**APPEAL REF: APP/Y1138/W/22/3313401**

**LAND AT HARTNOLLS FARM, TIVERTON**

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**CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT**

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## I. INTRODUCTION

1. We opened by saying that this appeal was remarkable for what was not in dispute between the main parties. Remarkably, following four days of Inquiry, that dispute has narrowed even further.

2. There is no dispute between the main parties that:

   i. the extension to the Business Park complies with relevant Local Plan policy, including polices S14 ("countryside") and DM18 ("rural employment development") and is acceptable in principle.[1] As Mr Aspbury ("AA") readily agreed[2], even on the Council's case, the location of the employment element of the mixed-use scheme is acceptable.

   ii. the Council acknowledge that the extension to the Business Park will help to meet the employment needs of Tiverton, which has suffered a historic shortfall of employment provision.[3]

   iii. the application was supported by a Transport Assessment, the conclusions of which are agreed with the Highways Authority, in that there are no significant off-site highways impacts in terms of capacity or congestion.[4]

   iv. the new access to Post Hill is safe and suitable, with the detailed design having been scrutinised by the officers of both the Council and Highways

[1] Main SoCG, para 7.1 [CD6]
[2] XX(AA) Day 2
[3] See OR, paras 1.18 and 1.20 [CD1]
[4] See OR, para 4.12

Authority.[5] It is capable of accommodating traffic not only from the appeal scheme, but also acting as an access for the TEUE.[6]

v. the proposed development would not adversely harm the landscape character of the area.[7] AA confirmed this was the position of the Council, accepting that one should not equate a change with harm, and confirming that the Council agreed with the assessment in the LVA that the landscape effects would be neutral, and therefore not harmful.[8]

vi. in respect of all relevant viewpoints, the visual effects of the proposed development would be "neutral"[9]. Subject to appropriate design and mitigation (which the Council accept is capable of being secured at reserved matters stage) – the overall visual effect could be made to be "neutral". [10] Neutral effects are, by definition, not adverse. Again, AA confirmed that the Council agree that the overall visual effects of the appeal scheme would not be harmful.[11]

vii. the co-existence of commercial and residential uses does not give rise to any residential amenity issues. In particular, it is agreed that suitable separation distances, together with appropriate green infrastructure – in the form on an enhanced bund, a green space buffer and a boundary residential road – will protect residents from any noise generated from the business park. [12]

viii. the proposal is in a sustainable location in transport terms: including by reference to its accessibility to local facilities and the choice of sustainable transport modes that it offers.[13] As Mr Buckley-Thomson ("LB-T")

[5]See OR, paras 4.12-4.13
[6] XX (AA) Day 2. The highways officers indicated that the existing access to the business park would not be acceptable for the levels of traffic generation being proposed from the TEUE (see OR, para 4.13), which is the primary reason for promoting a new access to Post Hill
[7] Main SoCG, para 7.4 [CD6]
[8] XX(AA) Day 2
[9] Additional SoCG, para 2, bullet 3
[10] Additional SoCG, para 2, bullet 3
[11] XX(AA) Day 2
[12] OR, paras 8.3&8.7 and 9.1-9.4
[13] Additional SoCG, para 2, bullet 5

explained in her XX of DS the Council do not say that the site itself is unsustainable.[14]

ix. The development would not result in the loss of Grade 1 Best and Most Versatile (BMV) agricultural land (contrary to the allegation in the reasons for refusal).[15] The area of Grade 2 and 3a BMV lost is not significant[16] and not objectionable.[17] Although AA said in his rebuttal proof that the loss is a material consideration, he accepts that the Council does not contend that it is a consideration weighing against the proposal.[18]

x. The proposal would result in a biodiversity net gain.[19]

xi. There is no objection to the proposal in respect of heritage assets, including non-designated archaeological heritage assets within the appeal site.[20]

3. This large measure of agreement meant between the parties that, even prior to the opening of this Inquiry, the Council's case against the development had narrowed considerably. Of the six putative reasons for refusal originally relied upon, the Council now relies only on the first reason, and even then they acknowledged that the reference to the loss of Grade 1 BMV in that reason was erroneous.

4. During the inquiry, the slenderness of the Council's remaining case (such that it is) against the proposal has become apparent. Following cross-examination of AA[21] – from which, LB-T, on behalf her client, quite properly has not sought to row back – the position is now as follows:

i. the Council relies solely on the "in principle" harm which (on their case) arises from the breach of spatial policies of the Local Plan. They agree that

[14] XIC(DS) Day 3
[15] Main SoCG, para 7.2
[16] OR, para 1.23
[17] Main SoCG, para 7.2
[18] AA XX(Day 2)
[19] Main SoCG,
[20] Archaeology SoCG, para 2.5 [CD7]
[21] XX(AA) Day 2

the appeal proposal would not give rise to any other discrete harm which is to be weighed against the appeal proposal.

ii. In particular, the Council accept that there is no "actual", as opposed to "in principle" harm, caused to acknowledged planning interests, such as landscape, visual, biodiversity heritage, residential amenity, noise, highways etc.

iii. The "in principle" harm relied upon by the Council flows from the residential element of the appeal scheme only. The employment element would give rise to no harm whatsoever.

iv. On the Council's case the "in principle harm" arises solely as a result of the breach of Policies S1(a) (and parasitic on this, Policy S2) and Policy S14. They now agreed that Policies S3 & S4 are complied with.

v. Notwithstanding their allegation of breach, the Council accepts that (a) the appeal proposal does not conflict with the underlying objective of Policy S1(a); and (b) the appeal proposal complies, and indeed advances, the express objectives of Policy S14.

5. To put it bluntly, the Council's case against the proposal has collapsed. There remains only a scintilla of the case as original advanced in the reasons for refusal.

