safety

43. Putative reason for refusal 5 is maintained in part. Mr Carr gave evidence on behalf of HCC, dealing carefully with the shifting evidence presented by the Appellant up to and during the inquiry.

44. His position is that there remains a concern on safety grounds which the updated swept path analyses and revised Road Safety Audit have failed to remove. This is because of the conflicts which the swept path analyses show will occur between larger refuse trucks and large cars on Lye Lane between the site access and the passing bay. While this is a

[26] CD10.6 para 6.4 pg 30

conflict which *can* arise now, the significant increase both in traffic movements on Lye Lane and the ambition to put a footway alongside the carriageway results in an unacceptable increase in safety risk – something acknowledged by the RSA which identifies at Problem Reference 3.6 the risk of drift from the carriageway to the footway and the adjacent ditches.

45. Highways safety is an issue of the utmost importance. While Mr Ferguson' conflicting view is acknowledged, the Inspector is invited to prefer the advice of the statutory highway authority as represented by Mr Carr.

Issue 5) The effect of the proposed development on flood risk

46. As set out in opening, the Council considers, relying on the advice of the LLFA as represented by Ms Waters, that it has not been satisfactorily demonstrated that the proposed development will not increase flood risk off site or that sustainable drainage can be accommodated within the development. This has not been resolved by the Appellant's evidence either during the normal sessions of the inquiry or following the adjournment.

47. These are both matters which go to the principle of whether the site can be developed for 115 dwellings.

48. Ms Waters set out her analysis with clarity through her written and oral evidence.

49. The application materials (CD1.8 and CD1.9) identified that infiltration was not viable and that there were no watercourses, surface water sewers or combined sewers to which discharge could be made in the immediate vicinity of the site.

50. As such, the only sustainable option identified by the Appellant prior to 20 June 2024 is to pump water to a watercourse some 240m north west of the site. However, as Ms Waters explained

    (1) There is no information provided as to (i) whether third party land consents would be provided (ii) of the environmental, ecological and arboricultural impacts of laying a pump through the intervening woodland and (iii) of the potential impacts in flood risk terms of discharging additional water into that watercourse.

    (2) There is no information to show that there is capacity within the watercourse and the EA flood maps show that there is already a flood risk to which additional

discharges will add[27]. Any additional water to this catchment will increase flood risk to others and not be feasible without significant off-site mitigation.

(3) There are also knock on effects. The use of pumping requires back up storage on site to deal with critical storm events. If it were to be identified that there is capacity in the watercourse, it might still be that the discharge rate needs to be significantly reduced from the 5.1 l/s currently envisaged.

51. The Appellant then applied for an adjournment to seek the opportunity to adduce further information about a cricket pitch related land drain and, following the adjournment, then provided a new Sustainable Drainage Strategy (ID18) which was then updated again in October 2024 (ID25a) neither of which identified or rely on a cricket pitch drain. The new SuDS Strategy still proposes a primary strategy which relies upon discharge to a surface watercourse but again failed to come anywhere close to demonstrating that a feasible option existed.

52. As Ms Waters explains, the new strategy:

(1) The new strategy does not now rely on or refer to the option of piping surface water to the north-west watercourse.

(2) Seeks to rely on the idea that a ditch through the ancient woodland to the south of the Site could be "*restored*" where in fact there is no current drainage feature following the proposed route[28]. ID16 records that there is "*no evidence in* [the area south of Ditch 1] *of any drainage ditch crossing boundary fence*". All there is relates to a likely way of trying to drain the hardstanding into the garden of 22a Park Street Lane.

(3) Again, like the north-west option, involves construction across third party land, through ancient woodland, and there has been no engagement with whether levels of the question of whether any of the highways ditches to which the Appellant ultimately seeks to discharge have adequate capacity[29]. There are no levels to show whether drainage here will be technically feasible or what kinds of interventions

[27] CD9.3 at figure 2.3.
[28] There is no evidence of any form of ditch running along the majority of the suggested route (see ID22 in particular extracted Fig 2-3 pg 12, compare with Fig 2.1 at pg 6). See Ms Water's further evidence in the roundtable session.
[29] Ms Waters emphasised that they are not constructed to take non-highways water flows.

might be required. Again, the EA flood maps show that there is already a flood risk to which additional discharges will add.[30]

(4) Ms Waters, of the LLFA, confirmed that she was still unable to confirm that there is a technically feasible solution.