## II. HOUSING LAND SUPPLY

### *Introduction*

6. The Appellant has not and does not promote the appeal scheme solely on the basis that there is a lack of a demonstrable five-year supply of housing. We say the merits of the proposal are self-evident, and justify the grant of permission, regardless of the housing land supply position. However, we do say that, on analysis, the Council cannot demonstrate a five-year supply of housing. We also contend that there are real issues with delivery of housing over the plan-period as a whole.

7. In contrast the Council's first – and only remaining - reason for refusal was, within the decision notice, expressly predicated on them demonstrating a five-year supply. The Council was under an obligation to *"state clearly and precisely their full reasons for refusal"*[22]. This they did. It was "by reason" of the site's location beyond the settlement boundary *"and because the Local Planning Authority can demonstrate an up-to-date housing 5 year land supply"*[23] (emphasis added) that reason for refusal 1 was advanced. Although the Council dispute that this is the correct reading of reason for refusal 1, it is clear from the OR that the Council placed considerable weight on the five-year supply position in the planning (noting that this *"strongly weighs against granting consent for the scheme"*[24]). On any account, there is no evidence of either members or officers considering what their position would be if the Council could not demonstrate a five-year supply.

**Main Issue 1: Whether or not the Council can demonstrate a 5-year supply of housing**

***Principles***

8. The definition of "deliverable" is set out in the Glossary to the NPPF[25]. The following principles apply to the application of that test to individual sites:

    a. **The burden is on the local planning authority to demonstrate deliverability; not on the Appellant to demonstrate undeliverability** – This much is clear from both the NPPF, para 74 (which places on the onus on *"Local Planning Authorities"* to *"identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing"*) and the Planning Practice Guidance concerning 'Hosing supply and delivery' (which states that *"an authority will need to be able to demonstrate a 5 year housing land supply when dealing with applications and appeals"*[26]).

[22] Article 35(1)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015
[23] CD2, RfR1
[24] CD1, para 11.1
[25] NPPF, p67
[26] PPG Para 004. See also Para 008.

b. **The evidence relied upon by the authority must be "robust [and] up to date"[27].**

c. **The amended definition (introduced by the 2019 NPPF) establishes evidential presumptions.**

d. **In respect of "category A" cases** (sites with full planning permission; or any planning permission if under 10 units)**, there is an evidential presumption that the site is deliverable, rebuttal only by "clear evidence" to the contrary.**

e. **In respect of "category B" cases** (including sites with outline permission; and allocations )**, there is an evidential presumption that the site is *un*deliverable, rebuttal only by "clear evidence" to the contrary.**

f. **In order to meet the "clear evidence" threshold, the evidence must be cogent, as opposed to mere assertions –** This much was explained by Inspector Stephens in the *Caddywell Lane* decision[28], and is accepted by the Council.[29]

g. **In particular, reliance on emails or pro-formas from a developer *alone* will not meet the clear evidence threshold** - Again this was explained by Inspector Stephens in the *Caddywell Lane* decision, who pointed to the incentive on developers to forecast optimistically. Again, this is accepted by the Council.[30]

h. **The fact that a site has been allocated in the local plan does not demonstrate deliverability –** Mr Beecham regularly prayed in aid the fact that a site had been allocated in the local plan as supporting its deliverability. This is, with respect, to elide two separate considerations. Allocation in the plan may indicate that (at least at the time that the plan was examined), there were no showstoppers which would prevent the site delivering within the plan period. That is quite different from – and does not support – a conclusion that the site

[27] PPG para 007
[28] See DS Housing Proof, p10, para 4.5
[29] See Mr Beecham, p10, para 6.9-.6.10
[30] See Mr Beecham, p10, para 6.9-.6.10

is deliverable within five years. Indeed, this much is this is evident from the fact that allocations are treated as category B cases, and therefore (where they do not benefit from the grant of a full planning permission) require "clear evidence" to rebut the evidential presumption of undeliverability.

*Individual Sites*

9. The deliverability of six sites is in dispute:

a. **Tiv 10 – Roundhill – 14 units in dispute**

i. This is a category B site (evidential presumption against). No permission granted. No planning application. Clear evidence of deliverability is needed.

ii. The only evidence advanced by the Council is an email exchange with an unnamed officer at the Council[31]. Far from meeting the "clear evidence" threshold, that evidence in fact tells against the site having a realistic prospect of delivering within 5 years. The email exchange indicates that: scheme-specific evidence could not be provided; feasibility studies had not yet been completed (it is unclear whether they had yet been commissioned); although the application has been "scheduled for submission in Q23/24", there is no positive evidence as to whether the schedule had been adhered to; and the site's delivery is based on assumptions about future funding being forthcoming.

iii. The site is currently occupied by an inconsistent user, namely garages, with users having rights of access. There are also risks of mineshafts in the area. Mr Seaton gave evidence as to why these factors, even if not insuperable in the long term, are likely to rise to delays in delivery. Mr Beecham's response that the site had been through the HELAA and local plan process tells us nothing about the deliverability of the site by 2027.

[31] Beecham, Appendix C, p39. Emails 8 August 2023

iv. Although Mr Beecham suggested that the site was not earmarked for delivery by the Council's arm's length delivery vehicle (3 Rivers Developments Ltd), which is subject to closure[32], it is entirely unclear who the developer would be. Even if the Council is to deliver the site itself, that fact alone cannot constitute the clear evidence to rebut the evidential presumption. This is particularly so given the entirely unpersuasive evidence relied upon by the Council, as described above.

b. **TIV 9 – Howden Court – 6 units in dispute**

i. This is a category B site (evidential presumption against). No permission granted. No planning application. Clear evidence of deliverability is needed.

ii. The Council relies on the materially similar evidence as in respect of Roundhill.[33] It is equally unpersuasive. Indeed, the latest evidence indicates that Howden Court is further out in the programme than Roundhill.[34] This was not reflected in the current 5 year supply trajectory, which Mr Beacham accepted was in error.

iii. Mr Beecham could not confirm whether the site had funding via the Council's MTFS (medium term funding strategy).

c. **TIV1-TIV5 – TEUE, Chettiscombe Trust Land – 98 units in dispute**[35]

i. This is a category B site (evidential presumption against). Outline permission only. Reserved matters application not yet determined. Clear evidence of deliverability is needed.

[32] See DS Housing Rebuttal, para 5.6-5.7
[33] Beecham, Appendix C, p38. Emails 2 May 2023
[34] Beecham, Appendix C, p39. Emails 8 August 2023
[35] This site is identified in the plan attached to HSoCG by a dotted blue line.

ii. Remarkably, the Council seeks to include this site in its deliverable supply even though it has no evidence whatsoever from the developer (Redrow Homes) to support this position.

iii. The height of Mr Beecham's case was that it is "logical to assume" that Redrow Homes will continue to develop out the TEUE once it has built out the area of land within the TEUE which it is currently developing. This may or not be true, but it tells us nothing about: the timescales for determination of the current reserved matters application (which has only recently been made); whether that application is likely to be approved; and, critically, if, and when it is approved, the timescales for bringing forward such development.

d. **<u>Creedy Bridge/ CRE Pedlerspool – 35 units in dispute</u>**

i. This is a category A site (evidential presumption in favour). Full permission granted. The Appellant does not dispute that the site has a realistic prospect of delivering within five years However, it disputes whether the delivery is realistic.

ii. It does so because: the delivery rate adopted by the Council exceeds that which is assumed within the HEELA methodology for sites of this size (50dpa), with Mr Seaton confirming that 50dpa is a realistic delivery rate for developments within this area; the sole basis for the Council departing from the HEELA assumptions is an assertion made by the developer in a pro-forma[36]; that proforma expressly noted the possibility for slippage given that the reserved matters application had not (at that time) been determined; and because the pro-forma appears to have been completed prior to the recent exponential rise in interests rates which, as Mr Seaton explained, is already having a dampening effect on delivery rates.[37]

[36] Beecham, Appendix C, p52

[37] See also Seaton Rubuttal, paras 5.14-5.15 and photos at Appendix 2

e. **Alexandra Lodge – 45 units in dispute**

i. This is a category A site (evidential presumption in favour). Full permission granted.

ii. There is clear evidence that the site does not have a realistic prosect of delivering within 5 years. As Mr Seaton's evidence demonstrates[38], and as the Council accepted, since making a technical start shortly after permission was granted in July 2019 (to implement the permission), the site has stalled. No discernible work has taken place for three and half years.

iii. The elongated period in which work on the site has stalled; the acknowledged historic environment issues to address[39]; and the lack of any evidence from the developer to indicate when work may restart, constitute clear evidence to rebut the presumption of deliverability.

f. **TIV16 – Blundell's School – 75 units in dispute**

i. This is a category B site (evidential presumption against). Clear evidence of deliverability is needed. No grant of planning permission. Resolution to grant outline planning permission only (even if granted it would remain a category B site).

ii. The evidence (very belatedly) relied upon by the Council, in the form of a pro-forma from the site developer[40], only seeks to raise further issues about the deliverability of this site. As Mr Seaton had noted, the central impediments to delivery of this site is the fact that it is currently occupied by an operating recycling centre and scrapyard. The late evidence underscores this noting that *"Relocation of metal recycling centre/scrapyard needed before redevelopment can take place"* and that *"Suitable site for the relocation of the metals recycling centre/scrapyard has not been established."* In the face of this agreed impediment to delivery, the developer's mere assertion

[38] Seaton Housing Proof, paras 7.48-7.50
[39] Beecham, Rebuttal, para 5.19
[40] Circulated by Mr Beecham mid way through the Husing roundtable

that projected build out includes 75 units in the five year period plainly cannot constitute the requisite clear evidence of deliverability.

***Windfall delivery - 274 dwellings***

10. The NPPF establishes an exacting threshold for inclusion of a windfall allowance within a deliverable supply. It requires that *"compelling evidence that they will provide a reliable source of supply."*(NPPF, para 71). Thus the evidential standard required is high – higher even than the standard of evidence required to rebut the presumption against deliverability in category B cases ("compelling" rather than "clear evidence"). But the degree of certainty of delivery is also high ("will provide" as opposed to "realistic prospect" for individual sites. )

11. Moreover, the NPPF requires that, in setting any allowance, regard is to be had *"to the strategic housing land availability assessment, historic windfall delivery rates and expected future trends."* (NPPF, para 71). It is clear from these mandatory considerations that any allowance must have regard not only to historic trends, but also the likely pool of sites available (identified in the SHLAA) and expected future trends. It is not enough simply to basis windfall allowance on historic trends.

12. Unfortunately, this is precisely what the HEELA methodology[41] - on which the Council relies - does. It simply projects forwards historic trends, with some discounting to avoid double counting, to strip out larger sites and omit garden sites. It makes no attempt to consider the pool of sites available in the area as established through the SHLAA process. Nor does it have regard to expected future trends.

13. This is particularly troublesome where there is good reason to think that future windfall contributions will not reflect historic trends, not least because of recent exponential increase in interest rates which is plainly likely to have a dampening effect on delivery from small windfall sites. But also due to the factors identified

[41] CD27

by Mr Seaton in his proof of evidence[42] (including increased "taxation" of small sites, and the fact that the opportunities for windfall development on larger brownfield sites is likely to have been realised already)

14. As the Council have not produced evidence which meets the exacting standard established in the NPPF for including windfall allowance in the deliverable supply, the assumed contribution from this source should be discounted in its entirety.

***Conclusion on five-year housing land supply***

15. The Appellant's position is that the Council can only demonstrate a **4.28 year supply** of deliverable housing sites[43].