(5) Even if there were, the ancient woodland impact would plainly be significant (as Mr Parker accepted). No case has been advanced to show that the "wholly exceptional circumstances" which would be needed to justify harm to the ancient woodland exist. This would lead to a whole new reason for refusal under NPPF 186(c).

53. At the inquiry, the Appellant chose not to challenge Ms Waters through any technical cross-examination or presentation of alternative expert evidence. Their sole response, as advanced in XX and by Mr Parker, was to:

(1) Rely on the bald view expressed by GeoSmart in the FRA, SDS and Addendum FRA that there is no flood risk; and

(2) Ask for the imposition of a condition preventing the development of the site until an acceptable drainage option can be identified and demonstrated.

54. Neither approach can properly be accepted.

(1) First, the suggestion of Mr Parker that the evidence of GeoSmart should be preferred to that of Ms Waters is contrary to the basic principles of fairness governing the examination of evidence in planning inquiries. Ms Waters is an expert, giving evidence in accordance with the guidance of her professional bodies. None of the factual evidence on which she expressed her opinion has been controverted and no competing expert has given evidence to contradict her conclusions. No questions were advanced to challenge her assessment of the flood risk either by the Appellant or by the Inspector. As such, by analogy with the position in civil proceedings, there is no basis for the Inspector to prefer GeoSmart's generic view to Ms Water's opinion: see ***Griffiths v Tui (UK) Ltd*** [2023] 3 WLR 1204.

[30] CD9.3 at figure 2.3.

(2) Second, the use of a Grampian condition (while legally permissible[31]) is, the Council considers, plainly unreasonable and contrary to the expectation of the NPPF and PPG that flood risk and sustainable drainage issues will be addressed in principle on any outline application for planning permission. This was explored in detail with Mr Parker who accepted that:

(a) Grampian conditions are not generally used to defer the consideration of otherwise material questions from the outline to reserved matters stage.

(b) The NPPF and PPG – in particular PPG paras 020 and 059[32] envisage that the principle of a sustainable drainage system should not just be submitted but established at the outline stage. This includes showing that there will be "*no increase in flood risk to others off-site*" and *"where sustainable drainage systems are considered to be inappropriate, provide clear evidence to justify this*".

(c) The effect of using a Grampian condition here – where the principle of a sustainable drainage option has <u>not</u> been established – would be to circumvent the purpose of the NPPF and PPF in requiring those matters to be addressed at the outline. This puts the situation into an analogous one with that considered by the Court of Appeal in ***R(Hillingdon LBC) v SST*** [2021] PTSR 113 see [85]-]91]. Here, as there, the condition is to be used to reserve for future approval matters which are "*integral*" to the permission which is now being sought. While the case arises under a slightly different regime and relies on guidance which is not directly applicable it is a clear steer that the imposition of the condition suggested here would be unreasonable. It follows that no permission can be granted on the flood/sustainable drainage position alone.

55. Although Mr Parker had originally sought to rely on two examples where he said the LLFA had taken a different and inconsistent approach he was constrained to accept that the examples showed quite the contrary:

[31] I pause to note that this is the question which the Appellant has repeatedly sought to address. With respect, the question is not whether a condition <u>can</u> be imposed but whether it is appropriate, in the light of the NPPF and PPG, for you to exercise your power to grant permission subject to such a condition.
[32] ID8

(1) On Chiswell Green South, the inconclusive flood risk assessment and sustainable drainage strategy he was thinking of (but didn't append to his rebuttal proof) was not acceptable and so was superseded by more detailed iterations which did establish the principle of sustainable drainage and allow the LLFA to set a limit on the permissible discharge rates.[33]

(2) On Copsewood, the strategy submitted at the outset was based on detailed infiltration testing[34] which allowed for two feasible drainage strategies to be set out[35]. This was again detailed enough to demonstrate no increase of flood risk to the site or the surrounding area and that a sustainable drainage strategy was available in accordance with the discharge hierarchy.