16. Even if, contrary to the Appellant's case, the Council's case on deliverability was accepted in full, the housing land supply position would be marginal, amounting to only 205 dwellings above the five year requirement.[44]

**Delivery of housing over the plan period**

17. The Appellant also has concerns – to put it mildly – about the ability of the plan to deliver its overall housing requirement across the plan period as a whole.

18. As a starting point, as Mr Seaton explained[45] the allocations at Cullompton – where most allocated growth is directed within the plan – are largely contingent on the Cullompton Town Centre Relief Road.[46] Funding has still not been secured, with two funding bids having been rejected.

19. Perhaps of more relevance to this proposal is the delay in delivery of housing that is being experienced at TEUE. The Council position is that Area A of the TEUE will not be completed within the plan period (their own projections – which Mr Seaton considers to be optimistic – have 138 dwellings from the outline permission

[42] Seaton Housing Proof, para 5.3
[43] ID11
[44] 2698 (Council's supply) -2493 (requirement) = 205
[45] XIC and XX
[46] See CD60, paras 44-50

granted over Area A delivering outside the plan period[47]). Given that the delivery of Area B is largely contingent on the delivery of Area A, then realistically – at least without a separate link road from the east, to which we will return – the majority of housing from this area is likely to come forwards beyond the plan period.

## III. APPROPRIATE LOCATION (Main Issue 2: Whether or not the location of the proposed development is acceptable having regard to adopted national and local policies)

### Appropriate location in land use terms

20. The suitability of the location in land use terms for a mixed-used residential and employment scheme is obvious. Tiverton is the largest and most sustainable settlement in Mid-Devon. The appeal site lies adjacent to its settlement boundary, immediately to the east of the TEUE, an allocation in the Local Plan which include up to 1830 dwellings and at least 30,000 sqm of commercial floorspace. To the east, the appeal site is bounded by, and wraps around, the Hartnoll Farm Business Park, a long standing and successful business park. To the north is existing residential development along Post Hill.

21. It is predominantly because of the existing and future uses in the vicinity of the appeal site that, notwithstanding the proposals constitute development of a greenfield site, it is common ground between the main parties that there would be no adverse impact on the landscape character or visual amenity of the area.

22. AA accepted that development of a greenfield site, of circa 12 ha in the countryside, for commercial and residential which gives rise to no adverse impact on landscape character or visual amenity is "unusual". That is a significant understatement. The lack of any "site-specific" (to use AA's phrase) adverse impact is exceptional and illustrates the appropriateness of this location for the mixed-use development proposed.

[47] Housing SoCG, para 3.8

**Appropriate location in policy terms**

23. The appropriateness of the location for the appeal scheme is also evident in policy terms. The Appellant's primary case is that the appeal proposal is fully compliant with the relevant policies in the development plan, including strategic policies However, even if the Council's interpretation of those policies is accepted, any breach would properly described as "technical": it being accepted that the objectives which those policies seek to advance are met.

***Development Plan policies***

***Policy S1 – Sustainable development priorities***

24. Policy S1 establishes the strategic priorities which will need to be achieved in order to deliver the Vision of the plan. It is common ground that:[48]

    a. there is no *a priori* hierarchy identified between the thirteen priorities identified;

    b. the appeal scheme would either not conflict with, or would actively advance, twelve of those thirteen objectives (namely objectives (b) to (m)).[49]

    c. the only dispute concerns whether the appeal proposal conflicts with strategic priority (a).

    d. the underlying objective of this strategic priority is to focus development coming forwards in locations where facilities are accessible and the need to use the private car is minimised.

    e. given Tiverton is the most sustainable settlement in Mid Devon, and given that it is accepted that its facilities (both those currently and coming forward on the TEUE) would be accessible to future residents of the appeal, AA agreed that the appeal proposal would not harm the underlying objective of this strategic

[48] XX(AA) Day 2

[49] It was agreed that the appeal scheme would advance (b) [due to the provision of jobs], (d) [via diversification of agriculture], (g) [by providing affordable and custom build housing], (j) [by increasing the use of low carbon energy], and (l) [by providing a net gain in bidoveirsyt]

priority. LB-T later confirmed that the Council did not seek to resile from this concession.[50]

25. The only dispute between the parties is therefore a matter of semantics. Does "at Tiverton" mean "within the settlement boundaries of Tiverton"?

26. We say "at" means "at". Had the drafters of the policy wished the strategic priority to focus development "within the settlement boundaries" of certain settlements, they would have said so. What is more, that interpretation accords with the (agreed) underlying objective of the policy, as outlined above, whereas the Council's interpretation is in tension with it. Put simply if a decision maker, having regard *inter alia* to the proximity of the development to Tiverton and the accessibility of its facilities, concludes that development is "at Tiverton" then it complies with this strategic priority.

27. Moreover, there has been no suggestion by the Council that the appeal site is anywhere other than "at Tiverton" in the common understanding of that phrase (i.e. if it is not restricted to within the settlement boundaries).

28. But even if the Inspector were to conclude that this interpretation is wrong, it does not much matter.

29. In circumstances where it is common ground that twelve out of thirteen of the strategic priorities are either not conflicted with, or actively advance and where it is accepted that the appeal proposal is consistent with the underlying objective of strategic priority (a), then there is plainly overall compliance with Policy S1. AA's refusal to acknowledge as much[51] betrayed his myopic view of this appeal proposal.

30. Therefore, whatever the correct interpretation of Policy S1(a), there is compliance with the policy in the Local Plan which establishes its strategic priorities. This is an

[50] XX(DS) Day 3
[51] XX(AA) Day 2

very important consideration. It underscores the appropriateness of the location for this form of development.

***Policy S2: Amount and distribution of development***

31. The policy has two functions. To establish the amount of development coming forward under the plan. And to identify the distribution of that development.

32. It is common ground that there is no conflict with the first function. Policy S2 establishes a minimum figure for housing and commercial floorspace. It does not impose a cap.

33. In terms of the second function, the policy seeks to distribute development under the plan, in terms of commitments and allocations, consistent with Policy S1(a). There are, therefore, two clear reasons why the appeal proposal is not in conflict with this policy. First, it is not a commitment or allocation in the plan. Second, and more fundamentally, for the reasons given above, the appeal proposal is consistent with both the letter of, and objective underlying, strategic priority (a).

***Policy S14: Countryside***

34. The appeal proposal will preserve the character and appearance of the countryside; enhance biodiversity; and promote the sustainable diversification of the rural economy. These are, it is agreed, the stated objectives of Policy S14, and it is also agreed that the appeal proposal does not conflict with – and indeed actively advances – these objectives.[52]

[52] XX(AA) Day 2. In XX (Day 2) AA briefly appeared to suggest that although the appeal proposal would cause no harm to the character and appearance of the countryside, it would not preserve it because there would be change. However, he quickly reversed this position. He was right to do so. It is settled law in the context of heritage matters – and specifically s.66 and 72 Planning (Listed Buildings and Conservation Areas) Act 1990 - that "preserve" means "do no harm". It does not mean preserve in aspic. See *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council* [2014] EWCA Civ 137 at [16] *per* Sullivan LJ and *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, per Lord Bridge at page 150. There is no reason to adopt a different interpretation in respect of Policy S14. The Appellant understands that the Council agrees with this interpretation of the meaning of the term "preserve" in Policy S14.

35. This is precisely what Policy S14 says "development outside of the settlements….will [do]". Accordingly, we say, that on a proper interpretation, the proposal accords entirely with this policy.

36. The Council advances an alternative interpretation, which restricts development in the countryside to those uses which are listed in S14(a)-(f), and which comply with the related development management policies. This interpretation should be rejected. Firstly, the policy does not say "development in the countryside shall be restricted to", or even that "*only* agricultural and other appropriate uses…will be permitted". Thus, the Appellant's interpretation relies on words being read into the policy which are not there. Secondly, LB-T said, in support of the Council's interpretation, that it was through the restriction to those appropriate uses, together compliance with the development management policies, that the stated objectives for the countryside will be achieved. However, with respect to LB-T, this is wrong. Those development management policies expressly allow development which would cause harm to those stated objectives. For instance, DM17 (Rural shopping) and DM 18 (Rural employment) both permit certain types of development in the countryside which would not preserve its character or appearance so long as the "*adverse impact to the character and appearance of the countryside*" is not "*unacceptable*". They are, therefore, better seen as a derogation from the stated objectives for the countryside. Which is why the policy expressly permits them.

37. Properly understood, therefore, development which furthers the stated objectives of Policy S14 is (unsurprisingly) consistent with the policy.

38. However, even if the Inspector were to disagree with the Appellant's interpretation, any breach of this policy would be wholly technical given that (as is common ground): (a) that the appeal proposal would comply with Policy S14's stated objectives for the countryside and (b) any breach would be limited to the residential element of the appeal proposal only, it being accepted that the Business Park extension is compliant with Policy S14(b) and DM18.

39. Having regard to these factors, AA accepted (albeit only after much prevarication) that the weight to any breach of Policy S14 "could be reduced". He also agreed that the weight given to any breach should be limited, albeit he subject that to the caveat "[when put] in those narrow terms".[53] By "narrow terms" we had understood AA to mean when having regard to the compliance with the stated objectives and the fact that the commercial element complies with Policy S14(b) and DM18.

40. Whether or not this is what AA meant, it is plain as a pikestaff that if (contrary to the Appellant's case) there is any breach of policy S14, can be given only the most limited weight.

***Tiverton Neighbourhood Plan***

41. The Appellant's has proceed on the basis that, as the site falls outside the plan area, the Tiverton Neighbourhood Plan (TNP) does not form part of the relevant development plan policy. The OR took the same approach.[54] However, AA refers to the TNP as a material consideration.[55] Even if AA's approach is correct, this is a material consideration that weighs in favour of the development plan, given that Policy T1 of the TNP permits development outside of settlement boundaries where it preserves or enhances the appearance of the area.

***National Policy***

42. In terms of **national policy,** it is common ground that the site does not form part of a valued landscape (in respect of which the relevant policy objective is to "protect and enhance"[56]). The intrinsic character and beauty of the countryside is recognised[57] – and indeed preserved - by the appeal scheme.

[53] XX(AA) Day 2
[54] OR, p18 [CD1]
[55] AA Proof, para 4.9
[56] NPPF, para 174(a)
[57] NPPF, para 174(b)

## IV. INFRASTRUCTURE PROVISION/PLANNING OBLIGATIONS (Main issue 3: Whether or not there is sufficient infrastructure to support the appeal scheme)

43. As with the primary case, the issues in respect of required planning obligations have narrowed considerably. The Council no longer seek contributions in respect of transport, waste and recycling or secondary education. Several education contributions are sought, although the request for Secondary Education funding has been withdrawn. The Appellant challenges whether they are compliant with Reg 122 of The Community Infrastructure Levy Regulations 2010 ("CIL Regs"), for the reasons set out in the CIL Non-Compliance Statement[58], and were amplified at the roundtable session.

44. Likewise, the request in terms of NHS funding has narrowed. The Council have confirmed that they do not support the request for such funding. The Royal Devon University Healthcare NHS Foundation Trust have confirmed that they are not seeking the NHS Funding Gap contribution. This leaves the NHS Devon Integrated Care Board ("ICB") who are seeking the GP Provision Contribution and, very belated, late last week submitted a letter in support of this request only. The Appellant challenges whether this contribution in Reg 122 compliant, for the reasons set out in the CIL Non-Compliance Statement[59], which were amplified at the roundtable session.