56. Viewed in the round, the repeated reliance of the Appellant on the idea that requiring more would conflict with the idea of what is proportionate to a scheme of this kind or the (obvious) fact that more detail on the sustainable drainage strategy will be required at any reserved matters stage is hopeless. To say that the evidence at this stage needs to be proportionate begs the question of the purpose which it must be proportionate to. Here, as accepted by Mr Parker, the purpose is to satisfy the decision-maker that they can have sufficient confidence that an increase in flood risk will not arise and that a sustainable drainage system can be incorporated. Ms Waters has convincingly demonstrated why neither of these is the case.

57. The Appellant has repeatedly failed to do develop anything like a convincing sustainable drainage strategy despite the issue having been raised in February 2023 and notwithstanding the adjournment of the inquiry in June 2024. As with the design issues, and much of the evidence on the footway, the failure speaks volumes.

Issue 6) If the proposed development is inappropriate, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other

[33] See ID12 pg 32
[34] See CD2.14.1 pg 9
[35] See pg 12

considerations so as to amount to the very special circumstances necessary to justify the proposal.

58. The final main issue, if the Inspector concludes that the proposal is inappropriate development, is the VSC balance itself. On the harm side, the NPPF requires consideration of both Green Belt harms and all other harms.

Green Belt harm

59. The proposed development gives rise to three forms of Green Belt harm: definitional harm from inappropriate development; harm to openness (which the Inspector will already have concluded is substantial in extent); and harm to the second and third Green Belt purposes. Each of these attract substantial weight per NPPF 153.

Other harms

60. These have been largely covered already.

61. On landscape, Mr Hughes attached significant weight to this factor. Mr Parker gave it very limited weight. Their assessment rests on the evidence given by Ms Williams and Mr Hughes in the landscape section of the inquiry. For the reasons already set out, Mr Hughes' approach is preferable and the higher adverse weigh is the correct level for this harm.

62. On sustainability, Mr Hughes attached significant weight to the deficiencies of the location – as explained under Main Issue 3 above – assessed against the need to provide a genuine choice of modes as per NPPF 109. This reflects the approach taken on the Tollgate Road appeal where the absence of LTN 1/20-compliant cycling routes was given moderate weight.

63. Turning to the other possible environmental harms of providing a surface water drainage option and providing the footway along Lye Lane, the parties are agreed[36] that any unavoidable harms from those schemes need to be taken into account as part of the decision on the appeal. This presents real difficulties where the information remains deficient and is another reason why the Inspector should not accept the Appellant's approach of using Grampian conditions to allow the flood and sustainable drainage strategies to be demonstrated in principle at a later stage (see above).

[36] See XX of Mr Parker

64. Mr Hughes said that if the Inspector were to accept that Grampian conditions can reasonably be used then the Inspector must also take a precautionary approach to the environmental harms. He therefore gives significant weight to (i) off site arboricultural harm (ii) on and off site ecological harm and (iii) having heard the evidence of Ms Waters, the lack of a feasible sustainable drainage option.

Other considerations: housing

65. Turning to the benefits side of the equation, the main benefit which the appeal scheme would provide is the provision of housing.

66. There is no doubt that the housing position in St Albans is dire. The Council has accepted that it has no up-to-date adopted strategic housing policies to meet its identified needs and that it faces a housing crisis with a very poor level of HLS and rising affordability ratios. The delivery of housing and affordable housing is therefore something which should be afforded very substantial weight.

67. However, there is an important caveat to this. As Mr Hughes emphasised, the Appellant is asking the Inspector to grant permission outside of the development plan process and in conflict with the NPPF's strong emphasis on the retention and permanence of the Green Belt because there is an urgent need now. If the proposed development is not actually deliverable, at least in the short and medium term, the basis of that case simply falls away. Mr Parker accepts that deliverability is unknown. – This is right given (i) the Grampian conditions the Appellant proposes and (ii) the doubts of Ms Waters and Mr Carr as to the feasibility of both the drainage strategies and footway proposals.

Other considerations

68. A number of other benefits are identified for the appeal proposal.

69. First, the whole of the site is acknowledged to be PDL. Mr Hughes and Mr Parker agree that its reuse should attract moderate weight.

70. Second, biodiversity net gain will be secured in the absence of a legal or policy requirement. Mr Hughes says this should also get moderate weight, albeit Mr Parker says only limited.

71. Third, both parties give weight to economic benefits. Mr Hughes says limited weight – reflecting the approach of the Secretary of State on *Chiswell Green* (a much larger scheme

where no existing economic activity was lost) who gave those benefits moderate weight[37]. Mr Parker stuck to substantial weight despite the Secretary of State's approach. He was referred in ReX to NPPF 85 but the recent decision of the High Court in ***Bewley Homes v SSLUHC*** [2024] EWHC 1166 (Admin) makes it clear that the idea that this sets the level of weight to be given is an "*obvious distortion of national policy for which there is no conceivable justification*".[38]

72. The other benefits relied upon by the Appellant are (i) reduction in pressure on the Ancient Woodland within his ownership through the cessation of paintballing activities and removal of wider access to it and (ii) the wider benefit of the footpath to the general public.

    (1) The Council accepts that removing activity from the woodland would be beneficial – but it needs to be secured in a robust enforceable way, not least the history of unauthorised development on this site. Care should also be taken not to double-count any benefit. At present Ms Williams relies upon it as mitigation/compensation for the landscape effect arising from the footpath.

    (2) On the footpath itself, Mr Hughes did not accept any more than limited weight; which put him at odds with the substantial weight insisted upon by Mr Parker. Mr Parker's position on this was not credible. He contended that the weight should be assessed regardless of the number of people benefited. This was a bold position to adopt and one which does him no credit. Benefit to the public interest must be determined not only by the degree of impact it has on any single individual but by the number of people so benefited. Mr Ferguson accepted there was only very limited benefit to anyone living north of the site and Mr Hughes explained that even the dwellings to the south were less benefitted than might otherwise be the case given access to alternative footpath routes taking them to Bricket Wood.

The planning balance

73. How, then, are these various threads to be drawn together into a conclusion?

[37] CD5.2

[38] "In reality what the claimant and others have been trying to argue, sometimes successfully, is that "significant weight" is mandated by the NPPF for any economic benefit, even though no evidence is given about the level of that benefit (or its effect in relation to the economy and its requirements), and even if a decision- maker would consider that benefit to be relatively small. This involves an obvious distortion of national policy for which there is no conceivable justification."

74. The test, it is agreed, is the VSC test if the Inspector sides with the Council on the application on NPPF 154(g). That is not a flat balance, but a tilted one; and it is heavily tilted against the development. It is not enough for the benefits to outweigh the harms; they must clearly outweigh them if the proposed development is to meet the policy tests for permission.

75. The Appellant has also underestimated the other harms which its proposed development would cause.

76. The Council fully accept that the need for housing, of all kinds, is acute in this district. There is no doubt but that St Alban's needs more homes. The ELP itself recognises that Green Belt land will need to be released to meet that need.

77. But it does not follow that this site is required for housing. That depends on its sustainability, its environmental sensitivity, it deliverability and its contribution to the both the Green Belt and wider landscape.

78. The site is not a sustainable location and its availability as an achievable site for housing is constrained by what appear (on the evidence available) to be unsurmountable challenges to delivering a sustainable drainage strategy or pedestrian or cycle connections to surrounding settlements.

79. While the need for housing in St Alban's is undoubtedly acute, it has simply not been shown that this is the right place for those houses or even that the site could accommodate the number of homes proposed. The harms which would result are just too great to justify the loss of this part of the Green Belt forever.

80. On other (secondary) benefits, the Appellant has included assignments of weight to benefits which are not borne out by the evidence and do not take account of the challenges to delivery. In particular, the Appellant has over-assessed the economic and footpath benefits.

81. In those circumstances, the VSC balance resolves against the proposal.

Matthew Dale-Harris

Landmark Chambers

180 Fleet Street

25 October 2024.