45. This (already lengthy) closing is would not benefit from repetition of those matters, save to stress that in respect of all obligations, the burden is on the requesting party to persuade the Inspector that the contribution meets the tests in Regulation 122. In respect of the ICB request in particular this weighty burden given that the Council does not consider the request to be Regulation 122 compliant and as the Foundation Trust (albeit it is accepted in respect of a different type of NHS

[58] CD10
[59] CD11

funding) have recognised that there is not currently a sufficiently cogent evidence base on which to advance their request.[60]

46. In all cases the relevant obligations are included in the unilateral undertaking, albeit subject to a "blue pencil" clause. Therefore, whatever the Inspector's conclusion on Reg 122 compliance, the appeal scheme will provide the requisite infrastructure funding. As AA confirmed[61], this means that reason for refusal 4 no longer constitutes a basis for refusing permission for the appeal scheme.

## V. BENEFITS

47. There is agreement between the main parties that the appeal scheme would give rise to a number of tangible benefits which weigh in favour of the proposal. Agreed benefits of the appeal scheme include: the provision of housing, including affordable and custom build housing; the employment provision; the utilisation of a low carbon energy source; and biodiversity net gain.[62] The only dispute in respect of these matters is the weight to be given to these benefits. The Appellant also says that provision of a link road amounts to a significant benefit of the scheme, something which the Council, belatedly, has disputed.

48. As DS explains[63], the Appellant contends that the weight to be given to these benefits is as follows[64]:

| **Benefit** | **Weight** |
|---|---|
| Employment Provision | Very Significant |
| Housing (including affordable and custom build) | Very Significant |
| Renewable/Low Carbon linkage | Significant |
| BNG | Significant |

[60] See the email form the NHS Foundation Trust dated 7th September 2023
[61] XX(AA) Day 2
[62] See Aspbury Rebuttal, p14
[63] DS Proof,p26
[64] DS confirmed that his scale of weighting of benefits was as follows: Very Significant, Significant, Moderate, Limited, Zero

| | |
|---|---|
| Link Road to TEUE | Significant |

**Employment Provision**

49. The agreed position[65] is that:

    i. Hartnolls Farm is a successful and well utilised business park. There is no reason to believe that the proposed extension would not be equally successful;

    ii. the extension would generate circa 400 additional jobs.[66] AA had come to the same assessment of job creation independently.

    iii. the Council's economic team are in favour of the development[67]

    iv. both the economic team and the planning officers at the Council recognised that there has been a "historic shortfall of employment provision and delivery in Tiverton"[68]. The employment proposals would meet that need.

    v. Whilst officers were of the view that there is no unmet need for employment land at a district-wide level, AA did not dispute DS's evidence[69] that the historic supply had been significantly skewed towards the rural, and therefore inherently less sustainable, locations.[70]

50. In those circumstances the provision of additional employment at Tiverton is a very real benefit which should be given **very significant weight**.

**Housing (including affordable and custom build)**

51. The Council does not dispute DS's evidence[71] of the extent of affordable housing need in the district, with AA describing the weight to be given to affordable

[65] XX(AA) Day 2
[66] CD53(b)
[67] OR, para 1.18 [CD1]
[68] *Ibid,* para 1.20
[69] DS Proof, p11, in particular fig 4
[70]
[71] DS Affordable Housing Proof

housing provision alone as "considerable"[72]. DS demonstrates that since the beginning of the plan period there has been very significant shortfall of affordable housing delivery against both the target within the plan (shortfall of 689 affordable homes) and assessed need (shortfall of 743 affordable homes).[73] The appeal scheme would deliver up to 45 much needed affordable homes. It would also deliver policy compliant levels of custom and self-build housing.

52. In terms of market housing, the position is set out above. AA rightly accepted that if the inspector were to conclude that the Council could not demonstrate a five year supply of housing this would increase the weight to be given to this matter.

53. Taken those matters together, the **very significant weight** to be given to the delivery of housing.

**Renewable/Low Carbon linkage**

54. The units on the 3.9 ha extension to the business park would be powered and heated by a combined heat and power plant (CHP) sourced by an Anaerobic Digester (AD) on a nearby farm which is operated by the owner of the Business Park.

55. Again the relevant context is undisputed:[74]

    i. Mid-Devon declared a climate emergency in February 2019, following the IPCC's 15th report into climate change

    ii. Following the IPCC's report, the UK Parliamentary Committee on Climate Change published a report in May 2019 which stated in terms that *"every tonne of carbon, counts, wherever it is emitted"*

[72] AA Proof, para 10.6
[73] DS AH Proof, paras 5.11 and 5.12
[74] XX(AA) Day 2

iii. In March of this year, Mid-Devon adopted a "Non-Statutory Interim Planning Policy Statement: Climate Emergency"[75] which was "intended to raise the profile and importance …of climate change and climate emergency considerations in the planning process in Mid Devon". It indicates that "Tackling climate change is a material consideration to the planning process, to which significant weight should be attached".[76]

iv. The use of low carbon sources of energy is one of the strategic priorities of the Local Plan.[77]

v. The AD/CHP is a low carbon source of electricity and heat.

vi. The AD is currently producing excess heat which is going to waste. This proposal would enable that wasted heat to be utilised by heating the business park. Electricity which is currently exported to the grid would be diverted to a local end-user.

vii. 100% of the total annual energy demands and 100% of the electric demands from the Business Park extension would be sourced from the AD/CHP.[78]

viii. The use of the excess heat alone would save as much as 281 Tonnes of CO2 per year[79].

ix. The AD/CHP link to the business park extension could not be viably provided if the business park was to come forward in isolation (at least without external funding)[80]. As DS explained, the intention is that the profits from residential element of the mixed use scheme will cross-subsidise this linkage. Condition 21 operates so as to require the linkage to

[75] https://www.middevon.gov.uk/residents/planning-policy/interim-climate-change-statement/ . This document is not before the Inquiry, but AA confirmed that he was aware of its existence and that it included the statements put to him.
[76] At para 1.3
[77] Policy S1(j) and DM2
[78] Energy Feasibility Report CD 5, Appendix 8, p4 [PDF, p147]
[79] Energy Feasibility Report CD5, Appendix 8, p5 [PDF, p148]
[80] See Costs Feasibility Report, CD5, Appendix 9 [PDF, p160] and KLP Letter, appendix 0 [PDF, p173]

be in place, and available to the units on the business park, before the 100th dwelling is built and before any of the business units are occupied.

x. The Council's economic team received the proposal very warmly, indicating that it would create the first low carbon commercial development in the district, and would act as an exemplar for other schemes.[81] The planning officers explained that this is a "unique proposal to provide a highly sustainable, joined up development"[82]

xi. As confirmed by AA, the factors which led planning officers in the OR – notwithstanding this very positive assessment – to reduce the weight to be given to this benefit are agreed to have been erroneous.[83]

56. In all these circumstances, at the very least **significant weight** must be given to use of low carbon energy sources.

**Biodiversity Net Gain**

57. The agreed position is that the appeal scheme is capable of providing a biodiversity net gain which is in excess of the policy requirement, and in excess of the emerging legislative requirement (which is not yet in place). It is agreed that the net gain can be secured by condition. **Significant weight** should be given to his benefit.

**Link Road to Area B of the TEUE**

58. The Council's refusal to treat this as a benefit of the appeal scheme is perplexing. When seen in context, this is a very real benefit which should be afforded **significant weight**.

59. The context is as follows:

i. securing a secondary access to Area B of the TEUE has been a long-held objective of the Council. As long ago as October 2017 Mid-Devon's Cabinet

[81] OR, para 1.18 [CD1]
[82] OR, para 5.4
[83] Main SoCG, paras 7.21-7.25.

resolved that alternative access arranged may be considered as part of the master planning process for Area B.[84]

ii. the emerging SPD, which has been through two rounds of public consultation and is in a version ready for adoption, concludes that "*the delivery of Area B would benefit from additional alternative vehicular access points*"[85] However, given the nature of the roads the SPD concludes that, other than emergency access, "*no direct vehicular access to serve the residential and employment development areas shall be provided via Manley Lane, West Manley Lane or Mayfair*"[86]. This is plainly to be understood as meaning the Manley Lane/Post Hill Lane should not be used for the secondary access (for reasons which will become obvious following the site visit), because it goes onto say that there is a "*potential for a new vehicular access onto Post Hill or to the east of the development should these opportunities become available and be acceptable (but protecting Manley lane from additional traffic movements)*"[87] . It is not without import that the illustrative plans show the secondary access road running from the east of the development, with access clearly being envisioned to be taken <u>from the appeal site</u> across Manley Lane. This is most clearly seen from the movement plan (fig 33)[88], which notes that "third party land [is] required": the appeal site is that third party land.

iii. The benefits of the secondary access are, at least, two-fold. First, it would accelerate delivery of Area B, which then wouldn't be contingent on access being provided from Area A for development to begin. This much was recognised by officers of the Council.[89] Second, it would enable the bus services serving the TEUE to run as through route, rather than on an

[84] Emerging SPD Area B Masterplan, p31 [CD13]
[85] Emerging SPD Area B Masterplan, p62 [CD13a]
[86] *Ibid.*
[87] *Ibid*, p69
[88] *Ibid.* p68
[89] OR, paras 4.9-4.11

internal loop, which is obviously preferable.[90] AA accepted that these were both benefits of a secondary access from TEUE onto Post Hill.

iv. Officers of the Highway Authority are satisfied that the new access provided by the appeal proposals onto Post Hill[91] – which is the subject of detailed design drawings and a matter for determination at this appeal - is safe and suitable, including for the volume of traffic that would be generated by the TEUE.[92]

v. Providing a secondary access to the TEUE is not an afterthought. It has been integral to the design process of appeal scheme from its inception.[93]

60. AA accepted that the secondary access to Area B of the TEUE would provide the benefits detailed above. And he accepted that the appeal proposal would provide such an access in a safe and suitable manner. His steadfast refusal to afford this factor any weight – apparently on the basis that access can still be provided from Area A - defies logic.

61. Shortly prior to the Inquiry, the Council disclosed the potential of an 'alternative' potential access to the TEUE, promoted by Westcountry Land. As DS rightly said, no weight can be given to this alternative in circumstances where: (a) the location of the access has not been disclosed to the inquiry; (b) no plans, even on a schematic level, have been provided to the inquiry; (c) no details of the enabling scheme have been provided (save that it would constitute an application for access and residential development); (d) although we are told that Devon County Highways have confirmed "that the general principle of our access is acceptable" , we have no evidence form the Highways Authority themselevs; and (e) having been told by AA in his rebuttal proof served only last week that a planning application is expected in the near future[94], the Westcountry Land letter confirms that this is yet

[90] See Neil Thorne Rebuttal, paras 3.24
[91] CD39. See also CD41 Framework Plan
[92] Highways Officers considered that the existing access to the Business Park (which is being closed) would not be suitable for access to the TEUE. No such concerns were raised with the proposed access.
[93] See. Eg. DAS,p42 [CD42]
[94] AA Rebuttal, p7, R2.11.2

to be prepared and commits only to making the application "within the next 12 months".

62. We do not know whether, once detailed designs are considered, this alternative will be considered to provide a safe and suitable secondary access to the TEUE. Contrast this with the agreed position concerning the appeal site access. We do not know what the planning impacts of the alternative scheme (both the access itself and its enabling development) would be, or whether they would be acceptable. Contrast this with the appeal scheme, which is agreed to have no "site specific" (as opposed to in principle) adverse impacts. And we do not know when the application will be made, let alone determined. Whereas the application for the appeal scheme was made some 2 years ago, and has been thoroughly scrutinised, including through this appeal process.

63. The Westcountry letter therefore provides no sensible basis for reducing the weight to be given to link road provided by the appeal scheme to the TEUE. Indeed, all that letter does is underscore the benefits of, and need for, a secondary access to Area B.

## VI. MISCELLANEOUS

### Precedent

64. AA advances the argument that to allow the appeal site would establish an "unacceptable precedent" for the granting of permission for developments outside of settlement boundaries in "disparate locations". With what only can be described as significant hyperbole, he says this would "undermine and subvert the Local Plan".[95]

65. With respect to AA, this is a thoroughly bad point. Which is probably why this was not raised in the OR, decision notice or statement of case.

[95] AA Rebuttal, para 7.1.2

66. It is a bad point not simply because each application must be dealt with on its own merits, such that potential for precedent setting in the planning system is, in general terms, low. And not simply because AA does not point to any site-specific factors which would give rise to the risk of precedent. But because, as DS pointed out, the circumstances of this appeal scheme (adjacent to existing business park, adjacent to planned urban extension; proximite to low-carbon source of energy; ability to provide an access road; and no site specific adverse impacts) will be hard, if not impossible, to replicate.

**Interested Parties**

67. The Appellant listened closely to the representations made by Halberton Parish Council ("HPC") and Tiverton Civic Society ("TCS"). The primary concern of both – beyond the matters addressed within the main issues above – concerned impacts of additional traffic on the safety and operation of the local road network.

68. As set out in Section 5 of Mr Thorne's Rebuttal, the planning application submission included a Transport Assessment ("TA"), dated July 2021.[96] This comprehensive assessment was prepared following a detailed scoping exercise with DCC and is in accordance with best practice guidance. The TA considered the impacts of traffic associated with the proposed development, as well as other committed development (including the TEUE), throughout the local road network, including Halberton, Sampford Peverell and past Blundell's School.

69. The TA concluded that safe and suitable access can be achieved for all users, that there would be no unacceptable impact on highway safety, and the residual cumulative impacts on the road network would not be severe (NPPF Paras 110 and 111). This conclusion was agreed with DCC. DCC and MDDC confirm that they have no objection to the application, subject to the imposition of appropriate conditions. No reasoned basis has been advanced to depart from this view.

[96] CD37

70. HPC also raised concerns about the implications of the appeal scheme in respect of the amount of feedstock which would be required for the AD plant. However, The agreed position between the main parties is that the appeal scheme would not result in the need for additional feedstock to supply the AD plant[97]: the excess heat which is currently being created would simply be utilised, and existing electricity generation diverted.

## VIII. PLANNING BALANCE AND CONCLUSIONS

71. As Mr Seaton explains in his evidence[98], there are a number of ways in which the planning balance in this case can be struck, all of which lead to the same end: that planning permission ought to be granted for this scheme.

72. **First,** on a proper interpretation of Policies S1, S2 and S14 (the only policies left in dispute), the appeal scheme is **entirely in compliance with all the relevant policies of the development plan**. This is the Appellant's primary case.

73. **Second,** even if the Council's interpretation of those policies is accepted, and there is a degree of non-compliance with them, **there is overall compliance with the development plan read as a whole**. On the Council's own case, the appeal scheme complies with the underlying objective of Policy S1(a); and meets the express objectives of Policy S14. In those circumstances, even if the appeal scheme is technically in breach of those policies, only the most limited weight can be given to the breach of those policies. Reading the plan as a whole that breach is plainly outweighed by the appeal schemes compliance -and indeed advancement – of the remaining policies in, and objectives of, the development plan, including the strategic priorities established in Policy S1(b)-(l), DM2 (renewable and low carbon energy), DM18 (Rural employment development), and DM26 (Green Infrastructure in major development).

[97] Main SoCG, para 7.20-7.25
[98] Seaton Proof, Section 5.

74. AA accepts[99] that if the Inspector concludes that the appeal scheme is in compliance with the development plan as a whole, then applying the section 38(6) test planning permission should be granted. There are no material considerations which "indicate otherwise" .

75. **Third**, even if the Inspector were to conclude that the appeal scheme was in conflict with the development plan as a whole, that breach would have to be weighed against the multiple and substantial benefits of the scheme. This is plainly not a case where planning permission might be seen as undermining the credibility of the plan. That cannot be so where, on the Council's own case, the appeal scheme would further the objectives (underling objectives in respect of Policy S1(a) and express objectives in respect of Policy S14) of the only policies which it is said to breach.

76. If the Inspector were to conclude that the Council cannot demonstrate a five year supply of housing, then the question (at least as a matter of national policy) would be whether the adverse impact – which is limited to "in principle harm" from the residential element of the appeal scheme – "significantly and demonstrably" outweigh the benefits outlined above.

77. The answer, we say, is self-evident.

78. **Fourth,** if the Inspector were to conclude that the Council can demonstrate a five year supply of housing, and a 'straight balance' were to be applied, we submit the answer would be the same. The multiple and very significant benefits that the appeal scheme would bring substantially outweighs the, at most, limited harm resulting solely from the breach of strategic policies, whose objectives (it is agreed) are nevertheless furthered.

79. As we said in opening, this conclusion is not surprising. It is a scheme that will provide employment and housing (including affordable housing), for which there is an acknowledged need. It will do so at Tiverton, the District's most sustainable

[99] XX(AA) Day 2

settlement. And it will do so, without causing any material harm to acknowledged planning interests, and whilst bringing with it tangible and substantial benefits.

80. Accordingly, the Appellant commends the proposal to the inspector and requests that he grants planning permission, subject to appropriate conditions.

**ROBERT WILLIAMS**

**CORNERSTONE BARRISTERS**

**15th September 2023**